7

THE FOURTH AMENDMENT AND WARRANTS

Go to the end of the chapter. Skim the key terms and phrases and read the summary closely. Come back and look at the following news excerpts to focus your reading throughout the chapter to understand the law guiding citizen–police encounters, including when officers (a) stop people on the street to talk and ask questions, (b) place their hands on people to pat down for weapons, (c) arrest people and use force to effectuate an arrest, and (d) secure and execute warrants to search and seize. The chapter begins with a hypothetical case study of Charlie the spy. Follow Charlie as he encounters the rules of law presented throughout the chapter, and connect Charlie's exploits with the relevant section of text.

WHY THIS CHAPTER MATTERS TO YOU	LEARNING OBJECTIVES AS REFLECTED IN THE NEWS
After you have read this chapter: **Learning Objective 1:** You will be able to analyze Fourth Amendment problems.	One of the tools in the federal government's immigration enforcement kit is the detainer—a written request by Immigration and Customs Enforcement agents to a state prison or local jail to hold a person suspected of being in the country illegally for up to 48 hours beyond his or her scheduled release to give immigration agents time to go get the person for possible deportation. But, as a federal judge recently told the federal government—again—holding someone without charge or a court order violates the 4th Amendment protection against unreasonable seizure. (*Los Angeles Times*, February 14, 2018)
Learning Objective 2: You will appreciate how Fourth Amendment analysis has changed with advancing technology.	As I write these words, there are more than 30 Oakland Police Department patrol cars roaming the city with license plate readers, specialized cameras that can scan and record up to 60 license plates per second. Meanwhile, the Alameda County Sheriff's Office maintains a fleet of six drones to monitor crime scenes when it sees fit. The Alameda County district attorney's office owns a StingRay, a device that acts as a fake cell tower and forces phones to give up their location. And that's just in one little corner of California. (*Los Angeles Times*, May 2, 2018)
Learning Objective 3: You will understand the role race may play in the intersection of the citizen–police encounter in assessing reasonable suspicion that criminal activity is afoot.	Philadelphia's mayor's office and Police Department have begun separate investigations into the arrest of two African American men waiting to meet an acquaintance at a Center City Starbucks after a video of the incident was widely shared on social media. In the clip, the two men can be seen being escorted from a table at the cafe in handcuffs while a white man, who has been identified as Philadelphia real estate investor Andrew Yaffe, asks why officers were called. "What did they get called for, because there were two black guys sitting here, meeting me?" [The police chief responded,] "The police did not just happen upon this event—they did not just walk into Starbucks to get a coffee . . . They were called there, for a service, and that service had to do with quelling a disturbance, a disturbance that had to do with trespassing. These officers did absolutely nothing wrong." (www.philly.com, April 14, 2018)

WHY THIS CHAPTER MATTERS TO YOU	LEARNING OBJECTIVES AS REFLECTED IN THE NEWS
Learning Objective 4: You will be able to distinguish the legal basis for a *Terry* stop, arrests, and claims of excessive force.	A man who was shot and killed by a Kansas City, Kansas, police officer Wednesday had previously won a $300,000 excessive force settlement from police across the state line in Kansas City [MO]. Manuel G. Palacio, 27, was the man fatally shot by the police officer. Years earlier, Palacio had sued Kansas City police, alleging that officers used excessive force even though he complied with their commands during a 2014 arrest that was captured on dashcam video. At the time, Palacio was a suspect in a robbery. None of the three officers are still with the Police Department. (*Kansas City Star*, May 3, 2018)
Learning Objective 5: You will be able to articulate the sources of probable cause and the procedure for obtaining and serving a warrant.	A Merced County Sheriff's detective testified Thursday in the Ethan Morse's federal civil rights trial he had probable cause to arrest District Attorney Larry Morse's son in July 2014 in connection with a triple murder because he was suspected of being the driver in a drive-by shooting. But detective Erick Macias also admitted that he omitted key evidence from Morse's arrest warrant that would have shown he was innocent. That's important because Morse's lawyers contend an arrest warrant requires a detective to state incriminating evidence—as well as any evidence that exonerates a suspect—so a judge can make an independent decision whether to sign the warrant. (*The Fresno Bee*, April 26, 2018)

Chapter-Opening Case Study: Charlie the Spy

Charlie worked for the Central Intelligence Agency (CIA) and lived in Brooklyn, New York. His coworkers called Charlie "Gollum" behind his back because he resembled the small, troll-like creature from the *Lord of the Rings* movie series. One of his coworkers, Beth, believed Charlie was a spy and she reported Charlie to the Federal Bureau of Investigation (FBI). **(Rule of Law [ROL]: Members of the public are deemed reliable informants.)** The FBI placed Charlie under surveillance by attaching a global positioning system (GPS) tracker under the bumper of Charlie's car. **(ROL: A warrant is needed to attach a device to a suspect's car even though electronic monitoring on public streets is not a search.)** One night, agents watched as Charlie met two suspicious individuals, Elaine and Jamal, in front of an electronics store. The three friends walked up and down the street in an obvious agitated manner, constantly looking around, and pacing back and forth in front of the store. Thinking the trio was about to commit a crime, Agent Wick approached and began to ask routine questions about what the three were doing in the area. **(ROL: The *Terry* stop is a brief encounter between police and the public to confirm or dispel the reasonable suspicion that criminal activity is afoot.)** Because Agent Wick saw a weapon protruding from Elaine's pocket, he immediately put his hands on Elaine and took the gun out of her pocket. **(ROL: If, during a *Terry* stop, an officer has a reasonable belief that the suspect is armed, the officer can legally disarm the suspect.)** Because Elaine did not have a permit to carry a concealed weapon, she was placed under arrest. As she was taken into custody, she blurted out that Charlie was a spy for North Korea. Agents prepared an affidavit of probable cause to attach to the search warrant for Charlie's house. **(ROL: Probable cause means it is more likely than not that a specific person has or will commit a specific crime or specific evidence will be found in a specific place.)** On the face of the warrant in the space where the list of things to be seized was to be typed, the agents mistakenly typed Charlie's home address in Brooklyn. **(ROL: If the warrant is so facially defective that no reasonable officer would serve it, the officer who executes the warrant may be personally liable.)**

At Charlie's house, agents directed Charlie to sit on the couch while they searched and discovered evidence related to spying. At an open laptop, an agent started clicking on files and opened

one labeled "private," where encryption codes for offshore bank accounts were discovered. **(ROL: Warrant is to search for only those items listed; a computer search generally requires a separate warrant.)** While the agents were focused on the computer contents, Charlie got up and ran out the door. One agent yelled, "Stop!" but when Charlie kept running, the agent shot Charlie, killing him. **(ROL: The amount of force used to effectuate an arrest is subject to the Fourth Amendment's reasonableness clause.)** Were the agents' actions lawful?

THE FOURTH AMENDMENT

How did the law evolve in America to protect people suspected of committing a crime? We turn to history to understand what life was like before we had a Bill of Rights. The genesis of the **Fourth Amendment** was the Crown of England's abuse of criminal and civil process. Early American colonists witnessed the king abuse both **writs of assistance**, which were papers authorizing the seizure of property to help pay the king's debtors, who would in turn pay dues to the king, and **general warrants** that were issued by King George III to seize and arrest in the Colonies authors, publishers, and printers of "seditious libels," pamphlets advocating for government reform.

When America became a country, adopted the Constitution, and enacted the Bill of Rights in 1791, the Fourth Amendment established the minimum requirements for the government to search and seize people and personal property.[1] The late Honorable Charles E. Moylan, Jr., offered the following schematic device to conceptualize the exact language of the Fourth Amendment as it protects people from government abuse of power. The Fourth Amendment provides that

The right of the people to be secure in their

(1) persons,

(2) houses,

(3) papers, and

(4) effects

against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, [except]

(1) upon probable cause,

(2) supported by oath or affirmation, and

(3) particularly describing

  (a) the place to be searched, and

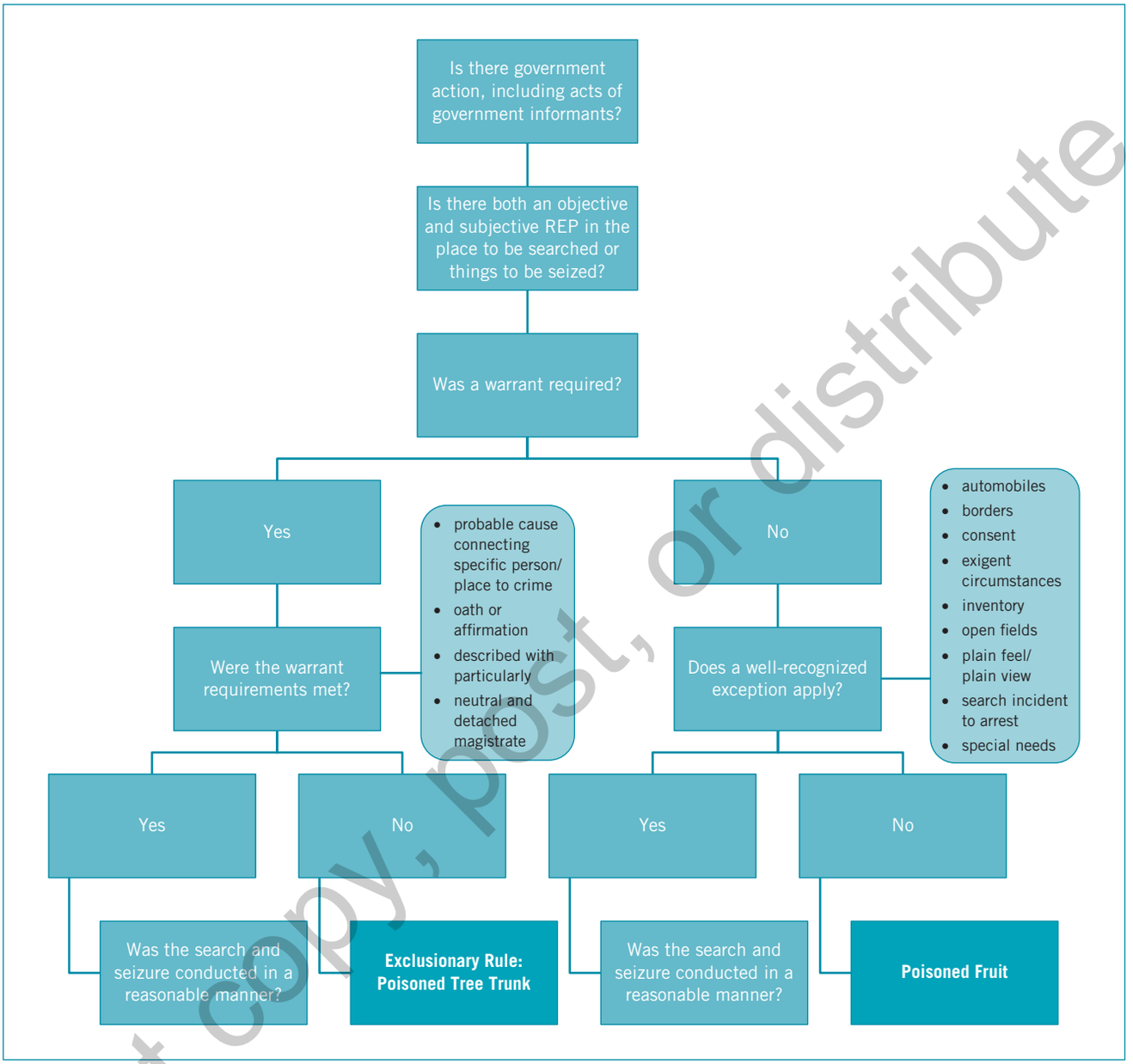
  (b) the persons or things to be seized.[2]

The two prongs of the Fourth Amendment are generally known as the "reasonableness clause" and the "warrant clause." The Fourth Amendment does not prevent all searches and seizures, only unreasonable ones. For instance, a suspect can be arrested on a public street without a warrant because there is no invasion of privacy, but on the other hand, "a man's home is his castle," and a warrant is required to search such an intimate space. Searches and seizures are two distinct actions. A **search** is looking for evidence to use against a suspect in a criminal prosecution. A **seizure** denotes taking the evidence found, or taking or arresting a suspect.

How to Analyze the Fourth Amendment

A method of analysis, represented in Figure 7.1, determines whether the Fourth Amendment's protections apply, whether the government has violated those protections, and, if it has, what the appropriate legal remedy should be.

Figure 7.1 How to Analyze Fourth Amendment Problems



The first step in analyzing whether the Fourth Amendment protects a person's right against unreasonable search and seizure is to determine whether a government actor is involved. If a neighbor trespassed into her drug-dealing neighbor's house and took a kilogram of cocaine to turn over to the police, the Fourth Amendment is not implicated because the government was not involved in invading the drug dealer's privacy. If the neighbor, however, was acting under the direction and control of the police as an informant, then the Fourth Amendment applies.

The second step is to determine whether there exists an expectation of privacy in the place to be searched or the thing to be seized. The reasonable expectation of privacy must be subjectively and objectively reasonable as determined in *Katz v. United States* (1967), reprinted in part on the following page.

The third step is to determine whether the police action in conducting the search and seizure was "reasonable." For example, choking a suspect to get the bag of drugs the suspect just

swallowed is reasonable if done to save the suspect's life but unreasonable if done to get the drugs to use as evidence against the suspect.

The fourth step is to determine whether sufficient probable cause exists to support the warrant or arrest. The U.S. Supreme Court has stated **probable cause** exists if "[under] the totality of the circumstances, as viewed by a reasonable and prudent police officer in light of his training and experience, would lead that police officer to believe that a criminal offense has been or is being committed."[3]

What may suffice as probable cause in one case may not in a similar case. The probable cause standard is flexible, but it must be based on more than a **"hunch"** or "reasonable suspicion" that someone is engaged in criminal activity.[4]

The fifth step is to determine whether, in the case of a Fourth Amendment violation, the evidence seized will be excluded or admitted. The **exclusionary rule** is designed to punish the police for not following the law by preventing the government from using illegally seized evidence against the defendant and any **derivative evidence** (something based on another source) found as a result of the illegal search and seizure. Trees get nourished by drinking water from their trunks. If the tree trunk is poisoned by the illegal search, then the leaves and fruit are going to be poisoned as well. Hence, the phrase **"fruit of the poisonous tree"** describes inadmissible evidence derived from the initial illegality committed in seizing the evidence without legal authorization. The good faith exception may allow such evidence to be used at trial because the officers were simply doing their job and made innocent mistakes. Both concepts are discussed more fully in Chapter 8.

The Expectation of Privacy

Rule of Law: The Fourth Amendment protects a reasonable expectation of privacy, which must be both subjective (personal) and objective (relative to everyone else).

People do not forfeit their Fourth Amendment right to be free from unreasonable search and seizure by engaging in criminal activity. In *Katz v. United States* (1967), the defendant had been convicted for wagering illegal bets across state lines using the telephone, a federal crime. The evidence against him was obtained when federal agents put listening devices on the exterior panels of the public telephone booth where Katz conducted his gambling business. The U.S. Supreme Court found in favor of Katz because Katz subjectively expected his conversations inside the booth would be private, and everyone else passing by the telephone booth had an objective belief that Katz expected to have a private conversation in the telephone booth. As you read the case excerpt below, note how the Court formulated the legal definition for a **reasonable expectation of privacy** that the Fourth Amendment would protect.

KATZ V. UNITED STATES, 389 U.S. 347 (1967)

Supreme Court of the United States

Justice Stewart delivered the opinion of the Court. (8–1)

FACTS: The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston, in violation of a federal statute.[5] At trial the Government was permitted, over [Katz's] objection, to introduce evidence of [his] end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment, because "[t]here was no physical entrance into the area occupied by [Katz]."

ISSUE: [Katz] has phrased those questions as follows:

A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening and recording device to the top of such booth is obtained in violation of the right to privacy of the user of the booth.

B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to violate the Fourth Amendment to the United States Constitution.

We decline to adopt this formulation of the issues. In the first place, the correct solution to Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all . . .

HOLDING: The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

REASONING: [Katz] has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented in this case.[6] *For the Fourth Amendment protects people, not places* (emphasis added). . . .

The Government urges that, because its agents relied upon [prior case law and] did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized.

In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," and that searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* [on its face] unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. And bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations "only in the discretion of the police."

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent [prior] justification that is central to the Fourth Amendment," a procedure that we hold to be a constitutional precondition [a legal requirement that must be met in order to satisfy the Constitution] to the kind of electronic surveillance involved in this case.

CONCLUSION: Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed. It is so ordered.

In the *Katz* decision, the high Court said the Fourth Amendment protects "people, not places." What about people who come visit you at your house? Should they, too, have a reasonable expectation of privacy in the guest room and should their belongings be protected against unreasonable search and seizure even though you own the house? In *Minnesota v. Olson* (1990), the high Court held houseguests enjoy the same expectation of privacy as the homeowner or apartment dweller, because visiting one's friends and relatives is a long-standing social custom.[7] On the other hand, if houseguests are using the home for purely commercial transactions, such as the weighing and packaging of illegal drugs as happened in *Minnesota v. Carter* (1998), the guests do not enjoy the same privacy rights as social guests because selling drugs is not a social custom or norm.[8]

What happens if you borrow a friend's rented car to deliver drugs? Terrence Byrd's girlfriend rented a car but did not list Byrd as an authorized driver. Byrd was pulled over and police asked for consent to search the car. Byrd refused consent, but when officers discover Byrd was not on the car rental agreement, they decide he had no expectation of privacy and proceeded to search the car.

In the trunk, officers discovered 49 bricks of heroin and body armor, which, as a felon, Byrd was not allowed to possess. Officers arrested Byrd, and he moved to suppress the evidence based on the lawfulness of the stop and search. The contraband was not suppressed and Byrd was found guilty. But on appeal to the U.S. Supreme Court, Byrd won. The Court found that Byrd, as the driver with dominion and control over the car and the right to exclude others from the car whether or not he was listed on the rental agreement, indicated Byrd had a right of privacy in the car that law enforcement was obligated to respect. *Byrd v. United States*, 2018.[9]

The Fourth Amendment and Modern Technology

One of the many hallmarks of American democracy is the U.S. Constitution's bedrock of law that guides government conduct. Although the Constitution lists many rights, it does not explicitly describe those rights, leaving the community to define its own rights and liberties. Community values change over time as do the public's perception of constitutional rights. For instance, before drugs and guns in middle and high schools became a focus of student discipline, students had a right of privacy in their school locker. Once the community demanded more proactive school surveillance, schools changed their policies to reflect the school "owned" the locker which the student merely "borrowed," eliminating students' legal claim to a right of privacy in their lockers. Nowhere has the definition of the right of privacy seen more evolution in the past 20 years than the Fourth Amendment's applicability to technology and new definitions of what government behavior constitutes a search and a seizure.

Searching and Seizing an Electronic Device. Modern technology has advanced to such a degree that commonly understood Fourth Amendment privacy analysis is constantly changing. For example, when officers have probable cause to arrest someone, they may also, without a warrant, search the area within the arrestee's immediate control and accessible "closed containers," such as briefcases and purses. For a long time, cell phones were considered "closed containers," and on arresting suspects, officers would often scroll through the suspect's phone contents searching for incriminating information. Read the case excerpt of *Riley v. California* reprinted in part below, initially discussed in Chapter 1, and focus on the Court's reasoning that cell phones have now become such an indispensable part of everyday life that officers should now make a probable cause showing before a judge to obtain a warrant before searching a cell phone for evidence of a crime.

Rule of Law: Electronic devices such as cell phones that store a person's "social DNA" require a warrant to search.

RILEY V. CALIFORNIA, 134 S.CT. 2473 (2014)

Supreme Court of the United States

Chief Justice Roberts delivered the opinion of the Court. (9–0)

FACTS: [P]etitioner David Riley was stopped by a police officer for driving with expired registration tags. In the course of the stop, the officer also learned that Riley's license had been suspended. The officer impounded Riley's car, pursuant to department policy, and another officer conducted an inventory search of the car. Riley was arrested for possession of concealed and loaded firearms when that search turned up two handguns under the car's hood.

An officer searched Riley incident to the arrest and found items associated with the "Bloods" street gang. He also seized a cell phone from Riley's pants pocket. According to Riley's uncontradicted assertion, the phone was a "smart phone," a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity. The officer accessed information on the phone and noticed that some words (presumably in text messages or a contacts list) were preceded by the letters "CK"—a label that, he believed, stood for "Crip Killers," a slang term for members of the Bloods gang.

At the police station about two hours after the arrest, a detective specializing in gangs further examined the contents of the phone. The detective testified that he "went through" Riley's phone "looking for evidence, because . . . gang members will often video themselves with guns or take pictures of themselves with the guns." Although there was "a lot of stuff" on the phone, particular files that "caught [the detective's] eye" included videos of young men sparring while someone yelled encouragement using the moniker "Blood." The police also found photographs of Riley standing in front of a car they suspected had been involved in a shooting a few weeks earlier.

ISSUE: [Is the search of a cell phone seized without a warrant and searched incident to arrest lawful?]

HOLDING: [No. Police are not allowed, without warrant, to search digital information on a cell phone seized from an individual who has been arrested.]

REASONING: As the text [of The Fourth Amendment] makes clear, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" Our cases have determined that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing . . . reasonableness generally requires the obtaining of a judicial warrant."[10] Such a warrant ensures that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers. The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life." The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.

CONCLUSION: Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

If the government, generally, needs a warrant to search cell phones, what is legally required to capture information gathered from an electronic device's output? As stated in the *Katz* decision, the "Fourth Amendment does not protect what one knowingly exposes to the public," and the U.S. Supreme Court has said personal information we share with the public, so-called third parties, is not expected to be private and, therefore, not protected by the Fourth Amendment.

Searching and Seizing the Output of an Electronic Device. Pursuant to the **third-party doctrine**, if you voluntarily share private information with a nonconfidential third party (a bank, a telephone company, even a friend in whom you confide your secrets), you have no control over what the third party does with your information and there is no reasonable expectation of privacy. The third-party doctrine was articulated in *Smith v. Maryland* (1979), where a woman was robbed by a man she later identified drove a Monte Carlo.[11] After the robbery, the suspect would call the victim on the telephone. On one occasion, the robber told her to come outside and she recognized the Monte Carlo, which police traced to defendant Smith. Without securing court approval, police asked the telephone company for a list of all telephone numbers used by the subscriber's telephone, called a **pen register**. When phone company records showed Smith's phone had called the victim's house, he was arrested, tried, and convicted. On appeal, Smith claimed a privacy right

Rule of Law: Once a person shares his or her personal information with a "third party," such as a bank or phone company, there is a diminished reasonable expectation of privacy.

in his phone's dialing activity, but the high Court disagreed. The Court said society was not willing to respect a privacy interest in automated, routine, business activities.[12]

The same rationale of the third-party doctrine can be applied when law enforcement uses a device to track a suspect in a public location. Without a warrant but with the consent of the store's owner, federal agents placed a beeper in a container of chloroform in a store, suspecting people were buying the chemical to produce methamphetamine. Someone bought the chloroform, and agents followed the beeper to a cabin. The officers then obtained a search warrant for the cabin and arrested the occupants, who claimed the search violated the Fourth Amendment. The high Court found in *United States v. Knotts* (1983), because the beeper signal had only a limited range, its signal was followed only on public roads, so there was no expectation of privacy the Fourth Amendment was bound to protect.[13] Conversely, in *United States v. Karo* (1984), the Court held a beeper to track a suspect's movements inside a house was too invasive, and the Court held a warrant was required to protect privacy interests inside a home.[14]

Based on the *Knotts* holding that there is no warrant required for outside, public activity, agents used a thermal imaging device to capture heat coming off a roof. Growing marijuana inside requires strong lamps to give the plants the light they need for full development. When agents used the thermal images of heat emanating from Danny Kyllo's roof to get a warrant to search his house and, indeed, found marijuana plants inside, the Supreme Court held in *Kyllo v. United States* (2001) that when "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[15] The Court was saying if the government uses equipment not generally available to the public to expose private activity, a search without a warrant is unreasonable.

APPLYING THE LAW TO THE FACTS

Reasonable Expectation of Privacy in a Car's Black Box?

The Facts: On October 6, 2013, Charles Worsham, Jr., was the driver in a crash in which his passenger, Amanda Patterson, was killed. His vehicle was seized and impounded by police. Twelve days later, police in Palm Beach County, Florida, accessed the data in the car's black box without first obtaining a warrant. The information retrieved from the black box indicated Worsham was speeding at the time of the crash. Worsham was convicted of vehicular manslaughter and challenged the lawfulness of the warrantless search of the car's black box. The police maintained the black box was full of third-party records such as data on speed, braking, and steering, data that required no warrant or consent from the vehicle's owner. Moreover, black boxes are in vehicles so car companies can comply with national safety standards, not for everyday use by the individuals who drive the car. Which side will win, and why?

The Law: A divided appellate court decided that the police should have obtained a warrant for the black box. Stating that retrieving information from a black box is not like putting a car on a lift and inspecting the tires, the court said, "Modern technology facilitates the storage of large quantities of information on small portable devices. The emerging trend is to require a warrant to search these devices" (*Florida v. Worsham*, 2017).[16]

Searching and Seizing the Output of an Electronic Device to Pinpoint Location. Using the *Kyllo* precedent that the government needs a warrant to use enhanced technology, but tracking movements on public streets with a beeper is legal under the *Knotts* precedent, which legal standard is applicable when the government uses a GPS on a vehicle's undercarriage to track the car's movements on public streets? In 2012, federal agents suspected Antoine Jones of drug dealing. Officers, without a warrant, placed a GPS on Jones's Jeep and tracked his movements for 28 days. Like a beeper, GPS is an attachment-based technology and has limited range because satellite signals can be lost. Evidence retrieved from the GPS showed Jones traveling to and from drug deals and, based on the evidence, he was convicted at trial. On appeal, Jones argued that his Fourth Amendment rights were violated by the warrantless GPS tracking. The U.S. Supreme Court agreed, based on the historical doctrine of trespass (unlawful interference with property), that officers physically placing a GPS on

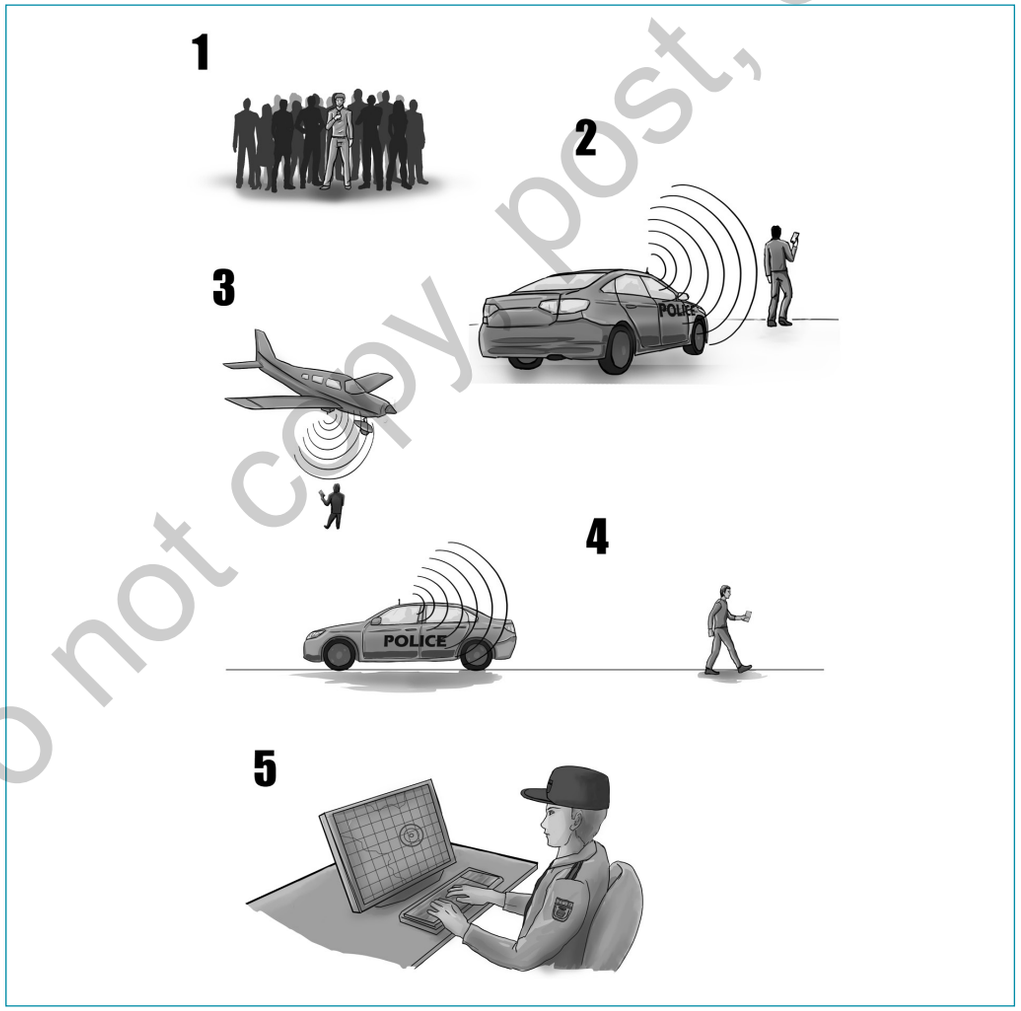
Jones's Jeep was a trespass without legal justification. Jones won his appeal in *United States v. Jones* (2012).[17] In the chapter-opening case study, officers probably needed a warrant to place the GPS tracker on Charlie's car for long-term surveillance, because even though a beeper on public streets is not a search, it is an act of trespass for the warrantless placement of a tracking device on a person's personal property.

The way law enforcement is currently using advanced technology "not in use by the general public," as stated in the *Kyllo* case, to track and catch suspects is illustrated in Figure 7.2.[18]

Referring to Figure 7.2, let's say that (1) there is a suspect who is in a crowd using a cell phone, and law enforcement—without being detected—would like to track the suspect's movements. (2) Officers can use mobile technology called a **StingRay** (manufactured by Harris Corporation), which is a briefcase-size international mobile subscriber identity (IMSI) catcher that acts as a roving cell phone tower and intercepts the suspect's cell phone signal by temporarily disconnecting the phone from its contracted wireless provider. Cell phones are designed to automatically connect to the strongest cell tower signal, whether or not the phone is turned on. If police have a StingRay in a car or van, the StingRay sucks up all the cell phone signals from nearby phones and can be downloaded directly to law enforcement computers using mapping software. IMSI catchers can capture and download information, even behind walls, from voice communication, texts, websites requested, and other data and apps stored on all phones within a certain distance from the catcher.[19]

Another form of direct government surveillance is the **dirtbox** (made by Digital Receiver Technology, Inc.), which also mimics cell phone towers and (as shown in Figure 7.2 [3]) attached to the underside of low-flying aircraft, allowing law enforcement to sweep large areas to intercept

Figure 7.2 Government Surveillance With StingRays and Dirtboxes



TIMELINE

Precedent Hierarchy From Third-Party Doctrine

2018 — *Carpenter v. U.S.* (2018) Monitoring suspect's movements through historical cell-site location information without a warrant not legal

2012 — *U.S. v. Jones* (2012) Monitoring suspect's movements by GPS attached to car w/o warrant not legal

2001 — *Kyllo v. U.S.* (2001) Using advanced technology to monitor house w/o warrant not legal

1984 — *U.S. v. Karo* (1984) Monitoring suspect's movements by beeper inside house not legal

1983 — *U.S. v. Knotts* (1983) Monitoring suspect's movements by beeper on public road legal

1979 — *Smith v. MD* (1979) No privacy rights in personal info given to third parties

the suspect's cell phone location. Reporters reveal that the U.S. Marshals, responsible for catching suspects, fly planes with dirtboxes attached scanning tens of thousands of cell phones at a time in the hunt for fugitives.[20] (4) Sometimes, the StingRay has to keep moving to be able to triangulate the suspect's location via his cell phone signal. (5) The data collected from both cell-site simulators can be transmitted and analyzed by law enforcement either on laptops or back at the police station, and used to locate and apprehend the suspect. Dirtboxes are effective for finding contraband, such as cell phones behind prison walls.

The timeline to the left represents the hierarchy of case precedent of the third-party doctrine, starting with *Smith v. Maryland* (1979), that says people lose privacy rights in the information they share with third parties (such as banks) and follows up the steps through case decisions controlling the use of electronic monitoring devices such as GPS attached to cars without a warrant (*United States v. Jones*, 2012). The next step in the analysis is tracking location through cell phone signals.

In 2011, the FBI, investigating cell phone robberies, obtained from Timothy Carpenter's cell phone carrier his historical cell-site location information (CSLI) data over a 127-day period. According to the American Civil Liberties Union, which is representing Carpenter, this information "revealed 12,898 separate points of location data—an average of 101 each day over the course of four months." The FBI did not obtain a warrant but relied on the Stored Communications Act, 18 U.S.C. §2703, which does not require probable cause for a court order to issue a warrant, but only "specific and articulable facts showing reasonable grounds to believe are relevant and material to an ongoing criminal investigation." Carpenter was convicted of the robberies based on the evidence of his location culled from his cell phone signal. He appealed, and the U.S. Supreme Court found in Carpenter's favor that the "seismic shift in digital technology" means that the government can access "deeply revealing" information about people the Fourth Amendment was designed to protect (*Carpenter v. United States*, 2018).[21] Therefore, officers should have established probable cause and secured a warrant for the information leading to Carpenter's location as transmitted by his cell phone.

SEIZURES OF THE PERSON

America, as our national anthem the "Star-Spangled Banner" proclaims, is the "land of the free and home of the brave."[22] People can go about their

daily business free from government interference. When the police stop members of the public, whether it is to ask questions or to arrest and take to jail, there is a corresponding legal basis for police action. If the minimum legal requirement is not met for the citizen–police encounter, the detention, however brief, is unlawful.

The *Terry* Stop

Police officers can approach and ask anyone questions, and the person approached can consent to answer or not. The brief investigatory detention, also called the ***Terry* stop**, is a temporary restraint of a citizen based on reasonable suspicion that criminal activity is afoot. The detention is brief and designed to allow officers the freedom to ask questions to confirm or dispel their suspicion that a crime has been or will be committed. How can the public distinguish between a detention and an arrest?

In *Terry v. Ohio* (1968),[23] Detective Martin McFadden was on duty one night when he noticed three men behaving suspiciously. Two of them were walking up and down the same street to look into a store window. They made 24 trips back and forth, while a third man stood watch. McFadden approached the two men, Terry and Chilton, and asked their names. When the men mumbled a response, McFadden turned them to face one another, patted Terry down, and removed a gun from his coat pocket. Terry was convicted for carrying a concealed weapon. On appeal, the Supreme Court found that the officer's patdown, even without probable cause, was legal. The *Terry* Court stated,

> where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . and nothing . . . serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

The **reasonable suspicion** standard states that if police have specific and articulable facts that a crime was about to happen or did just happen—that criminal activity was afoot—then the police could briefly detain the suspect and ask questions. **Specific and articulable facts** means that at the time of the seizure, the officer "must be able to articulate [speak to] something more than an 'inchoate and unparticularized suspicion or hunch.' From a courtroom perspective, when judging the legality of a *Terry* stop, criminal justice professionals should always envision themselves in a courtroom, testifying under oath to the specific facts that justified their behavior. The Fourth Amendment requires 'some minimal level of objective justification' for making the stop."[24] Some circumstances that contribute to the "reasonable suspicion" determination are the following:[25]

Rule of Law: Every citizen–police encounter, from briefly stopping a person to ask questions to the government securing a conviction, has a specific legal basis.

Rule of Law: The *Terry* stop is a brief encounter between police and the public to confirm or dispel the reasonable suspicion that criminal activity is afoot.

- The person approached: Does the officer know this person? Does the person fit a description of the suspect in a reported crime? Does the person appear cooperative? Is the person dressed appropriately given the weather and circumstances?
- The initial encounter: Is the area typically populated with people at this time of day? Is the area known by law enforcement as a "hot spot" for repeated criminal activity?
- Specific and articulable facts: What evidence supports the suspicion that a person is, has, or will commit a crime? Is the person known to law enforcement? Has there been a police report; if so, for what type of crime?

Furthermore, if the officers had a **reasonable belief** that the person is armed, police could lawfully conduct a patdown (frisking) for weapons by placing hands on the suspect's outer

clothing. The patdown is to ensure the safety of both the officers and the public and is not a full-blown search; probable cause is required to search.

Figure 7.4 illustrates the *Terry* stop, the patdown, and the full-blown arrest.

In the chapter-opening case study, Agent Wick was within the law to stop and talk to Charlie, Elaine, and Jamal because of the reasonable suspicion that criminal activity was afoot by the late-night rendezvous and "casing" the electronics store for a possible robbery. Wick could also pat Elaine down for weapons because he had a reasonable belief she was armed when he saw the weapon protruding from her pocket.

Duration of a *Terry* stop

A *Terry* stop is to last only as long as to either confirm or dispel the officer's reasonable suspicion that criminal activity is afoot. The *Terry* reasonable suspicion legal standard does not provide officers with authority to take a suspect to the police station to take mug shots or fingerprints or to put the suspect in a line-up without his or her consent or a warrant authorizing such behavior.[27] If a *Terry* stop lasts too long, the person is not free to leave and is, therefore, under arrest without legal authority. Any evidence retrieved from the suspect unlawfully detained may be suppressed by operation of the exclusionary rule.

Springboard for Discussion

Two women were speaking Spanish in a gas station in Montana. A federal Border Patrol agent approached the women, asked for identification, and detained the women for 30 minutes on the basis that Montana is a "predominately English speaking state" and the women were "pretty far north."[26] Was the agent's stop lawful? What's the difference between a hunch and "specific articulable facts" that criminal activity is afoot?

There is no concrete defining moment when a *Terry* stop becomes an unlawful arrest. The U.S. Supreme Court declared, "Much as a 'bright line' rule would be desirable in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria."[28] Courts examine the totality of the circumstances in making the determination whether the *Terry* stop was proper and whether the detention lasted too long. For example, after an officer observed a vehicle swerve from the highway onto the shoulder and back again, he pulled the vehicle over. A traffic stop is a *Terry* stop based on the reasonable suspicion the driver has committed a traffic violation. The driver, Dennys Rodriguez, explained that he had swerved to avoid a pothole. After checking Rodriguez's driver's license, registration, and insurance, the officer asked Rodriguez a number of questions regarding his travels. When the officer returned the documents and issued a warning for improper driving, the officer asked for permission for the officer's K-9 dog to walk around Rodriguez's vehicle, and he lawfully refused. The officer then ordered Rodriguez out of the car and called for a second officer to arrive at the scene. When the second officer arrived, the first officer walked the police dog around the vehicle. The dog alerted to the presence of drugs and a subsequent search revealed a big bag of methamphetamine. Did the *Terry* stop last too long, transforming the stop into an illegal arrest? Yes, the stop lasted too long. In *Rodriguez v. United States* (2015), the high Court held the stop went beyond the "time reasonably required to complete" the stop making the stop "unlawful." Rodriguez's case was remanded back to the trial court for further disposition.[29]

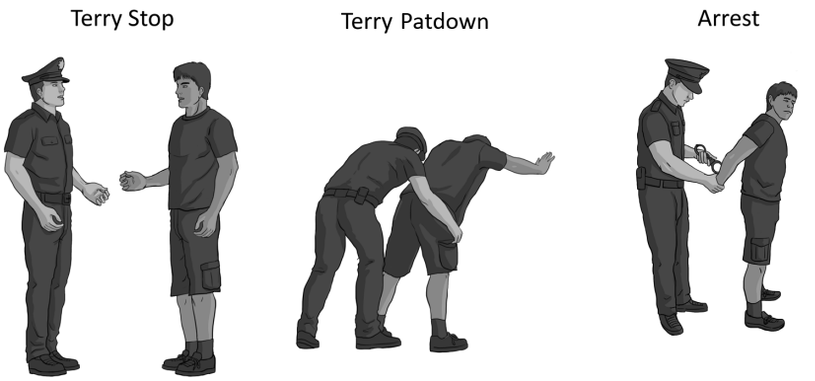
Rule of Law: If a *Terry* stop lasts too long to either confirm or deny the reasonable suspicion that criminal activity is afoot, it transforms to an arrest unsupported by probable cause, which is an unlawful arrest.

Requests for Identification

Rule of Law: Requests for personal identification can be made only in the context of a *Terry* stop and, without consent, should be supported by state law.

Are individuals legally required to identify themselves to police officers or run the risk of being arrested? In Nevada, police received a report of an assault and saw Larry Hiibel and a woman parked by a side of the road. Officers asked Hiibel for his name and identification. Hiibel, who appeared to be intoxicated, refused 11 times to identify himself and was arrested under Nevada's "stop and identify" statute. Hiibel challenged his arrest under the Fourth Amendment as an unreasonable seizure. The Supreme Court found in favor of the officers in *Hiibel v. Nevada* (2004), holding that the statute requiring identification serves the "purpose, rationale, and practical demands of a *Terry* stop" and was a limited intrusion when weighed against the government's interest in identifying a suspect's criminal record or mental disorder, or in clearing the suspect as

Figure 7.4 The Three Steps From Talking to Arrest



the object of the investigation.[30] The Court limited its holding to asking for identification within the context of the *Terry* stop only; authority to demand identification does not extend to anyone for any reason. As always, police may ask for identification and the person may agree and consent, but refusal to comply without a supporting state law does not confer authority to arrest.

Terry Stops of Automobiles

Rule of Law: The same legal standard that guides *Terry* stops of people applies with equal force to automobiles.

What happens when, during a roadside encounter, officers have a reasonable suspicion that criminal activity is afoot on the basis of the actions and statements of a driver and passengers in a vehicle? What does the law allow the officer to do? According to the decision made in *Delaware v. Prouse* (1979), if officers have reasonable suspicion that the motorists are engaged in criminal activity, then the officers can detain motorists in their vehicles.[31] Once the car is seized, passengers are also seized and have a Fourth Amendment claim as well, as held in *Brendlin v. California* (2007).[32] To balance the safety concerns of the officer with the need to minimize intrusion on the privacy of the motorists, the officers not only can detain the motorists but also order both the driver, *Pennsylvania v. Mimms* (1977), and the passengers, *Maryland v. Wilson* (1997), out of the car until the officer completes the traffic stop.[33]

But if, during the stop, the driver and passengers make the officer fear for her safety, and if she believes that the motorists may be armed or that the passenger compartment (where everyone sits) contains weapons, the officer may order everyone out of the car and search for and remove those weapons. In *Arizona v. Johnson* (2009), officers were part of a gang task force when they stopped a vehicle with a suspended registration.[34] While speaking to the driver and passengers, officers noted Johnson was wearing a blue bandana consistent with Crips gang membership, there was a police scanner in the car, and Johnson volunteered he was from Eloy, Arizona, home to a Crips gang. Officer Trevizo ordered Johnson out of the car and patted him down for her safety and discovered a gun in his waistband. The U.S. Supreme Court upheld the legality of the officer's actions because she had a reasonable suspicion Johnson was armed.

The Intersection of the *Terry* Stop and the Suspect's Race

When the *Terry* case was decided in 1968, U.S. Supreme Court Chief Justice Earl Warren's opinion cautioned against the potential abuse of power that might come from a relaxation

of the rules controlling law enforcement's relationship with the public. Warren wrote for the majority,

> Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires.

Chief Justice Warren was saying that the rule that excludes evidence from being used against a defendant because it was seized unlawfully will not cure the "wholesale harassment by certain elements of the police community" that people of color often report. Although law enforcement has a duty to investigate and prevent crime, men of color frequently complain that race was a motivating factor in their being stopped. But if the stop was based on what Justice Warren said was "an objective evidentiary justification," what the officer subjectively had in his mind about the suspect's race does not matter (*Whren v. United States*, 1996).[35] However, the statistical racial disparities in analyzing *Terry* stops either on foot (which led a federal judge to stop New York City's aggressive stop and frisk policy because of unconstitutional racial profiling[36]) or in a car (e.g., a federal judge reduced a man's sentence because his criminal history was for traffic violations that, on closer inspection, amounted to little more than "driving while Black"[37]) raise questions whether all of the *Terry* stops in minority communities have been "objectively reasonable." In *Utah v. Strieff* (2016), the U.S. Supreme Court held that drug evidence could be used against a defendant because officers discovered an outstanding arrest warrant while conducting a *Terry* stop. The problem in the case was there was no legal authority for the *Terry* stop. All citizen–police encounters are analyzed from the beginning of the encounter, not what happens later, which means since there was no legal authority to stop Strieff, all evidence seized from him should have been suppressed. In a notable dissent, Justice Sotomayor disagreed with the *Strieff* majority's holding. She wrote that not requiring officers to follow the law in the initial stop would have far-reaching consequences, particularly for minorities:

> The white defendant in this case shows that anyone's dignity can be violated in this manner. But it is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.[38]

If people of color are stopped without legal authority, such police conduct may breed "cynicism and distrust" of the police in minority communities. In *Illinois v. Wardlow* (2000), the U.S. Supreme Court held that a suspect who, on sight, runs from the police may indicate that the person is involved in criminal activity. Justice Stevens, however, noted in his dissent that minority communities may believe "that contact with the police may be dangerous, even for innocent people."[39] In 2016, the Massachusetts Supreme Court found the Boston City Police Department had a long-standing problem with racially profiling African Americans. When Jimmy Warren ran from the police, who wanted to question him about a recent breaking and entering, officers used his flight to justify stopping him, eventually using the illegal handgun found on the ground next to Warren against him. In suppressing the gun on the basis that the officers did not have reasonable suspicion to stop Warren, the state court noted the Boston Police's own Field Interrogation and Observation (FIO) data indicated that

> Black men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations. . . . We do not eliminate flight as a factor in the reasonable suspicion analysis whenever a black

male is the subject of an investigatory stop. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.

The Massachusetts court concluded judges should use the FIO conclusions that Black men might flee simply to protect themselves in considering whether a suspect's unprovoked flight from the police indicated reasonable suspicion that the man running was involved in criminal activity.[40]

The Arrest

The Arrest as a Fourth Amendment Seizure

As the U.S. Supreme Court has said, officers "do not violate the Fourth Amendment by merely approaching an individual on the street or other public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions."[41] Consent to abide by police wishes must be voluntary and must not be the product of unlawful coercion, such as by the threat or show of force or authority. Courts examine the totality of the circumstances surrounding the restraint to determine whether a reasonable person would have believed he was not free to leave.[42] An arrest is a seizure; a formal arrest with handcuffs is not required. "If a reasonable person would feel free to terminate the encounter, then he or she has not been seized,[43] and courts consider the following factors:[44]

1. Whether the person was approached by more than one police officer in a show of force and the officers' demeanor (friendly, hostile, professional)
2. The basis for the police encounter
3. The duration of the police encounter
4. Whether an officer told the person he was under investigation
5. Whether an officer told the person she was not free to leave
6. Whether an officer blocked the person's path or blocked his progress when he tried to leave
7. Whether an officer displayed a weapon or police dogs were present
8. Whether the encounter was in a public or private location

Springboard for Discussion

Is it reasonable for African Americans to perceive a *Terry* stop differently from other members of the public? If so, should courts take a community's experience with local law enforcement into account when judging the reasonableness of the citizen–police encounter, or should the law be color blind?

Rule of Law: A person is under arrest if he or she does not feel free to leave or otherwise terminate the police encounter.

The significance of a person being "under arrest" is that certain constitutional protections attach, such as whether or not the so-called *Miranda* warnings are required before an interrogation or whether the person has a right to a lawyer.

For a seizure to occur, the suspect must actually submit to police authority. The high Court held in *California v. Hodari D.* (1991) that even though the police yelled "Stop!" at a suspect who was running away, that suspect was not seized until he actually stopped.[45] The issue was important because if Hodari D. was "under arrest" when he was running and throwing away his drugs, he might have had a sufficient legal challenge to the police seizure of the drugs. But by throwing his drugs away, Hodari D. also threw away his reasonable expectation of privacy and the drugs became **abandoned property** that could be seized without violating the Fourth Amendment.

Reasonable Force. Because an arrest involves the restraint of a person and, sometimes, the use of force, the Fourth Amendment is the touchstone for determining if the amount of force used was reasonable. The seminal case is *Tennessee v. Garner* (1985).[46] Police responded to a call about a

Rule of Law: The amount of force used to effectuate an arrest is subject to the Fourth Amendment's reasonableness clause.

prowler, saw Garner run away, and ordered him to stop. Garner was a 15-year-old boy who was 5'4" and weighed between 100 and 110 pounds. When Garner kept running away, an officer shot him once in the back of the head, killing him. Garner's family sued the officer for violating Garner's rights under 42 U.S.C. §1983 (discussed in Chapter 1), but the officer acted lawfully as the Tennessee statute said police could use "all the necessary means to effect the arrest" of a fleeing suspect. After reviewing the case, the high Court decided that deadly force had to be limited to dangerous situations.

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.

Today's statutes give officers wide latitude in using their discretion on how much force is "reasonable" and recognizes the split-second decision officers must make under pressure, as the Court stated in *Graham v. Connor* (1989): "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[47] Legal scholars surveyed how the *Garner* decision prompted states to change their laws defining when officers could use deadly force.[48] **Reasonable force** laws cover a wide range of activities, as illustrated by the Chippewa Cree Tribe statute as compared to California's Code, reprinted in part here.

Chippewa-Cree Tribal Law and Order Code Title IV, §1.6 Use of Reasonable Force by Police Officers

A police officer must not use unnecessary or unreasonable force in carrying out the apprehension, arrest, search, summons, interrogation, traffic supervision, and other procedures the police force is authorized or obligated to perform.

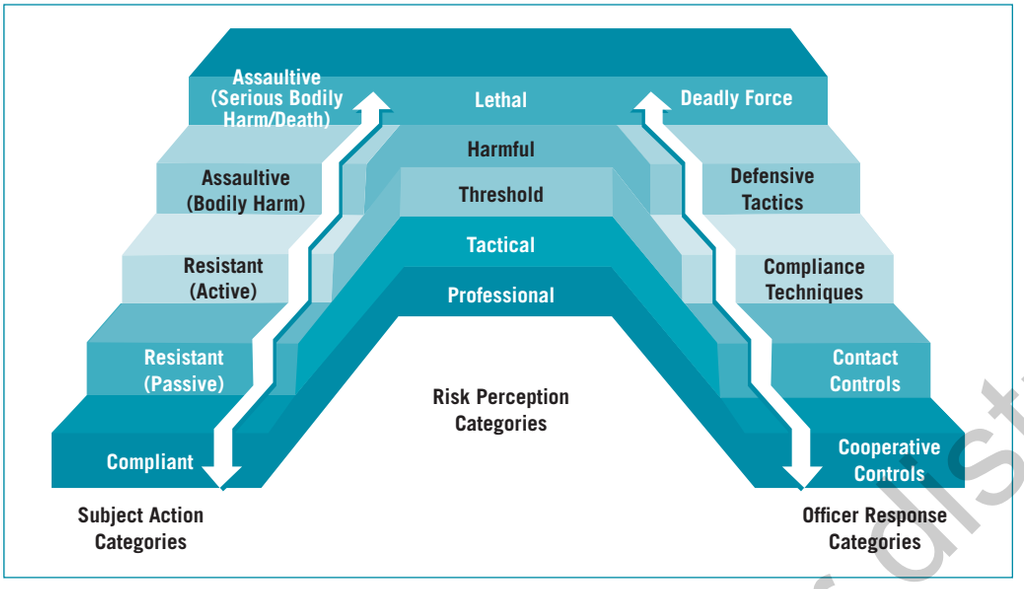
California Code Annotated §835a Reasonable force to effect arrest; Resistance

- Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance.
- A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.

If the suspect is posing a danger, police officers can use deadly force to protect the public, including during high-speed chases. In one case where a suspect was driving in excess of 100 miles per hour for many miles while fleeing police, officers used what is called a "pit maneuver" (i.e., applying the police cruiser's push bumper to the rear of the fleeing vehicle), causing the car to crash and rendering the driver a quadriplegic. The high Court found the officer's action was not an unreasonable seizure because the officer protected innocent bystanders from injury.[49]

Thus, if police use **excessive force** in effectuating arrests, they have violated the Fourth Amendment's reasonableness clause, but the legal analysis is whether the use of such force is objectively (to everyone's perspective) reasonable, which may be determined by reference to the "use of force" model that shows the behavior of the suspect and the corresponding appropriate level of force used by an officer. For example, if a suspect is compliant, using a baton to subdue the suspect would be inappropriate. In the chapter-opening case study, officers would be unreasonable to shoot Charlie, a fleeing suspect not known to be armed or dangerous. Figure 7.5 illustrates the use of force continuum.

Figure 7.5 Use of Force Model



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Arrest Warrants

An **arrest warrant** is a piece of paper signed by a judge allowing for the legal seizure of a person and is generally not required if the person has committed a felony and is found on a public street or if the officer witnessed the commission of a crime. Prior to the 1980s, if a person was suspected of committing a felony, state laws allowed police to enter private homes without a warrant to arrest the suspects, but the high Court interpreted the Fourth Amendment to require more protection for the sanctity of the home. In *Payton v. New York* (1980), state law allowed for warrantless entry into private homes to make felony arrests.[50] In finding police merely entering a home without a warrant "the chief evil against which the wording of the Fourth Amendment is directed," the high Court required arrest warrants for the home and also recognized that such warrants carried the authority to enter the home "in which the suspect lives when there is reason to believe the suspect is within," a phrase that has generated much litigation. Officers challenged on entering homes in which it is later determined a suspect does not live are frequently asked in court (a) how they determined a suspect was using the dwelling as a primary residence and (b) how they determined the suspect was inside the home at the time they entered.

Rule of Law: State and federal laws guide when arrest warrants shall issue, but absent exigent circumstances, a warrant is required to enter a personal residence to effectuate an arrest.

Moreover, a warrant to enter to arrest does not grant the authority to enter someone else's home. The high Court said the Fourth Amendment right that "protected—that of presumptively innocent people to be secure in their homes from unjustified, forcible intrusions by the Government—is weighty," and officers generally have to ask for consent to enter the third-party's home or wait for the suspect to come out.[51]

THE WARRANT REQUIREMENT

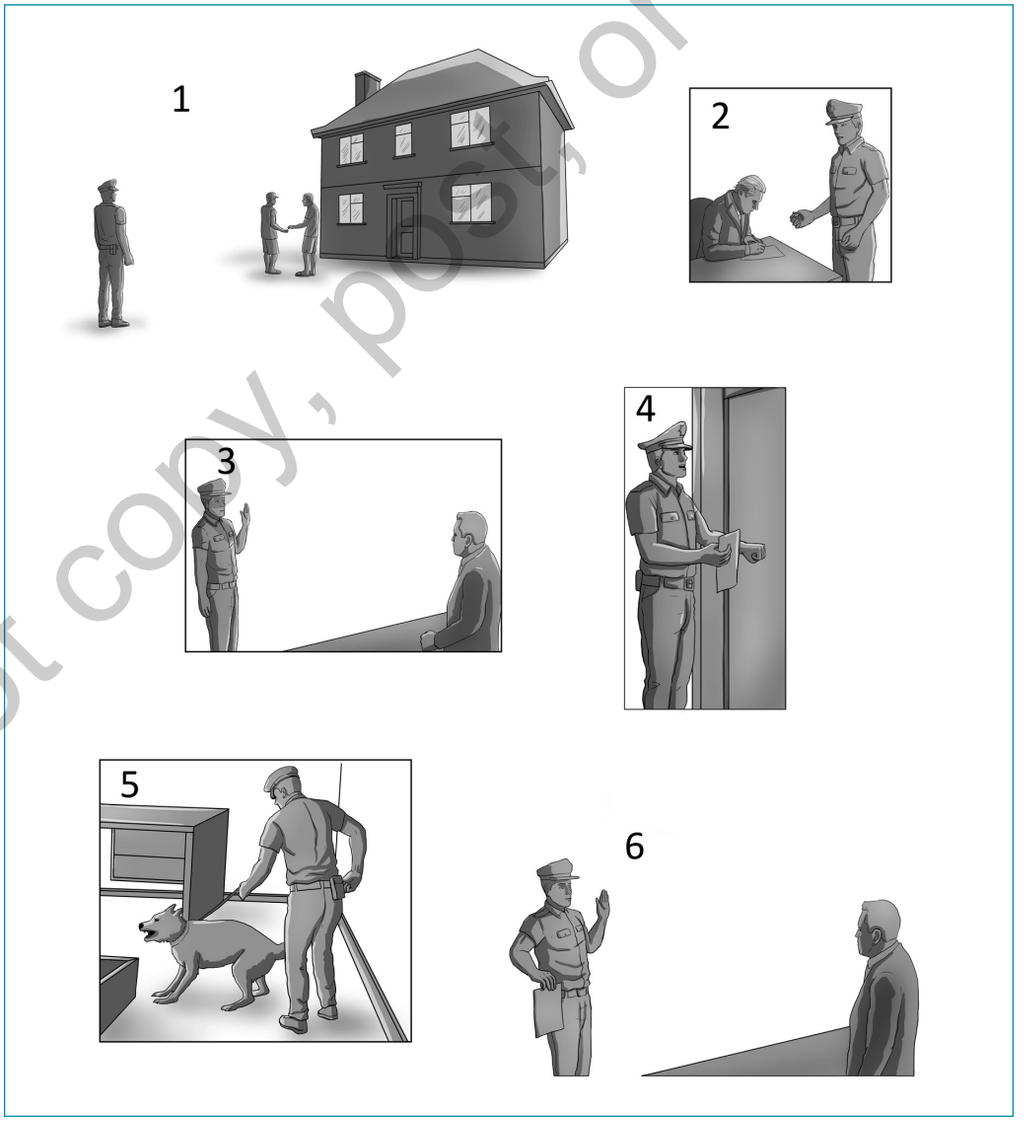
The Procedure to Obtain a Warrant

A **warrant** is the legal document that notifies the person the cause for his arrest or notifies the person whose property is to be searched of the legal authority for, and the limits of, the proposed search. An arrest warrant and a search warrant protect two, separate interests. An arrest warrant protects a person from an unreasonable seizure, and a search warrant protects a person's privacy

interests from unreasonable government intrusions. The procedure to obtain a warrant justifying the search or seizure is as follows, as illustrated by Figure 7.6:

1. Officers investigate to establish probable cause to search or seize.
2. The officer, or in complex cases an assistant district attorney (ADA, prosecutor), writes an affidavit in support of probable cause tracking the elements of the crime the suspect has alleged to have committed.
   a. The officer or ADA typically has a list of things to seize based on similar cases.
   b. The officer or ADA types the relevant information on the face of the warrant, incorporating by reference the attached affidavit of probable cause.
   c. When completed, a copy of the warrant and affidavit is typically given to the magistrate (judge) to examine before the officer appears to swear the facts contained in the affidavit are true to the best of his knowledge and belief.
   d. The officer, often accompanied by the ADA, makes an appointment with the magistrate's clerk.

Figure 7.6 Officer Obtaining, Executing, and Returning a Warrant



3. The officer appears before the magistrate, raises his right hand, and swears that the information contained in the affidavit attached to the warrant and on the warrant is true.
    a. The magistrate may ask questions to ensure sufficient probable cause exists.
4. If there are special circumstances in the service of the warrant (e.g., serving in the middle of the night and eliminating the "knock and announce" requirement because of a fear for officer safety), the magistrate will modify the conditions on the face of the warrant. Typically warrants must be executed within 10 days of being signed and during the hours of 6:00 a.m. and 10:00 p.m.
5. Once the warrant has been executed, officers leave a copy at the place searched or with the person arrested.
6. Once an inventory of the things taken are listed on the back of the warrant, the officer comes back before the magistrate and swears the list of evidence seized is true.

If there is not enough time to go to the courthouse and personally appear before a magistrate, the federal rules governing search and seizure provide for methods of securing a warrant, including by telephone.

> Federal Rule of Criminal Procedure 41
>
> (d) Obtaining a Warrant.
>
> (1) *In General.* After receiving an affidavit or other information, a magistrate judge—or if authorized by Rule 41(b), a judge of a state court of record—must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device. . . .
>
> (3) *Requesting a Warrant by Telephonic or Other Means.* In accordance with Rule 4.1 [Complaint, Warrant or Summons by Phone], a magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

An example of a federal warrant can be found on the student study site at edge.sagepub.com/jirard.

Probable Cause

Rule of Law: The Fourth Amendment demands probable cause to search and seize.

The probable cause determination is a flexible calculation based on an objective analysis that a specific person is committing, has committed, or will commit a crime or specific evidence of criminal activity is going to be found at a specific place.[52] There are many sources of probable cause.

Sources of Probable Cause

Officer's Perceptions. The law does not expect police officers to shut their eyes, cover their ears, and perform their jobs in a sensory vacuum. All officers have been trained at professional academies and typically gain some experience early in their careers investigating crimes and interviewing witnesses, victims, and suspects. Officers can rely on their training and experience to determine whether probable cause exists to search and seize. A person's acts cannot merely suggest that a crime is being committed but must specifically indicate criminal activity.

Collective Knowledge. A common source establishing probable cause is the **collective knowledge** of all the information gathered by law enforcement agents during an investigation. One police officer trying to establish probable cause to arrest or search can rely on what other officers tell him and on information learned from other investigations, including those in different jurisdictions. An officer in Indiana who has received an all-points bulletin (APB) or a

"be on the lookout" (BOLO) notice from neighboring Ohio describing a car last seen at a crime scene has probable cause to arrest a suspect driving that car based on the collective knowledge of all the officers. Also, second-hand hearsay (e.g., "Bill told me that Suzy said Mary sold drugs") is considered reliable in a preliminary investigation because of the nature of police work.

Presence in a "High-Crime" Area. Just because people live in a densely packed urban area known for illegal drug activity does not give rise to probable cause that its residents are criminals. But if someone is closely associated with known criminals in the area, that fact can be used to help establish probable cause. The courts use the following criteria to decide whether probable cause exists to search and arrest specifically for drug-related crimes in certain locations:

1. The suspect is present in an area notorious for its drug trade.
2. The suspect is engaging in a sequence of events typical of drug transactions, for example, many brief hand-to-hand transactions conducted late at night.
3. The suspect attempts to escape after being confronted by police.
4. The suspect attempts to conceal the subject of his business.[53]

All the previously listed factors in conjunction with other information known to law enforcement and personal observations may be used to establish probable cause.[54]

Informants. **Informants** are people who give information to law enforcement about crime and criminals in exchange for a government benefit. A typical informant is a criminal who has been arrested and enters into a plea bargain with the government, either for reduced charges or for a lighter sentence that enables the person to stay on the streets and gather more information about criminal activity to help the police. Because of their willingness to trade information for their own freedom, informant information may be suspect because they have an incentive to accuse others in exchange for a get-out-of-jail-free card from the government. When information is used to establish probable cause for a warrant, the officer must show in the affidavit of probable cause supporting the warrant that the informant is reliable. Informant reliability is determined by a three-prong test:

1. The informant's basis of knowledge

   How did the informant learn the information about the target suspect?
2. The basis for believing that the informant is telling the truth
   i. If the informant is an ordinary citizen, he or she is considered inherently credible;
   ii. If the informant is a criminal, the government must show that the informant has given accurate information in the past that has led to the further investigation, arrests, or convictions of other suspects; and
3. Independent corroboration of the informant's information.

If the informant provided information that he witnessed the suspect manufacture and sell illegal drugs, for example, the officer must state that he corroborated the information by surveillance that established the fact that the suspect was engaged in making and selling drugs. In the chapter-opening case study, Beth would be deemed an inherently reliable informant because she is an ordinary citizen who has no reason to lie about her suspicions that Charlie is a spy. The agents also relied on their personal observations, collective knowledge, and reliable hearsay to determine that Charlie is spying for North Korea.

The Difference Between Informants and Anonymous Tips. **Anonymous tips** typically are insufficient to establish probable cause because the source refuses to be identified. Imagine if a vindictive roommate, Vinny, called the police department to report, anonymously, that his roommate Maki was an embezzler. If Maki was not an embezzler and Vinny simply wanted to use the police to harass Maki, police time would be wasted. Anonymous tips may be reliable if the tip is sufficiently

detailed and if officers can independently corroborate the tip. An anonymous tip was found sufficient to establish probable cause in *Alabama v. White* (1990),[55] where an anonymous person called police and relayed the following information about Vanessa White: She would be leaving Lynwood Apartments driving a brown Plymouth station wagon with a broken taillight traveling to Dorsey's motel where she would be carrying a brown attaché case with an ounce of cocaine inside. Police followed White to the motel and she was arrested for the cocaine delivery. White challenged her conviction in appeal claiming the anonymous tip was insufficient probable cause, but the high Court found the officers had sufficiently verified the information provided and White's conviction was upheld.

On the other hand, in *Florida v. J. L.* (2000), police received an anonymous tip that a man would be standing at a bus station at a specific time and would be carrying a weapon.[56] Police went to the bus stop, saw a young man who fit the description, frisked him, and recovered the gun. The high Court overturned J. L.'s conviction on appeal, finding that the search for the gun was unreasonable because the anonymous tip was nothing more than "a man with a gun," no actual evidence of criminal activity, and, therefore, there was no legal justification for the stop. However, the high Court has held that if a 9-1-1 call to police reports a crime, the traceability of the caller makes the tip reliable to establish reasonable suspicion to make a traffic stop. In *Navarette v. California* (2014), a caller reported she had been run off the road by a truck driving erratically.[57] Police located the truck and, on making a *Terry* stop, smelled marijuana. A subsequent search discovered 30 pounds of marijuana. Justice Thomas wrote the majority opinion that under the totality of the circumstances under *Alabama v. White*, the officers had reasonable suspicion that the driver was drunk and the stop was legal. In dissent, Justice Scalia said the majority opinion was a "freedom-destroying cocktail consisting of 2 parts patent falsity," because people could call 9-1-1 with false information, which, pursuant to the majority decision, would grant police the authority to stop.

Springboard for Discussion

Given that many ordinary citizens fear retaliation from criminal suspects if they are known to report crime to the police, why does the law require more than an anonymous tip to establish probable cause?

Drug Courier Profile. The drug courier profile was developed by the federal Drug Enforcement Administration and is an abstract of characteristics found to be typical of persons transporting illegal drugs. The profile has been held a sufficient basis for a *Terry* stop but not probable cause. From a courtroom perspective, the government must be careful when law enforcement officers testify in drug cases. Officers testify as fact witnesses; that is, they tell the court about how they conducted their investigation. But officers also testify as quasi-experts about common characteristics about the drug trade based on their training and experience. In one case, *United States v. Espinoza-Valdez* (May 6, 2018),[58] a court overturned a defendant's conviction because the courier profile was the crux of the government's case. Rather than establish with proof that the defendant was part of a drug conspiracy, the government offered testimony about the structure of a typical drug organization and asked the jury to convict the defendant because he fit the courier profile. The court said, "A drug expert's testimony cannot substitute for witnesses who actually observed or participated in the illegal activity." In the courtroom, facts establishing a defendant's guilt are required to secure a conviction.

MAKING THE COURTROOM CONNECTION

The U.S. Supreme Court has said, "Responsible law enforcement officers will take care to learn what is required of them under Fourth Amendment precedent and will conform their conduct to these rules."[59] A review of state and federal case precedent reveals officers can often avoid mistakes in the field by simply slowing down and taking the time to ensure sources of probable cause are credible and there has been sufficient, corroborating investigation before relying on any confidential informant or anonymous tip. The majority of affidavits attached to arrest or search warrants are public records, and students should study them. Affidavits in federal cases are often road maps of how to develop probable cause through investigative techniques. Even

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though many judges defer to officers and may simply sign the warrant because they trust the officer, ultimately, the officer is responsible for presenting the court with sufficient facts establishing probable cause and an error-free warrant to sign. To the extent practicable, prosecutors should work closely with officers during investigations and help write, if not actually write, the affidavit of probable cause based on the officers' collective knowledge to ensure completeness and sufficiency of a probable cause finding. The officer is the one swearing to the truth of the facts contained in the affidavit, but a prosecutor's help in drafting can help avoid legal error. For the defense, the burden is on counsel's investigative skills to challenge a probable cause determination, made more difficult in cases when informants are used to establish probable cause because their identity can remain confidential until called to testify at trial. Testing the sufficiency of probable cause is done at a pretrial hearing, called a *Franks* hearing.[60] To get a *Franks* hearing, defense counsel must make a showing with evidence, not merely make a claim, that law enforcement was intentionally deceptive in stating facts establishing probable cause, a high evidentiary burden to meet.

Supported by Oath or Affirmation

Typically, when a search warrant is prepared, a state or federal prosecutor works in conjunction with the investigating officer to produce an **affidavit**, a statement of facts legally sufficient to establish probable cause sworn under the pains and penalties of perjury in front of a magistrate or judge. As depicted in the example of a federal warrant on the student study site (edge.sagepub.com/jirard), the format of a federal search warrant does not allow much room to type in the pages of facts that might support a probable cause determination. Therefore, in the space on the face of the warrant typically is typed the words indicating that the affidavit is **incorporated by reference**, which means the facts establishing probable cause are "brought in" on the face of the warrant, making the warrant valid. Sometimes, too, the description of the things to be seized can be more than a page long. To satisfy the "particularity requirement" of the Fourth Amendment, this list of things to be seized must also be incorporated by reference into the information included on the actual face of the warrant.

Before the search or seizure, the officer takes the warrant and his affidavit in front of the magistrate, raises his right hand, and swears or affirms by oath or affirmation that the information contained in the warrant and affidavit is true to the best of his knowledge and belief. Requiring the officer to swear to the truth of the facts establishing probable cause not only impresses on the officer the solemnity of the court but may make the officer personally responsible if the facts supporting the issuance of the warrant turn out to be false.

The Neutral and Detached Magistrate

The Fourth Amendment requires the magistrate (judge) signing the warrant be neutral (i.e., not acting in favor of one party or not having a personal stake in the outcome of the case) and detached (having no prior knowledge of the facts of the case) as discussed in Chapter 1 to ensure that there is a sufficient legal basis to justify the search or arrest. Court decisions have held that if the magistrate has investigated the crime, serves as a part-time prosecutor, or actually participates in the search for which he signed the warrant, the magistrate's objectivity whether there is probable cause to search is compromised, and the warrant issued is defective. In *Coolidge v. New Hampshire* (1971),[61] a 14-year-old girl was found murdered and Coolidge was a suspect. While he was at the police station taking a lie detector test, police went to his home, where Coolidge's wife turned over guns and clothing he was wearing on the night of the murder. Two weeks later, the attorney general of New Hampshire, who had a dual role as a justice of the police, issued a search warrant for Coolidge's car, where officers found incriminating evidence in the trunk, linking Coolidge to the murder. Coolidge was convicted. Because the issuance of the warrant by a biased magistrate violated the warrant requirement and thus violated Coolidge's rights, his conviction was overturned.[62]

The Particularity Requirement

The Fourth Amendment commands that the warrant must "particularly describ[e] the place to be searched and the persons or things to be seized." As interpreted by the Supreme Court, the **particularity requirement** protects against general, exploratory searches and leaves "nothing . . . to the discretion of the officer executing the warrant."[63] Courts take an inflexible position on the particularity requirement and have invalidated warrants that insufficiently explained what officers were to seize. Likewise, the place to be searched must be described fully.

Rule of Law: Warrants must describe with specificity the place to be searched and the person or things to be seized to prevent officers from having to "guess" what to take.

Warrants have been found invalid when the place to be searched was described as a single-family residence and was, instead, an apartment building, for example. But if the warrant merely contains a typographical error (e.g., "231" instead of "321"), such errors do not compromise probable cause to search. "The test for determining the adequacy of the description of the location to be searched is whether the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort."[64] Below is an affidavit from a U.S. Treasury Department special agent establishing probable cause to search businesses, homes, mailboxes, computers, and financial records of BALCO Laboratories, a company linked to supplying steroids to enhance the performance of world-class and professional athletes. Note the specificity and detail the agent relates in his affidavit establishing probable cause to search the various locations and to seize specific evidence.[65]

In the chapter-opening case study, agents would have to obtain another warrant establishing probable cause to search Charlie's computer because of the vast quantity of information stored on a hard drive, as Agent Novitsky did in the BALCO affidavit. Searches conducted pursuant to warrants are limited to the items listed on the warrant.

What happens when officers are not specific about the information that they include both on the face of the warrant and in the supporting affidavit of probable cause? In *Groh v. Ramirez* (2004), the high Court found a federal agent was not entitled to qualified immunity and was personally liable (responsible) for damages (money) to the people whose house was the subject of the unlawful search.[66] The search warrant was defective in describing the things to be seized. Instead of listing the things to be seized on the face of the warrant, the agent listed the address of the property. The Court found that no reasonable officer would have executed such a **facially deficient** (obviously wrong by looking at it) warrant. The particularity requirement is what constrains law enforcement from deciding what to take while searching. How do courts determine if the particularity clause has been met or if the list of things to be seized is too broad? One

Affidavit Of Special Agent Jeff Novitzky In Support Of Request For Search Warrants

I, Jeff Novitzky, being duly sworn, hereby depose and state as follows:

Introduction

1. This affidavit is submitted in support of a request for the issuance of five search warrants for locations under the authority and control of Victor Conte, Jr. The five locations to be searched are . . . [Conte's business, residence, and private mailboxes].

2. This request for authorization to conduct searches at the above-referenced locations is based upon the development of facts which provide probable cause to believe that Victor Conte, Jr. and others are involved in a nationwide scheme to knowingly distribute athletic performance-enhancing drugs, including anabolic steroids, a federally controlled substance, to numerous elite professional athletes at a local, national and international level [in violation of federal law].

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Affiant's Background

3. I am a Special Agent with the Internal Revenue Service, Criminal Investigation ("IRS-CI"), and have been so employed since 1993. During my 10 years with IRS-CI, I have conducted and/or participated in hundreds of criminal investigations involving income tax violations, money laundering violations, currency violations and other federal financial crimes.

Facts In Support Of Probable Cause

[Paragraphs 4–9 omitted]

Balco Laboratories, Inc. Background

10. On January 29, 2003, I spoke with Jaime Nazario, an employee of the Drug Enforcement Administration (DEA) in San Jose, California. Nazario ran the names of Victor Conte Jr. and Dr. Brian Halevie-Goldman [medical director of Balco Laboratories] through indices of authorized and registered controlled substance distributors that the DEA maintains. Nazario informed me that neither Conte nor Dr. Halevie-Goldman are currently authorized or registered through the DEA to distribute or prescribe controlled substances. Nazario further informed me that it is illegal for a doctor or anyone else to distribute or prescribe a controlled substance without authorization and registration with the DEA.

[Paragraphs 11–16 omitted]

Examination of Discarded Trash

17. Since September 3, 2002, I have performed, on approximately a weekly basis, an examination of the discarded garbage of Balco Laboratories Inc., located at 1520 Gilbreth Road in Burlingame, California. I have regularly retrieved the discarded garbage from a public-access parking lot where it is placed for pickup. . . . Following is a partial listing of items retrieved from the discarded trash of Balco Laboratories . . . along with the date the evidence was retrieved.

- A torn, empty box [that had contained] multiple vials of Serostin, a human growth hormone (9/3/02);
- A torn, empty box of 200 mg vial of testosterone (9/10/02); [Testosterone is an anabolic steroid and classified as a Schedule III controlled substance as listed in Title 21, U.S.C. §802] . . .
- At least eighty-four (84) empty, one-use syringe wrappers in various sizes (9/3/02 through 8/10/03); . . .
- A November/December 2002 issue of "Anabolic Insider," an underground steroid publication (12/16/02);
- Various small envelopes and letters from an elite track and field athlete, who is currently the United States champion in his event, including the following:

Vic, here is a check for the next cycl [sic]. I need it by the end of the week. [A cycle is a common phrase used for the administration of anabolic steroids because the users typically cycle their use on an on-and-off basis so that their bodies will not shut down the natural production of testosterone.]

Vic, here is $350, $300 for next + $50 for what I owed for last. Thanx.

[Paragraphs 18–39 omitted]

Emeric Delczeg

40. In the aforementioned interview of Conte in the November 13, 1998 article of "Testosterone" magazine, detailed earlier in this affidavit, Conte states: "A few of the older athletes feel that GH (growth hormone) supplementation has helped them extend their competitive career. I know a pro bodybuilder named Emeric Delczeg who's 47 years of age who supplements with GH . . . and he maintains a level of around 400 ng/ml. This is the level of a man twenty years younger."

41. On October 10, 2002, I received information from San Mateo County Narcotics Task Force (NTF) agent Ed Barberini that NTF had received information from a confidential informant that Emeric Delczeg was a steroid supplier to Balco Laboratories. Agent Barberini has informed me that the confidential informant who provided this information had pled guilty to felony steroid distribution charges a few years ago. Since the guilty plea, the informant has been providing information to the NTF on other individuals associated with steroids in an attempt to earn a reduced sentence in his criminal case. Agent Barberini has informed me that due to the cooperation provided by the informant, he has not done any jail time for his steroid conviction. The informant has never been paid by NTF. Agent Barberini has informed me that the informant has been deemed a reliable informant.

42. The informant told NTF that Delczeg, who is Bulgarian, obtains steroids and other performance-enhancing drugs from Europe and provides them to Balco in exchange for permission to sell a supplement on which Balco or its subsidiary, SNAC System Inc., owns licensing rights. In October 2002, the informant told NTF that Delczeg was in Europe to purchase steroids for Balco.

[Paragraphs 43–68 omitted]

Probable Cause to Search Computers

69. As detailed extensively in this affidavit, evidence has been collected showing that Conte and others use computers in furtherance of their criminal activities. In summary, Conte makes postings to an Internet message board regarding athletes and steroids, sends e-mails to athletes and coaches regarding performance-enhancing drugs and drug testing and has received e-mails from suspected athletic performance-enhancing drug suppliers of which a hard copy of such an e-mail was thrown out in Conte's discarded garbage. Because of these facts, I believe that probable cause exists to search any computers found on the physical locations of Conte's business and residence.

70. Based on my training and experience (which includes the execution of search warrants involving personal computers), as well as from consultation with Special Agent Michael Farley, Computer Investigative Specialist, I am aware that searching and seizing information from computers often requires agents to seize most or all electronic storage devices and the related peripherals to be searched later by a qualified computer expert in a laboratory or other controlled environment. This is true because of the following:

(A) Computer storage devices can store the equivalent of millions of pages of information. Additionally, a suspect may try to conceal criminal evidence by, for example, storing it in random order with deceptive file names. This may require searching authorities to examine all of the stored data to determine which particular files are evidence or instrumentalities of crime. This sorting process can take weeks or months, depending on the volume of the data stored, and it would be impractical to attempt this kind of data search on site.

[IV. omitted]

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Conclusion

72. I believe that the foregoing facts presented in this affidavit present probable cause to believe that Victor Conte and others have committed violations of Title 21 U.S.C. §841, the possession with intent to distribute, and distribution, of anabolic steroids, and Title 18 U.S.C. §1956, the money laundering of profits earned from the drug distribution and mail fraud activities. Specifically this affidavit has presented evidence of: illegal anabolic steroid and other athletic performance-enhancing drug distribution to professional athletes, including the distribution of new, untested substances; the use of the mail to purchase epitestosterone, a substance used in the fraudulent defeat of athletic performance-enhancing drug tests; the withdrawal of over $480,000 over a period of less than two years from Conte's accounts while paying most business and personal expenses with bank checks from those accounts; and the depositing of large checks from numerous professional athletes into Conte's personal account instead of his business accounts, specifically at the request of Conte, constituting illegal money laundering transactions.

[Paragraph 73 omitted]

74. I declare under the penalty of perjury that the foregoing is true and correct and that this affidavit was executed at San Jose, California, on September _____, 2003.

_____

Jeff Novitzky

Special Agent

Internal Revenue Service

Criminal Investigation

Attachment A-1 Description of Location to Be Searched

Balco Laboratories/SNAC System Inc.

1520 Gilbreth Road

Burlingame, CA

Balco Laboratories and Snac System Inc. are businesses operated out of the same location in a commercial area in Eastern Burlingame. A blue sign reading Balco Laboratories is clearly posted above the entrance to the business. The numbers "1520" appear on a window just left of the main entryway into the facility facing Gilbreth Road.

Attachment B Items to Be Seized

1. All controlled substances and other athletic performance-enhancing drugs, substances and paraphernalia including: anabolic steroids, human growth hormone, erythropoietin (EPO), stimulants, other prescription drugs, drug, substance and syringe packaging and containers, mail packaging and receipts, syringes and syringe wrappers.

[Paragraphs 2–3 omitted]

4. All financial documents and business records referencing Victor Conte Jr., James Valente, Balco Laboratories Inc., SNAC System Inc., and other employees or agents of these businesses relating to the purchase and sale of anabolic steroids, syringes, epitestosterone, human growth hormone, erythropoietin, athletic performance-enhancing controlled substance and electronic mail, bank statements and records, wire transfer records, money order, official bank checks, ledgers, invoices, accounting and payroll documents, records detailing

the purchase of assets, documents detailing business expenses and documents relating to cash sources and cash expenditures from 1/1/94 through the present.

[Paragraph 5 omitted]

6. Address books, phone books, personal calendar, daily planners, journals, itineraries, rolodex indices and contact lists associated with Victor Conte, James Valente and any other employees or agents of Balco Laboratories and SNAC System, Inc.

[Paragraphs 7–8 omitted]

9. The terms "records," "documents," and "materials" include all of the items described in this Attachment in whatever form and by whatever means they have been created and/or stored. This includes any handmade, photographic, mechanical, electrical, electronic, and/or magnetic forms. It also includes items in the form of computer hardware, software, documentation, passwords, and/or data security devices.

a. Hardware—consisting of all equipment that can collect, analyze, create, display, convert, store, conceal, or transmit electronic, magnetic, optical, or similar computer impulses or data.

answer to the specificity question can be found in the U.S. Supreme Court case *Messerschmidt v. Millender* (2012).[67]

Augusta Millender lived in California and tried to help kids by being a foster mother, as she was to Jerry Ray Bowen. By the time he was an adult, Bowen had amassed a 17-page rap sheet (list of criminal charges and convictions) and was a known associate of a California street gang, the "Mona Park Crips." One day, Bowen tried to kill his ex-girlfriend, Shelly Kelly, by aiming and shooting at her car as she tried to escape Bowen's violence. Los Angeles police detective Curt Messerschmidt prepared both an arrest warrant for Bowen and a search warrant for Millender's house, an address that was associated with Bowen in computer files. The warrant was to search for guns, because Bowen had assaulted Kelly with a shotgun, but then Detective Messerschmidt listed in the warrant the following "gang-related" items to be seized:

> Articles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to "Mona Park Crips," including writings or graffiti depicting gang membership, activity or identity. Articles of personal property tending to establish the identity of person [sic] in control of the premise or premises. Any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership, or which may depict the item being sought and/or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in this warrant, affiliation or membership with the "Mona Park Crips" street gang.

The officers searched Millender's house and found and seized Millender's weapons. Three weeks later, Bowen was found hiding underneath a motel bed and arrested. Millender sued Detective Messerschmidt pursuant to 42 U.S.C. §1983 claiming, in part, the search conducted at her home was unreasonable. Millender's lawsuit stated any reasonable officer could see that the list of things to be seized (particularly for evidence of gang-related items) was too broad and, therefore, obviously illegal. Under the *Groh* precedent, Millender argued Detective Messerschmidt was not entitled to qualified immunity.

By an objective standard, probable cause to search Millender's house for guns existed because Bowen was a gang member who tried to kill someone. But did the probable cause extend to the generic evidence of gang membership, which, on its face, had nothing to do with Bowen's assault? Bowen's relationship with Kelly had been violent for a long time. What did his gang membership have to do with a domestic assault? The lower court agreed with Millender that the search was unreasonable, but on appeal, the U.S. Supreme Court found in the officer's favor.

In the chapter-opening case study, the warrant that listed Charlie's address in place of the things to be seized rendered the warrant inherently defective, and any agent serving the warrant may be personally responsible to Charlie in a civil lawsuit. Law enforcement officers are presumed to know the requirements of the Fourth Amendment.

The Service of the Warrant

Knock and Announce Requirement

To execute a warrant, officers must **"knock and announce"** their presence and use force to enter only if entry is refused. Federal law on the execution of warrants provides that:[68]

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

The average time to wait before forcing entry into a dwelling is affected by the circumstances known to the officers executing the search warrant. In *United States v. Banks* (2003), the Court determined it was reasonable to wait 15 to 20 seconds before kicking down a door to execute a warrant.[69] In *Banks*, Las Vegas officers working with federal agents executed a search warrant for evidence of drug dealing at the apartment of Mr. Banks. After the officers knocked and announced their presence, they broke down the front door with a battering ram just as Mr. Banks emerged from the shower, dripping wet. Banks was eventually convicted for possession of the weapons and cocaine found during the search, and on appeal, Banks argued that the 15 to 20 seconds the police waited before forced entry violated the Fourth Amendment's reasonableness clause. The Supreme Court disagreed. Holding that the totality of the circumstances determined the appropriate waiting period before using force is properly judged by officers on the scene who can properly assess the exigent or emergency circumstances, such as how quickly Banks could have flushed cocaine down the toilet or jumped out the back window, the 15- to 20-second wait was reasonable.

Rule of Law: Police action during the execution of the warrant must be reasonable.

If the facts known to law enforcement prior to the execution of the warrant indicate that the officers' safety may be compromised by the knock and announce rule—for example, because of the nature of the suspected offense or known information about a suspect's prior convictions—then the officers can ask the issuing magistrate to issue a "no knock" on the warrant's face. This type of warrant allows officers to enter without announcement and may allow them to execute the search in the evening. Some state statutes provide for **no-knock warrants** in drug cases, but executing such warrants is dangerous because the occupants are often confused that it is law enforcement, and not armed criminals, who are breaking their door down in a forced entry. One U.S. Supreme Court pronouncement on the knock and announce rule is in the case *Hudson v. Michigan* (2006), in which the high Court found that even if the officers violated the knock and announce rule, which should lead to the operation of the exclusionary rule suppressing the evidence, the illegal drugs found in the case would be admissible because the knock and announce is a matter of courtesy, and the validity of the warrant and the authority to enter are not affected.[70]

Rule of Law: For officer safety during the execution of a warrant, people found on the premises may be briefly detained.

Securing the Scene

Once officers are inside a person's home, what can officers do with the people who are found on the premises when they are executing the warrant? In *Michigan v. Summers* (1981), Summers was on the front steps of his house when police arrived to execute a search warrant for drugs.[71] While officers conducted the search, they detained Summers, who was eventually arrested, and drugs were found in his pocket when he was searched. The high Court held that the probable cause that sustains the

warrant carries the authority to briefly detain people on the premises, reasoning that people on the premises may be involved in criminal activity justifying their detention. The length and condition of detention are situation specific.[72] The probable cause determination supporting the warrant will also forgive mistakes officers make in detaining people, such as a White couple detained when the arrest warrant was for African American suspects; even if the police know the people in the house are not the named suspects in the warrant, minimal detention of anyone on the premises for officer safety was warranted.[73]

APPLYING THE LAW TO THE FACTS

Is the Detention While Executing a Warrant Lawful?

The Facts: Police about to execute a search warrant witnessed two people leave the premises and drive away. Police followed and stopped the individuals one mile down the road. Officers ordered the men out of the car, handcuffed them, and told them they were not under arrest but were being detained pursuant to a search of the home. Officers brought the men back to the premises being searched. A cache of guns and drugs were found and used to convict Chunon Bailey. Was Bailey's initial detention one mile away from his home lawful?

The Law: No, the detention was not legal. The U.S. Supreme Court held in *Bailey v. United States* (2013) that under the *Michigan v. Summers* (1981) precedent, detention of others for officer safety is limited to the immediate area to be searched and does not apply to people who had left the premises at the time the police entered to search.[74]

The Return

Federal Rule of Criminal Procedure 41 requires the officer executing the warrant to "enter on its face the exact date and time it is executed." Next, the officer must "give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken." If no one is home, the officer should leave a copy of the warrant and receipt for any property seized in a conspicuous location within the premises. The inventory of the property seized must be completed in the presence of another officer, who must verify its accuracy. Ideally, if the property owner is on the premises, he or she should sign the inventory acknowledging the removal of the property. The officer executing the warrant must return the warrant and swear that the inventory list is true in front of a magistrate, preferably the one who issued the warrant, indicated in the example of a federal warrant on the student study site (edge.sagepub.com/jirard). A return must occur even if no property is seized. The magistrate then files all papers associated with the warrant and the return with the court clerk in the jurisdiction where property was seized. The officers do not have to inform the property owner how to get his or her seized property back. The property owner may seek the return of the property by filing a motion in court in the district where the property was seized.

Scope of the Search

Generally, police can search pursuant to the warrant only those areas specified in the warrant. "If the place to be searched is identified by street number, the search is not limited to the dwelling house, but may also extend to the garage and other structures deemed to be within" the surrounding area of the house and yard.[75] If the warrant is specific about the place to be searched, the officers are limited to search in that area only. If the warrant is for contraband that can be easily hidden, such as drugs or illegal weapons, officers can search drawers, closets, and closed containers where the contraband may be found. A warrant to search a house does not extend to vehicles on the property, nor does a warrant to search a vehicle on the property extend to the buildings and homes on the property.

Rule of Law: The limits of the search are defined by the terms of the warrant itself.

There is also no general "crime scene" exception to the warrant requirement, as held in *Mincey v. Arizona* (1978).[76] Once a crime scene has been secured, officers determine that no one needs medical aid, and no suspects are on the premises, a warrant is required for further search.

SUMMARY

1. You will be able to analyze Fourth Amendment problems. In early America, the king abused the colonists by seizing personal property by writs of assistance and general warrants allowed the king to confiscate press materials critical of his reign. The Fourth Amendment of the Bill of Rights prohibits unreasonable search, looking for evidence, and seizure, taking of evidence. In analyzing whether the government has complied with the law, the first step is to determine whether a government actor is involved. The second step is to determine whether an objective and subjective reasonable expectation of privacy exists, as held in *Katz v. United States* (1967). There is no privacy interest in abandoned property that a suspect throws away. The third step is to determine whether the government's search or seizure was "reasonable." The fourth step is to determine whether a warrant was required for the search and seizure or, if not, whether a well-recognized exception to the warrant requirement applies. The fifth step is to determine the remedy for the violation if the government has failed to comply with the Fourth Amendment, which is suppression of the evidence pursuant to the exclusionary rule and derivative evidence by operation of the fruit of the poisonous tree doctrine. The good faith exception may make admissible illegally-obtained evidence.

2. You will appreciate how Fourth Amendment analysis has changed with advancing technology. StingRays and dirtboxes, which simulate cell phone towers and intercept signals from private cell phones, do not require warrants when tracking movements in public, but if the tracking goes on for a long period of time, as in *United States v. Jones* (2012), or reveals intimate details and location inside the home, such as in *Kyllo v. United States* (2001) or *United States v. Karo* (1984), a warrant may be required, as to search electronic devices that contain your social DNA, as held in *Riley v. California* (2014). The third-party doctrine provides no privacy interest in information shared with third parties such as telephone companies that track phone numbers called in a pen register, but revealing a suspect's long-term location through monitoring cell tower signals requires a warrant per *Carpenter v. United States* (2018).

3. You will understand the role race may play in the intersection of the citizen–police encounter in assessing reasonable suspicion that criminal activity is afoot. Drug courier profiling has been allowed to provide reasonable suspicion but not probable cause. When the *Terry* case was decided in 1968, the high Court warned the practice of stopping and frisking might heighten tensions in minority communities, which happened when New York City adopted an aggressive stop and frisk policy, which may or may not justify a suspect running from the police, as the Massachusetts Supreme Court found in *Commonwealth v. Warren* (2016).

4. You will be able to distinguish the legal basis for a *Terry* stop, arrests, and claims of excessive force. A brief investigatory detention is also known as a *Terry* stop because of the case *Terry v. Ohio* (1968). The *Terry* stop allows officers to briefly detain people on the streets and ask questions based on reasonable suspicion that criminal activity is afoot—that a crime has been, is being, or will be committed. Reasonable suspicion is more than a hunch and is established by specific and articulable facts crime is happening. If, during a *Terry* stop, the officer has a reasonable belief that a person is armed, the officer can pat down the person's outer clothing for weapons only; the officer cannot conduct a full-blown search. A *Terry* stop can last only as long as the officer needs to confirm or dispel her reasonable suspicion that criminal activity is afoot. If the stop lasts longer, it is transformed into an arrest unsupported by probable cause, which is illegal. The same legal standard applies to *Terry* stops of automobiles. An arrest is a seizure of a person and requires an arrest warrant, unless it is conducted in a public place. To meet the constitutional requirements of the Fourth Amendment, the amount of force used to effectuate all arrests and seizures must be reasonable. Officers may not shoot to kill unarmed fleeing felons; that would be excessive force. In the context of high-speed chases, in which the police chase suspects in vehicles—chases that may end up harming or killing others or the suspects—courts use the same analysis of reasonable force under the Fourth Amendment.

5. You will be able to articulate the sources of probable cause and the procedure for obtaining and serving a warrant. A warrant is a legal document authorizing the government to search and seize based on probable cause that a suspect has or will commit a crime. Probable cause

means it is more likely than not that a specific offender committed a specific crime and may be established by officers' collective knowledge on the basis of reliable hearsay, informants, corroborated anonymous tips, witness statements, the officer's observations based on his or her training and experience, and presence in a high crime area that is not necessarily associated with race. In general, anonymous tips alone are not sufficient for probable cause and informants must be proven reliable. Searches conducted without a warrant are presumed to be unreasonable unless a well-recognized exception to the warrant requirement applies. The elements of the warrant requirement include probable cause connecting the person to be seized or the place to be searched to criminal activity and a description that explains with particularity the place to be searched and the things to be seized called the particularity requirement. In addition, the warrant must be issued under oath; that is, the officer must swear or affirm in front of the magistrate (judge) that the facts contained in the affidavit establishing the facts of probable cause are true to the best of the officer's knowledge and belief. The affidavit must be "incorporated by reference" on the front of the warrant's face. If by looking at the warrant the officer can tell it is facially deficient, civil liability may attach if the officer executes the bad warrant. Also, the warrant must be issued by a neutral and detached magistrate—a judge who has no prior extensive knowledge of the case and no personal stake in the outcome of the case. To execute a warrant, officers must knock and announce their presence and wait the amount of time the exigencies of the situation demand, in some cases as few as 15 to 20 seconds, before they conduct a forcible entry. On request, or by law in some states, officers can obtain a no-knock warrant in which officers do not have to announce who they are before they forcibly enter the premises on the basis that, if the officers do announce their presence before entry, the occupants may destroy evidence or compromise the safety of the officers.

Go back to the beginning of the chapter and reread the news excerpts associated with the learning objectives. Test yourself to determine if you can understand the material covered in the text in the context of the news.

KEY TERMS AND PHRASES

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PROBLEM-SOLVING EXERCISES

1. Police in Los Angeles, California, received information from the federal Drug Enforcement Administration (DEA) that a chemist was arriving from overseas with the express purpose of setting up a methamphetamine laboratory. With the help from an anonymous tip, officers identified Mr. Fletcher as he got off the plane and followed him to a hotel. Fletcher later met with Mr. Callahan and, under police surveillance, went to Callahan's house moving back and forth from the house to the backyard several times, behavior the officers believed to be suspicious. Officers got a search warrant and discovered 68 pounds of methamphetamine. Callahan complained officers lacked probable cause to search. The officers claim there was sufficient probable cause and, in the alternative, the good faith exception should apply and the drugs should be admissible. You are the judge. How will you decide the case? **(ROL: Probable cause, anonymous tips, "good faith" exception)**

2. In Indianapolis, police suspected that a man inside a motel room was mixing cocaine with additives in the bathroom. The suspect opened the motel door in response to the officers' knock. Six uniformed and armed officers were present. They asked if the suspect would

be willing to step outside the door and talk to them. When he refused and tried to close the door, one officer placed his foot inside the door preventing the suspect from closing it. Reluctantly, the man let the police in, whereupon, to sit on the bed, one officer moved a jacket, revealing a firearm on the bed. The man was arrested for illegally possessing a handgun. Was the entrance into the motel room and subsequent search legal? **(ROL: Reasonable expectation of privacy [objective, subjective]; *Katz*, *Olson*, *Carter*, *Byrd* cases)**

3. Are the following descriptions of things to be seized listed in a hypothetical warrant sufficient to meet the particularity requirement of the Fourth Amendment?

   a. An unknown make .38 caliber weapon, blue with a wood grip

   b. Any and all videotapes made in violation of federal copyright laws

   c. Any and all doctor's files concerning patients prescribed oxycodone

   d. Items related to the smuggling, packaging, distribution, and use of controlled substances

   e. All records or other information regarding the identification of the Gmail account holder, including name, address, telephone number, and any log-in IP address used