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BASIC FOURTH AMENDMENT ANALYSIS

Russell W. Galloway, Jr.*

I. INTRODUCTION

One of the cornerstones of personal privacy in this nation is the Fourth Amendment right to be secure against unreasonable searches and seizures.¹ This article describes the basic structure of Fourth Amendment analysis as set forth in United States Supreme Court opinions. The purpose is to help readers, especially law students, analyze Fourth Amendment issues.²

Despite its complexity, Fourth Amendment law can be summarized in the following brief outline.³

Fourth Amendment: Basic Analysis

I. Preliminary questions
   A. Does the court have jurisdiction?
   B. Is the claim justiciable?

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1. U.S. CONST. amend. IV provides:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Fourth Amendment law is tremendously complex. This article will not attempt to catalogue the refinements of search and seizure law. Instead the purpose is to present a simplified analytical model that will help students grasp the basic structure of the law. For more detailed discussions of specific points, one should read the Supreme Court's opinions or WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (1987).

3. This outline presents the traditional one-track model of Fourth Amendment analysis. In recent years, an alternative two-track model has begun to emerge. See Russell W. Galloway, Jr., Emergence of a Two-Track Fourth Amendment Model, 15 SEARCH AND SEIZURE L REP. 33 (1988). In the new model, "limited intrusions" and searches and seizures based on "special needs" are analyzed on track two using a soft, three-part reasonableness test, while other searches and seizures are analyzed on track one, which corresponds to the traditional model.
C. Was the harm caused by government action?

II. On the merits: was the Fourth Amendment violated?
A. Is the Fourth Amendment applicable?
   1. Did a search or seizure occur?
   2. Did the search or seizure invade claimant's rights?
B. Were Fourth Amendment requirements met?
   1. Probable cause requirement
   2. Warrant requirement
   3. Reasonableness requirement

III. Remedies: if the Fourth Amendment was violated, what redress is appropriate?
A. Exclusionary rule
B. Harmless error rule
C. Civil damages

Let us translate this outline into prose. A claimant seeking redress for an alleged Fourth Amendment violation must initially meet three preliminary requirements. First, the court must have jurisdiction over the claim. Second, the claim must be justiciable. Third, the conduct giving rise to the claim must be government action. Failure to satisfy any of these requirements normally results in dismissal without reaching the merits of the Fourth Amendment claim.

If claimant satisfies the preliminary requirements, the court will proceed to the merits of the Fourth Amendment claim. On the merits, the analysis has two components. First, one must determine whether the Fourth Amendment is appli-
cable, i.e., whether the government conducted a "search" or "seizure" that invaded claimant's rights. Second, one must determine whether the search or seizure complied with the requirements of the Fourth Amendment, namely, the probable cause, warrant, and reasonableness requirements. If no search or seizure occurred or the search or seizure complied with applicable requirements, the Fourth Amendment was not violated, and the analysis ends.

If, on the other hand, the government conducted a search or seizure that invaded claimant's rights, and the requirements of the Fourth Amendment were not satisfied, a Fourth Amendment violation has occurred, and one must proceed to the question of remedies. Here the issues concern whether the exclusionary rule applies, whether any violation of the exclusionary rule was harmless, and what rules apply in civil suits for damages.

The next section discusses each step of basic Fourth Amendment analysis in more detail.

II. DISCUSSION

A. Preliminary Questions

1. Does the court have jurisdiction?

Claimant must show that the court has jurisdiction over the claim. If jurisdiction is lacking, the court should dismiss without deciding the Fourth Amendment claim on the merits.6 This is usually a statutory question rather than a Fourth Amendment question. This article will assume the court has jurisdiction.

2. Is the claim justiciable?

To qualify for a decision on the merits, the Fourth Amendment claim must involve a justiciable controversy between adverse parties.7 In general, this is not a problem, since Fourth Amendment issues normally arise in clearly justiciab
cases such as criminal prosecutions or suits against police officers for civil damages.

But justiciability issues do surface occasionally in Fourth Amendment cases. For example, the rule against advisory opinions prevents federal courts from reaching Fourth Amendment issues in cases decided on independent and adequate state grounds. Similarly, the Fourth Amendment claim must be ripe and not moot. And the party presenting the claim must have standing.

3. Was the harm caused by government action?

The Fourth Amendment, like most other constitutional limits, applies only to government action. A search or seizure undertaken by a person acting in a purely private capacity need not comply with the amendment's requirements.

a. Searches and seizures by government employees or agents

As a general rule, searches and seizures performed by a government employee or a person acting as a government agent are subject to the Fourth Amendment. For example, a search by a fire marshal or a health inspector is government action. If the search or seizure is wholly unrelated to the person's official duties, however, the government-action requirement is not met and the Fourth Amendment does not ap-

9. E.g., Pastore v. Board of License Comm'rs, 469 U.S. 238 (1985) (case involving application of exclusionary rule at liquor license revocation proceeding dismissed as moot because claimant had gone out of business).
10. At one time, standing was a major preliminary question in Fourth Amendment cases. In Rakas v. Illinois, 439 U.S. 128 (1978), however, the Supreme Court held that the rules formerly designated as "standing" rules should henceforth be treated as part of the merits of the Fourth Amendment claim. Thus, these rules are discussed infra notes 52-58 and accompanying text.
13. E.g., Skinner, 489 U.S. at 614 ("[T]he Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government.").
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ply. For example, a sheriff's search of his child's room to gather dirty clothes for the wash is not government action.

b. Searches and seizures by private persons

As a general rule, conduct by private persons is not government action and is therefore not subject to constitutional restrictions. For example, searches and seizures by private company guards or neighborhood security patrols need not comply with Fourth Amendment requirements. There are two possible exceptions to the general rule, however: the "public function" exception and the "nexus" exception.

1) Public function exception

Conduct by private persons is government action if the conduct is a public function, i.e., a function traditionally exclusively reserved for the government.14 However, since searches and seizures have not traditionally been exclusive government functions,15 the public function exception does not cover most searches and seizures.16

2) Nexus exception

Conduct by private persons is government action if there is a sufficient nexus (connection) with the government in the form of government compulsion or substantial government encouragement of the precise behavior claimed to violate the Constitution.17 If, for example, a statute compels private employers to give their employees drug tests, those searches would be government action and would have to comply with the Fourth Amendment.18 Similarly, if the government en-

15. In earlier centuries, when no permanent police forces existed, searches and seizures were typically conducted by private persons with constables standing by to keep the peace. Moreover, citizens' arrests have long been permitted and have survived into the present.
16. A case could perhaps be made that some modern searches, such as inspections of closely regulated industries, are exclusively public functions which are subject to the Fourth Amendment.
17. E.g., Blum v. Yaretsky, 457 U.S. 991 (1982). "A state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." Id. at 1004.
courages private drug tests to such a degree that the decision to test is attributable to the government, the Fourth Amendment applies.\(^\text{19}\)

If claimant does not satisfy the three preliminary requirements, the claim should be dismissed without reaching the merits of the Fourth Amendment issue. If claimant satisfies the preliminary requirements, one may proceed to evaluate the Fourth Amendment claim on the merits.

B. \textit{On the Merits: Was the Fourth Amendment Violated?}

1. \textit{Is the Fourth Amendment applicable?}

In all constitutional cases, the threshold question on the merits is whether the action that harmed claimant is the kind of action that is subject to the particular constitutional limit at issue. In Fourth Amendment cases, the question is whether the government\(^\text{20}\) conducted a "search" or "seizure" that invaded claimant's rights.\(^\text{21}\) If so, the requirements of the Fourth Amendment must be satisfied.\(^\text{22}\) If not, the Fourth Amendment does not apply, and the analysis ends.

   a. \textit{Did a search of seizure occur?}

First, one must determine whether a search or seizure occurred.\(^\text{23}\) More specifically, was there a search, seizure of a

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\(^{19}\) cf. Peterson v. City of Greenville, 373 U.S. 244 (1963) (segregation of a private restaurant is government action because compelled by state law).

\(^{20}\) In the rest of this article, "the government" will be used for convenience to refer to the person conducting any search or seizure satisfying the government-action requirement even if that person was a private party acting jointly with the government or pursuant to government compulsion or encouragement.


\(^{23}\) The Fourth Amendment protects the people against unreasonable
person, or seizure of a thing? The next three sections describe the tests the Court has developed to answer these questions.

1) Did a search occur?

A "search" is an invasion of a reasonable expectation of privacy. The definition has two parts. First, claimant must have manifested a subjective expectation of privacy. Second, the expectation of privacy must have been one that society recognizes as reasonable or legitimate. And, of course, the government must have "violated" the reasonable expectation of privacy. To make these determinations, one must examine the totality of the circumstances, taking into account such factors as the intent of the Framers, societal attitudes concerning the degree of protection to which the particular place is entitled, and the uses to which the place was put. Claimant apparently has the burden of proving that a reasonable expectation of privacy was violated.

24. This definition was first stated in the landmark case Katz v. United States, 389 U.S. 347 (1967). As the Court put it, "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied . . . and thus constituted a 'search . . . ' within the meaning of the Fourth Amendment." Id. at 353.

25. The two-part test was first stated in Justice Harlan's Katz concurrence, which refers to "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Katz, 389 U.S. at 361 (Harlan, J., concurring). The test has been approved and applied in many later cases. As the Court put it in California v. Greenwood, 486 U.S. 35 (1988), for example, "The warrantless search and seizure of the garbage bags left at the curb outside the Greenwood house would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable." Id. at 39. Cf. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 616 (1989) ("infringe an expectation of privacy that society is prepared to recognize as reasonable"); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 664 (1989) (drug tests "implicate the Fourth Amendment, as those tests invade reasonable expectations of privacy.").


a) Did claimant manifest a subjective expectation of privacy?

The first requirement for a search is an invasion of someone's subjective expectation of privacy. For example, leaving an object in "plain view" does not manifest an expectation of privacy, so viewing such an object is normally not a search. Similarly, recording a speech given in a public place is normally not a search, because the speaker does not expect the communication to remain private.

b) Was the expectation of privacy one that society recognizes as reasonable?

The second requirement for a search is that the expectation of privacy must be "legitimate," i.e., "one that society is prepared to accept as 'reasonable.'" To determine whether the expectation is "objectively reasonable," one must analyze the totality of the circumstances. The Court has identified several factors as especially important. For example, any expectation of privacy in materials left in a place "readily accessible to . . . the public" is not reasonable. Similarly, information voluntarily communicated to a third party is usually not protected by the Fourth Amendment, because any expectation that the third party will not pass the information on to the government is not reasonable. In other words, one assumes


30. This requirement may not apply if the government unilaterally destroys the individual's expectation of privacy. For example, a wiretap on a dissident's phone may be a search even though the target suspects the phone is tapped and thus has no expectation of privacy in his calls.

31. Smith v. Maryland, 442 U.S. 735, 735 (1979). As the Court put it in California v. Greenwood, 486 U.S. 35, 39-40 (1988), "An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable."

32. Id.

33. O'Connor v. Ortega, 480 U.S. 709, 715 (1987) ("We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable.").

34. Greenwood, 486 U.S. at 40.

35. "This Court consistently has held that a person has no legitimate expecta-
the risk that such information will be passed on. Whether respondent violated any law in conducting the surveillance is another factor to be considered. However, this factor is not controlling. Although the Court has not defined "society" in detail, it has indicated that the standard is "society as a whole," and that state law is not controlling.

Here are some examples. As stated before, expectations of privacy in objects left in "plain view" are not reasonable. The same is true for objects left in the "open fields." Therefore viewing such objects is not a search, even if flashlights, binoculars, or other commonly available technological devices for enhancing the senses are employed. When an individual voluntarily discloses her physical location, telephone calls, bank records, or thoughts to another, she assumes the risk the other person will pass the information on to the government, and any expectation of privacy in such a situation is not reasonable.

A search of a prison cell is not a "search" within the meaning of the Fourth Amendment, because society is not prepared to accept as legitimate prisoners' expectations of privacy in information he voluntarily turns over to third parties." Smith v. Maryland, 442 U.S. 735, 743-44 (1979).

37. Florida v. Riley, 489 U.S. 445 (1989) (helicopter surveillance is not a search where conducted from a vantage point that does not violate FAA air safety regulations). As the plurality put it, "[i]t is of obvious importance that the helicopter is this case was not violating the law." Id. at 451.
38. See, e.g., United States v. Dunn, 480 U.S. 294 (1987) (entry onto open farm lands is not a search although it violates state criminal trespass law).
40. See cases cited supra note 29.
42. E.g., Dunn, 480 U.S. 294 (1987) (using a flashlight to look into a barn from open fields is not a search); Dow Chemical Co., 476 U.S. 227 (1986) (aerial photography of factory grounds is not a search). "The mere fact that human vision is enhanced somewhat . . . does not give rise to constitutional problems." Id. at 238. The Court has suggested in dicta, however, that technologically enhanced surveillance may be a search if "highly sophisticated equipment not generally available to the public" is used. Id.
43. See, e.g., United States v. Knotts, 460 U.S. 276 (1983) (use of a "beeper" to signal physical location is not a search, at least if it does not reveal information inside a home); Smith v. Maryland, 442 U.S. 735 (1979) (use of a "pen register" to record numbers dialed from a telephone is not a search); United States v. Miller, 425 U.S. 435 (1976) (examination of an individual's bank records is not a search); United States v. White, 401 U.S. 745 (1971) (bugging conversations with the consent of a participant is not a search).
vacy in their cells." If a container has been "previously lawfully searched," the "subsequent opening is not 'a search'" unless "there is a substantial likelihood that the contents of the container have been changed." And a search of trash left on the curb in opaque plastic bags is also not a "search."

2) Did a seizure of a person occur?

A person is "seized" within the meaning of the Fourth Amendment when the government intentionally acts in a way that would cause a reasonable person to conclude under the circumstances that he is not free to leave. Thus, even if the police admit they would not have allowed a suspect to leave and the suspect believes he is not free to leave, no seizure has occurred unless there is some behavior by the police that would lead a reasonable person to believe that "his freedom of movement is restrained." "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be a threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of a citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

3) Did a seizure of a thing occur?

A thing is "seized" within the meaning of the Fourth Amendment if "there is some meaningful interference with an individual's possessory interest in that property." The Su-

47. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990) ("Fourth Amendment seizure occurs 'when there is a governmental termination of movement through means intentionally applied'") (quoting Brower v. County of Inyo, 489 U.S. 593, 597 (1989)).
48. Florida v. Royer, 460 U.S. 491, 502 (1983); United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."); Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").
49. Mendenhall, 446 U.S. at 553.
50. Id. at 554.
preme Court has not discussed this test in detail, so one cannot be sure how far it reaches. If extended to the limit of its logic, however, the test would mean that interception of oral communications is not a seizure, since electronic surveillance arguably does not interfere with the speaker's possessory interest.

If there was no search of a place, seizure of a person, or seizure of a thing, the Fourth Amendment is not applicable and the analysis ends. If a search or seizure did occur, the analysis continues with the next question:

b. Did the search or seizure invade claimant's rights?

For the Fourth Amendment to be applicable, claimant must show not only that a search or seizure occurred but also that the search or seizure invaded claimant's personal rights. In other words, claimants may not vicariously assert the Fourth Amendment rights of third parties. In earlier days, a search was held to invade claimant's rights if claimant was legitimately on the premises searched, owned the things searched or seized, or otherwise had a reasonable expectation of privacy that was invaded by the government. Now the first two have been cancelled, and the only question is whether the government invaded claimant's own interest rather than the interest of some other person. This question must be answered by considering the totality of the circumstances and determining

in United States v. Karo, 468 U.S. 705, 712 (1984), where the Court held that no seizure occurred since "it cannot be said that anyone's possessory interest was interfered with in a meaningful way." Id. Recent cases on the point include Horton v. California, 496 U.S. 128, 133 (1990) ("a seizure deprives the individual of dominion over his or her . . . property."); and Skinner, 489 U.S. at 618 n.4 (defining seizure as "meaningful interference with the employee's possessory interest").

52. The classic case on this point is Rakas v. Illinois, 439 U.S. 128 (1978). This requirement was at one time treated as a rule of "standing," i.e., a component of the preliminary "justiciability" requirement, but Justice Rehnquist's opinion in Rakas reconceptualized the analysis so that the issue became part of substantive Fourth Amendment law. See supra note 10.

whether the interests in privacy, freedom of movement, and/or possession at stake were those of claimant. 58

2. Were Fourth Amendment requirements met?

If claimant satisfies the preliminary requirements and demonstrates that the Fourth Amendment is applicable, i.e., that the government conducted a search or seizure invading claimant’s personal rights, the next question is whether the government complied with applicable Fourth Amendment requirements, including the probable cause, warrant, and reasonableness requirements. 59

a. Was the probable cause requirement satisfied?

As a general rule, searches and seizures violate the Fourth Amendment unless supported by probable cause. 60 The purpose of the probable cause requirement is to prevent general searches and seizures. 61 The next section assumes the probable cause requirement is applicable and explains how to determine whether the requirement is met. The following section discusses exceptions to the probable cause requirement.

58. See, e.g., Minnesota v. Olsen, 495 U.S. 91 (1990), holding that an overnight guest may challenge a search of his host’s home. The Court stated, “[W]e think that society recognizes that a house guest has a legitimate expectation of privacy in his host’s home.” Id. at 98.

59. When using the new two-track Fourth Amendment model, see supra note 4, one would proceed at this point to the “switching questions” whether the limited intrusion or special needs doctrine justifies use of the soft track-two reasonableness test. The traditional one-track model, used here, treats the limited intrusion and special needs doctrines as exceptions to the probable cause and warrant requirements.

60. E.g., Skinner v. Railway Labor Executives Ass’n, 489 U.S. 602, 619 (1989) (“Except in certain well-defined circumstances, a search or seizure . . . is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause”); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 667 (1989) (“[A] search ordinarily must be based on probable cause.”); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987). The Fourth Amendment only states that “no Warrants shall issue, but upon probable cause . . . .” U.S. Const. amend. IV. The Supreme Court has held, however, that probable cause is also required, as a general rule, for warrantless searches and seizures. Wong Sun v. United States, 371 U.S. 471 (1963).

1) **Definition of probable cause**

“Probable cause” is information sufficient to persuade a reasonable person that there is a “fair probability” or “substantial chance” that seized items will be found or that a person has committed a crime.62

In making initial probable cause determinations, magistrates must analyze the “totality of the circumstances”63 and decide whether the information presented to them is accurate and sufficient in amount and quality to satisfy the “fair probability” test. Although no single factor is controlling, the Supreme Court has identified a series of factors which should be considered. These factors include the source’s veracity, reliability, and basis of knowledge,64 and whether the information has been corroborated.

a) **Veracity**

One important factor is the source’s veracity or truthfulness.65 The Court has identified several further factors which should be considered in judging the source’s veracity. First, if the source has given prior truthful tips, that supports an inference that the current tip is true as well.66 Second, if the information is a declaration against the source’s interest, the infor-

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62. Illinois v. Gates, 462 U.S. 213, 238, 244 n.13 (1983). Probable cause was traditionally defined as sufficient information to support a reasonable belief that evidence of crime is present or that a person has committed a crime. This was often understood to mean a probability higher than fifty percent. The *Gates* substantial chance formulation suggests that a lower probability will suffice. The Court has steadfastly refused to describe probable cause in terms of any specific percentage. It has stated, however, that the quantum of evidence is less than that needed to make out a prima facie case and is not equivalent to the preponderance of evidence/more likely than not standard common in civil cases.

63. *Id.* at 230, 233, 234, 238, 241.

64. As the Court put it in *Gates*, 462 U.S. at 230, “We agree . . . that an informant’s ‘veracity,’ ‘reliability,’ and ‘basis of knowledge’ are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case . . . . [T]hey should be understood simply as closely intertwined issues that may usefully illuminate the common sense, practical question whether there is ‘probable cause’ to believe that contraband or evidence is located in a particular place.”

65. *Id.*

mation is more likely true. Similarly, if giving false information could result in sanctions, the source is less likely to lie.

Fourth, the identity of the source is a major consideration. If the source is an informer from the criminal milieu, veracity is suspect. If the source is a citizen informant such as a witness, victim, or other one-time volunteer, veracity may be virtually assumed. If the source is a police officer, veracity will depend on the officer’s track record. Finally, if the information is independently corroborated, that obviously suggests that the source told the truth.

b) Reliability

Another important factor is the source’s reliability. Even a report from a truthful informant is not trustworthy unless the informant is an accurate observer and reporter. Whether the source has given accurate information on prior occasions is an important consideration here. Again, independent corroboration of some of the information supports the reliability of the rest.

c) Basis of knowledge

Another important factor is the source’s “basis of knowledge,” i.e., how the source got the information. Again, several further factors are pertinent. First, is the information first-hand or second-hand? First-hand observation is considered to be the best basis of knowledge. In contrast, if the source is passing on second-hand information, the magistrate should


69. *E.g.*, Jaben v. United States, 381 U.S. 214, 223 (1965) (“narcotics informants, for example, whose credibility may often be suspect”).

70. *Jaben*, 381 U.S. 214 (1965). “The Court has since proceeded as if veracity may be assumed when information comes from the victim or a witness ....” WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 121 (1985).

71. For a more detailed discussion of corroboration, see infra notes 79-86 and accompanying text.

72. See supra note 64.


74. See supra note 64.

75. Gates, 462 U.S. at 234 (“explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight”).
inquire whether the original source was truthful and reliable and had a sound basis of knowledge. Second, if the information contains "sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor . . .," then a reliable basis of knowledge may be inferred. This is especially true for hard-to-predict details concerning future conduct or other details that suggest a reliable inside source. Again, independent corroboration of the information suggests that the source must have had an accurate basis for the information given.

d) Corroboration

As already stated, the accuracy of the information given to the magistrate may be established by independent corroboration. Obviously, if the police corroborate specific information by independent investigation, that information is more likely accurate. Moreover, corroboration of some details suggests that other details are accurate as well. This is especially the case where the corroborated details concern hard-to-predict future actions or otherwise suggest that the source is privy to some inside channel of information concern-

76. Indeed, the magistrate should perform a complete Gates totality-of-the-circumstances analysis for the original source and then a similar analysis for the second-hand informer to insure that the latter is truthful and reliable.


78. "Finally, the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." Illinois v. Gates, 462 U.S. 213, 245 (1983). "The letter-writer's accurate information as to the travel plans of each of the Gateses was of a character likely obtained only from the Gateses themselves, or from someone familiar with their not entirely ordinary travel plans." Id. Cf. Alabama v. White, 496 U.S. 325, 332 (1990) ("What was important was the caller's ability to predict respondent's future behavior, because it demonstrated inside information--a special familiarity with respondent's affairs.").

79. "Our decisions applying the totality-of-the-circumstances analysis outlined above have consistently recognized the value of corroboration of details of an informant's tip by independent police work." Gates, 462 U.S. at 241. Corroboration may help establish the source's veracity, reliability, and basis of knowledge.

80. "Because an informant is right about some things, he is more probably right about other facts." Spinelli v. United States, 393 U.S. 410, 427 (1969) (White, J., concurring), quoted with approval in Gates, 462 U.S. at 244. Cf. Alabama v. White, 496 U.S. 325, 331 (1990) ("because an informant is shown to be right about some things, he is probably right about other facts he has alleged, including the claim that the object of the tip is engaged in criminal activity.").
ing the crime.\textsuperscript{81} Even corroboration of innocuous details may provide some assurance that the information before the magistrate is accurate.

After analyzing all relevant factors, the magistrate must make a practical, common-sense decision\textsuperscript{82} whether there is a substantial chance that evidence of crime is present at a particular place or that a particular person committed a crime. No single factor is controlling; rather "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability."\textsuperscript{83} If, based on a synthesis of all relevant factors and circumstances, the magistrate concludes that the \textit{Gates} "fair probability" or "substantial chance" test is met, then the probable cause requirement is met as well.

A magistrate's decision that probable cause exists is entitled to "great deference."\textsuperscript{84} When such a decision is challenged later in the prosecution or on appeal, \textit{de novo} review is not appropriate. Instead, the reviewing court should uphold the magistrate's decision if the information before the magistrate provided a "substantial basis" for finding probable cause.\textsuperscript{85} As the Court said in \textit{Gates}:

\begin{quote}
[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of \textit{de novo} review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." . . . [T]he traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a "substantial basis for . . . . conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more.\textsuperscript{86}
\end{quote}

\begin{footnotes}
\footnotetext[81]{See supra note 78.}
\footnotetext[82]{\textit{Gates}, 462 U.S. at 230.}
\footnotetext[83]{\textit{Id.} at 233.}
\footnotetext[84]{\textit{Id.} at 236.}
\footnotetext[85]{\textit{Id.} This standard of review—a substantial basis for finding a probable cause—pretty much insures that probable cause decisions will be left in the hands of magistrates and will not be subject to serious appellate review.}
\footnotetext[86]{\textit{Id.}, (alteration in original) (citation omitted).}
\end{footnotes}
2) Exceptions to the probable cause requirement

The general rule is that searches and seizures violate the Fourth Amendment unless supported by probable cause.\textsuperscript{87} However, the general rule is subject to numerous exceptions which will be discussed in this section.

a) Limited intrusions\textsuperscript{88}

A search or seizure that is substantially less intrusive than full searches and custodial arrests is not subject to the probable cause requirement if the government interest outweighs the intrusion and the search or seizure is otherwise reasonable.\textsuperscript{89} To determine whether a search or seizure is "substantially less intrusive" and thus "limited," one must analyze the totality of the circumstances with special emphasis on the duration of the procedure and the diligence of the police in seeking to confirm or dispel the suspicion.\textsuperscript{90} If the intrusion is sufficiently limited and the need outweighs the harm, neither probable cause nor a warrant is required and the search or seizure need only satisfy the reasonableness requirement.\textsuperscript{91}

\textsuperscript{87} See cases cited supra note 60.

\textsuperscript{88} The Fourth Amendment's warrant clause is inapplicable to limited intrusions, so neither the probable cause nor the warrant requirement is applicable. Limited intrusions need only satisfy the reasonableness requirement. They must be justified in their inception, justified in their scope, and conducted so that the intrusion does not outweigh the need. Limited intrusions were the first track-two searches recognized by the Court. See supra note 4.

\textsuperscript{89} The landmark case on this point is Terry v. Ohio, 392 U.S. 1 (1968).

\textsuperscript{90} "The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: on investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 491, 500 (1983). "[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion." United States v. Place, 462 U.S. 696, 709 (1983). However, a longer duration is permitted if the delay is caused by "evasive actions" of the suspect. United States v. Sharpe, 470 U.S. 675, 688 (1985). "In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly . . . ." Id. at 686.

\textsuperscript{91} See infra notes 31-46 and accompanying text for a discussion of the reasonableness requirement. To be reasonable, a search or seizure must be justified in its inception, scope, and manner of execution. The Court uses a balancing test to determine the specific test to be used for determining whether the search or
Most limited intrusions violate the Fourth Amendment unless based on reasonable articulable suspicion, i.e., demonstrable, objective evidence sufficient to cause a reasonable police officer to suspect that evidence of crime may be present or that an individual may have committed a crime.\textsuperscript{92} "Reasonable suspicion is a less demanding standard than probable cause..."\textsuperscript{93} To determine whether the reasonable articulable suspicion test is met, police and courts must analyze the totality of the circumstances with stress on the same factors (veracity, reliability, basis of knowledge, corroboration, etc.) that are relevant in determining probable cause.\textsuperscript{94}

Reasonable articulable suspicion is required for the following limited intrusions: investigative stops,\textsuperscript{95} frisks for weapons,\textsuperscript{96} detentions of occupants during searches of premises,\textsuperscript{97} stops of cars to check drivers' licenses and registration,\textsuperscript{98} border patrol stops of cars travelling near U.S. borders,\textsuperscript{99} temporary detention of luggage,\textsuperscript{100} and temporary detention of mail.\textsuperscript{101}

A few seizures are so minimal that they are allowed without any particularized justification. For example, stopping all

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{92} See United States v. Cortez, 449 U.S. 411, 417-18 (1981), which states: Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.
\item \textsuperscript{93} Alabama v. White, 496 U.S. 925, 939 (1990).
\item \textsuperscript{94} Id. at 928; see supra notes 63-81 and accompanying text.
\item \textsuperscript{95} E.g., United States v. Sokolow, 490 U.S. 1 (1989) (airport stop of suspect drug courier); United States v. Hensley, 469 U.S. 221 (1985) (stop to investigate completed felony); Adams v. Williams, 407 U.S. 143 (1972) (stop to investigate on-going possessory offense); Terry v. Ohio 392 U.S. 1 (1968) (stop to investigate imminent armed robbery).
\item \textsuperscript{96} Terry, 392 U.S. 1 (1968).
\item \textsuperscript{97} Michigan v. Summers, 492 U.S. 692 (1981).
\item \textsuperscript{98} Delaware v. Prouse, 440 U.S. 648 (1979). Note, however, that customs officers may stop vessels for similar reasons even without reasonable articulable suspicion. United States v. Villamonte-Marquez, 462 U.S. 579 (1983).
\item \textsuperscript{99} Almeida-Sanchez v. United States, 413 U.S. 266 (1973).
\item \textsuperscript{100} United States v. Place, 462 U.S. 696 (1983).
\item \textsuperscript{101} United States v. Van Leeuwen, 397 U.S. 249 (1970).
\end{enumerate}
\end{footnotesize}
cars at a temporary checkpoint to detect signs of intoxication is permitted.\(^\text{102}\) Similarly, the decision to stop a car at a fixed checkpoint near a border to check for illegal aliens and the related decision to refer the car to a secondary inspection area for further inquiry may be made without even a reasonable articulable suspicion.\(^\text{103}\) Moreover, the driver of a car stopped for a traffic infraction may be ordered to step out of the car,\(^\text{104}\) and the officer may enter the car if necessary to check the vehicle identification number,\(^\text{105}\) both without particularized justification.

b) **Special needs**\(^\text{106}\)

Searches and seizures are permitted without probable cause "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"\(^\text{107}\) To determine whether the special needs doctrine is applicable, the Court uses a two-part test. First, the search or seizure must be supported by "special needs, beyond the normal need for law enforcement."\(^\text{108}\) Second, the special needs must be such that they would be frustrated by the warrant and probable cause requirements, \textit{i.e.,} the special needs must "make the warrant and probable-cause requirements impracticable."\(^\text{109}\)

If both prongs are satisfied, the warrant clause is inapplicable, and the Court uses a balancing test, weighing the need

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\(^{106}\) Like limited intrusions, searches and seizures based on special needs may be analyzed on the Fourth Amendment's new "track two." \textit{See supra} note 4. The warrant clause is inapplicable, so neither probable cause nor a warrant is needed. Searches and seizures that fall within the special needs doctrine need only be reasonable, that is, justified in inception and scope and no more intrusive than justified by the need.


\(^{109}\) \textit{Id.}
against the intrusion, to determine the particular standard of reasonableness to be applied in such cases. Generally the search or seizure need only be justified at its inception, justified in its scope, and reasonable in the sense that the need outweighs the intrusion. The following sections discuss the contexts in which the Court has invoked the special needs doctrine.

(1) Public school searches

Public school authorities may search students if they have a reasonable articulable suspicion that the search will uncover evidence of crime or of a violation of school rules.\(^{110}\) Probable cause is not required because of the special need to preserve school discipline in order to further educational goals and insure the safety of students and staff.\(^{111}\)

(2) Government workplace searches

Government supervisors may search the offices and desks of government employees without probable cause.\(^{112}\) Such searches are permitted because of two special needs that might be frustrated by the probable cause and warrant requirements, the need to retrieve work-related materials efficiently and the need to investigate work-related employee misconduct.\(^{113}\) Accordingly, warrantless work-related searches are permitted if the government employer has "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is neces-

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111. Justice Blackmun's separate opinion in the T.L.O. case contains the seminal passage later adopted by the majority as the standard statement of the "special needs" rule: "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."
469 U.S. at 351.
113. "In sum, we conclude that the 'special needs, beyond the normal need for law enforcement make the ... probable cause requirement impracticable for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct." Id. at 725 (citation omitted).
sary for a noninvestigatory work-related purpose such as to retrieve a needed file."114

(3) Searches of probationers and parolees

Probation officers are permitted to search the homes of probationers without probable cause and without a warrant if the search is conducted pursuant to reasonable administrative regulations requiring a likelihood or suspicion that prohibited items are present.115 As the Court put it, "We think it clear that the special needs of Wisconsin's probation system make the warrant requirement impracticable and justify replacement of the standard of probable cause . . . ."116 The same is probably true for parolees. Such searches are justified by the special need for close supervision designed to protect the public and rehabilitate probationers and parolees, a need which would be thwarted by the usual warrant and probable cause requirements.

(4) Closely regulated industries

Searches of businesses in closely regulated industries are permitted without probable cause if necessary to further a substantial government interest and if a constitutionally adequate substitute for a warrant is provided.117 The first question is whether the industry is "closely regulated," i.e., "whether the regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections."118 Relevant factors include the pervasiveness and regularity of the regulatory scheme, the volume and number of the regulations, and the length of time the industry has been regulated.119

114. Id. at 726.
116. Id. at 875-76.
118. Burger, 482 U.S. at 705 n.16 (quoting Donovan v. Dewey, 452 U.S. 594, 600 (1981)).
119. Id. at 700-01.
If the industry is closely regulated, the second question is whether the Burger three-part test is met. First, there must be a "substantial government interest." Second, the regulatory scheme must be a "substantially effective" and "necessary" method for furthering the government interest. Third, the regulations must provide a "constitutionally adequate substitute for a warrant." To be adequate, the substitute must give notice of the government's authority to search and the scope of the searches, and it must limit the discretion of government inspectors concerning the "time, place, and scope" of the searches.

If all these requirements are met, businesses in closely regulated industries may be searched without a warrant and without probable cause. Such searches are permitted even though the "special need" is to discover evidence of conduct which is also prohibited by criminal statutes.

(5) Health and safety inspections

Health and safety inspections conducted pursuant to reasonable legislative or administrative standards have long been permitted without probable cause to believe the particular house or business has any violations. The Court has recently interpreted this rule as an application of the special needs doctrine.

(6) Routine caretaking inventories

Under the "inventory exception," when private property comes into the government's possession for safekeeping, the government is permitted to search it without probable cause. Such searches are justified by three needs: 1) to pro-

120. Id. at 702-03.
123. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987). As opposed to other "special needs" searches, health and safety inspections must be conducted pursuant to a warrant. See infra note 148.
tect the property, 2) to protect the government from false theft claims, and 3) to protect the safety of the government custodians and others. To be reasonable, inventory searches must be conducted pursuant to standardized administrative guidelines which are "designed to produce an inventory." For example, such guidelines could presumably require opening all containers, no containers, or only those containers which must be opened to determine their contents. Although the Court has not yet formally listed the inventory exception under the heading of "special needs," the cases fit squarely in this category.

(7) Drug testing

Drug testing of some government employees is permitted without probable cause and even without reasonable suspicion. The special need is to deter drug use, a need which requires random tests and would be thwarted by requiring probable cause or particularized suspicion. Similarly, drug testing of railroad employees involved in serious accidents is permitted without probable cause because of the special need to ensure safety.

(8) Other special needs

The Court has used the special needs doctrine to justify other searches without probable cause. For example, searches in prisons do not require probable cause, because of the special need to maintain control and enforce rules.


126. "Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria." Bertine, 479 U.S. at 374 n.6.

127. Florida v. Wells, 495 U.S. 1, 4 (1990) ("The policy or practice governing inventory searches should be designed to produce an inventory.").

128. Id.

129. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). The holding in Von Raab was limited to Customs Service employees seeking promotions to jobs involving drug interdiction or requiring carrying a gun.

130. The need to deter drug use by Customs Service employees is particularly high when the employees are involved in drug interdiction or carry firearms.


The limited intrusions and special needs exceptions are so broad that they threaten to swallow the “general rule” requiring probable cause. The resulting end-run around the warrant clause poses a significant threat to privacy rights.133

c) Border searches

Border searches by customs officials are permitted without probable cause.134 The border search exception has usually been explained on historical grounds, i.e., the framers knew of and approved of general searches by customs officials at the border.135 In light of recent developments, border searches appear to fit within the special needs doctrine. The need, of course, is to prevent the importation of harmful items into the country.

d) Consent searches

Searches are permitted without probable cause or particularized justification if based on voluntary consent of a person with authority over the place searched136 or a person whom the police reasonably believe possesses such authority.137 To determine whether consent is voluntary, the Court uses a “ totality of the circumstances” test focusing on such factors as the competence and mental condition of the person who consented, whether she knew of the right to refuse, whether she cooperated or resisted, whether she was in custody when she con-

134. E.g., United States v. Ramsey, 431 U.S. 606 (1977). “Border searches . . . have been considered to be ‘reasonable’ by the single fact that the person or item in question had entered into our country from outside.” Id. at 619.
135. Id. at 621-22. In contrast, general searches by customs officials at places other than the border pursuant to writs of assistance were one of the main evils the Fourth Amendment was intended to combat.
136. United States v. Matlock, 415 U.S. 164 (1974); Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Persons having such authority include the owner of the property and others having “joint access or control for most purposes.” Matlock, 415 U.S. at 171 n.7. At one time, the closely regulated industries exception was grounded on the notion that doing business in such industries automatically amounts to consent to government inspections. Recently, however, the Court has switched to a “special needs” analysis for that exception.
sented, and whether the police made a "claim of authority" to search or engaged in other coercive conduct.\footnote{138. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).}

e) \textit{Searches incident to arrest}

The police have "unqualified authority" to search the \textit{person} of a custodial arrestee without probable cause.\footnote{139. United States v. Robinson, 414 U.S. 218, 225, 229, 230, 235 (1973).} Indeed, apart from the arrest itself, no particularized basis whatsoever is needed for such searches.\footnote{140. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect . . . . \textup{[A]} search incident to the arrest requires no additional justification. \textit{Id.} at 235.} The same authority extends to searches of the passenger compartment of a car whose occupant is arrested.\footnote{141. New York v. Belton, 453 U.S. 454 (1981).} The Court has not definitively decided whether other \textit{areas} within the arrestee's immediate control may also be searched without probable cause, but \textit{Belton} suggests that the answer is yes.\footnote{142. \textit{Cf.} Washington v. Chrisman, 455 U.S. 1, 7 (1982) ("Every arrest must be presumed to present a risk of danger to the arresting officer.").} The area search must be "substantially contemporaneous" with the arrest,\footnote{143. Vale v. Louisiana, 399 U.S. 30, 33 (1970).} although searches of the person incident to arrest may be deferred until later.\footnote{144. United States v. Edwards, 415 U.S. 800, 803 (1974).}

b. \textit{Was the warrant requirement satisfied?}

1) \textit{Was a warrant required?}

The Fourth Amendment warrant requirement varies depending on whether the government action in question is a search, a seizure of a person, or a seizure of a thing. The ensuing discussion deals separately with each of these three situations.

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\footnote{138. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).}
\footnote{139. United States v. Robinson, 414 U.S. 218, 225, 229, 230, 235 (1973).}
\footnote{140. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect . . . . \textup{[A]} search incident to the arrest requires no additional justification. \textit{Id.} at 235.}
\footnote{142. \textit{Cf.} Washington v. Chrisman, 455 U.S. 1, 7 (1982) ("Every arrest must be presumed to present a risk of danger to the arresting officer.").}
\footnote{143. Vale v. Louisiana, 399 U.S. 30, 33 (1970).}
\footnote{144. United States v. Edwards, 415 U.S. 800, 803 (1974).}
a) Searches

(1) General rule: a search warrant is required

The general rule is that warrantless searches violate the Fourth Amendment. Where possible, the decision to invade individual privacy should be made by a neutral, detached magistrate rather than police officers engaged in the competitive enterprise of fighting crime.

(2) Exceptions to the search warrant requirement

The Court has stated on numerous occasions that the search warrant requirement is the general rule subject to a few, "jealously and carefully drawn" exceptions. The excep-

145. E.g., Horton v. California, 496 U.S. 128, 133 (1990) (referring to "the general rule that warrantless searches are presumptively unreasonable"); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) ("Except in certain well-defined circumstances, a search . . . is not reasonable unless it is accomplished pursuant to a judicial warrant . . . ."); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989) ("[A] search must be supported, as a general matter, by a warrant issued upon probable cause . . . ."); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) ("[W]e usually require that a search be undertaken only pursuant to a warrant . . . ."); California v. Carney, 471 U.S. 386, 390 (1985) (referring to "the general rule that a warrant must be secured before a search is undertaken"); Mincey v. Arizona, 437 U.S. 385, 390 (1978) ("[I]t is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."); Chimel v. California, 395 U.S. 752, 762 (1969) ("Clearly, the general requirement that a search warrant be obtained is not lightly to be dispensed with . . . ."). As Justice Jackson put it, "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." Johnson v. United States, 333 U.S. 10, 14 (1948).


The essential protection of the warrant requirement of the Fourth Amendment, as stated in Johnson v. United States, 333 U.S. 10 (1948), is in requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id., at 13-14.

Gates, 462 U.S. at 240 (alteration in original) (citations omitted).

tions include most of the exceptions to the probable cause requirement plus a few more that include "exigent circumstances" and the "automobile exception."

(a) Exceptions to the warrant and probable cause requirements

All but one of the exceptions to the probable cause requirement are also exceptions to the warrant requirement. Thus warrants are not needed for limited intrusions, searches justified by special needs beyond the normal need for law enforcement, border searches, consent searches, and searches of persons incident to arrest.

(b) Exigent circumstances

Search warrants are not required where exigent circumstances make it impractical to get a warrant. Exigencies that justify setting the warrant requirement aside include 1) the threat of loss of evidence, 2) physical danger to police officers, third parties, or even the suspect, and 3) danger of escape. Exigent circumstances tend to be present in the following kinds of cases.

(1) Searches of places incident to arrest

Warrantless searches of places "within the immediate control" of custodial arrestees are allowed because of the danger that the arrestee will conceal or destroy evidence or grab a weapon and use it to harm the officers or to escape. Such searches must be "substantially contemporaneous" with the arrest. Despite some uncertainty, it seems likely that such

149. See supra pp. 30-47.
151. Chimel, 395 U.S. at 763.
152. Id. "It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment." United States v. Robinson, 414 U.S. 218, 224 (1973). Warrantless searches of the person of a custodial arrestee are allowed even if no exigent circumstance is present.
area searches are permissible even after the arrestee is safely in custody and the exigency has disappeared.154

(2) Hot pursuit

Warrantless searches are permitted when the police are in hot pursuit of a criminal suspect, because stopping to get a warrant would create a danger of escape, harm to others, and loss of evidence.155

(c) Automobile exception

If probable cause exists to believe evidence of crime is present, an automobile may be searched without a warrant,156 if it is 1) "being used on the highways," or 2) "readily capable of such use and is found stationary in a place not regularly used for residential purposes."157 The scope of such a search is "no broader and no narrower than a magistrate could legitimately authorize by warrant."158 Thus, glove compartments, trunks, packages, and other containers found in the automobile may be opened without a warrant if they are capable of holding the evidence sought.159 The same rule holds for other vehicles such as mobile homes if they are "readily mobile," that is, capable of traveling on the public highways and "the vehicle was so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle."160 Fac-


156. E.g., California v. Carney, 471 U.S. 386 (1985); United States v. Ross, 456 U.S. 798 (1982); Carroll v. United States, 267 U.S. 132 (1925). The automobile exception was originally based on the exigency of mobility, i.e., the danger that the car could be moved out of the jurisdiction while the officers seek a warrant. In light of the government's admitted power to impound and immobilize the automobile, this justification proved specious, so the Court reconceptualized the exception, basing it on the reduced expectation of privacy in automobiles. Carney, 471 U.S. at 391-92.


158. Ross, 456 U.S. at 825.

159. Ross, 456 U.S. at 821. Note, however, that if the police have probable cause to believe the evidence is in a specific container in the automobile rather than in the automobile generally, they may not open the container without a warrant. United States v. Chadwick, 433 U.S. 1 (1977); Arkansas v. Sanders, 442 U.S. 753 (1979).

160. Carney, 471 U.S. at 393. Thus, it may be more appropriate to refer to the
tors to be considered in determining whether “a motor home . . . is being used as a residence” include: “its location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road.”

This completes the discussion of the search warrant requirement and its numerous exceptions. The next two sections discuss when warrants are required for seizures of persons and seizures of things.

b) Seizures of persons

The general rule is that warrants are not required prior to seizures of persons. Thus, for example, a warrantless arrest based on probable cause does not normally violate the Fourth Amendment even though a warrant could easily have been obtained. There are two exceptions. First, an arrest warrant is required where entry into the arrestee’s home is necessary to make the arrest. Second, a warrant may be required to arrest a person for a misdemeanor not committed in the presence of the arresting officer. Temporary investigative detentions (“stops”) that are substantially less intrusive than arrests are covered by the “limited intrusions” exception to the warrant clause and are thus permitted without warrants.

161. Id. at 394 n.3. The Court has not yet decided whether vehicles being used as residences may be searched without a warrant. Id.
165. Watson, 423 U.S. at 418 (“The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor . . . committed in his presence . . . .”). Watson suggests but does not hold that the Fourth Amendment incorporates the common law in-presence requirement.
166. See supra notes 88-105 and accompanying text.
c) Seizure of things

The general rule is that warrantless seizures of incriminating objects in plain view are permitted. The officers must be lawfully present and have probable cause to believe the items in plain view are incriminating. However, moving the items and copying their serial numbers in order to determine whether they are incriminating constitutes a separate search, which must ordinarily be supported by a warrant.

2) Rules for issuance and execution of warrants

If a warrant is required, one must determine whether a warrant was, in fact, obtained and whether the warrant was properly issued and executed.

a) Issuance

Warrants must be issued by “neutral and detached magistrates.” The magistrate need not be a judge or even a lawyer but must be sufficiently competent to be “capable of determining whether probable cause exists.”

167. E.g., Arizona v. Hicks, 480 U.S. 321 (1987); Coolidge v. New Hampshire, 403 U.S. 443 (1971). Earlier Supreme Court cases suggested that warrantless plain view seizures are only permitted when the discovery is “inadvertent,” but the inadvertent discovery limitation is no longer good law. Horton v. California, 496 U.S. 128 (1990). There is some authority supporting a “general rule” that seizures of things must be authorized by a warrant. E.g., Horton, 496 U.S. at 144 (Brennan, J., dissenting) (“The plain view doctrine is an exception to the general rule that a seizure of personal property must be authorized by a warrant.”); Marron v. United States, 275 U.S. 192, 196 (1927). The “plain view exception” is so broad, however, that it swallows any such “general rule.” It is less misleading to recognize that warrantless plain view searches are the general rule.

168. Horton, 496 U.S. at 136 (“It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.”); Illinois v. Andreas, 463 U.S. 765, 771 (1983) (“The plain-view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity.”); Payton v. New York, 445 U.S. 573, 587 (1980) (“The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.”).

169. Hicks, 480 U.S. 321.


171. Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972) (court clerk held
The warrant must contain a particular description of the place to be searched and the persons or things to be seized. The description of the place to be searched is sufficient if "the officer with a search warrant can with reasonable effort ascertain and identify the place intended." Whether the warrant describes the things to be seized with sufficient particularity depends on a variety of factors including whether the police did the best they could to describe the items, whether the items are contraband, whether the items are used lawfully in substantial quantities, whether other items of the same general description are likely to be present, and whether the articles are books or films.

b) Execution

The method chosen for executing a warrant is generally left to the judgment of the officer as long as the officer's conduct satisfies the reasonableness requirement. The Supreme Court has been rather permissive in this area. However, the execution must be prompt enough so that the warrant is not stale, i.e., probable cause must still exist at the time of execution.

c. Was the search or seizure reasonable?

The most basic Fourth Amendment requirement is that searches and seizures be reasonable. The Court has developed several tests for measuring the reasonableness of searches and seizures.

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sufficiently competent to issue warrant for ordinance violation).

172. "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.
175. See infra pp. 175-218.
176. The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.
1) Was the search or seizure justified at its inception?

To be reasonable, a search or seizure must be "justified at its inception." In other words, before the search or seizure is undertaken, the government must have some demonstrable reason for invading claimant's rights. In general, this means that the government must have some particularized basis for believing or suspecting that seizable evidence is present or that claimant has committed a crime, but there are some exceptions.

a) The particularity requirement

As a general rule, searches and seizures are not permitted unless the government has particularized justification for searching a specific place or seizing a particular person or thing. The particularity requirement is crucial for preventing general searches and seizures.

Probable cause, of course, is sufficient to satisfy this requirement. If the probable cause requirement is not applicable, the Court usually requires "reasonable articulable suspicion," i.e., some identifiable facts that would lead a reasonable officer to suspect that criminal activity may be afoot or that seizable items may be present.


178. E.g., United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976) ("[S]ome quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure.").

179. See supra notes 62-64 and accompanying text for a discussion of probable cause.

180. Terry v. Ohio, 392 U.S. 1, 30 (1968). As the Court put it in Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402 (1989), "When the balance of interests precludes insistence on a showing of probable cause, we have usually required 'some quantum of individualized suspicion' before concluding that a search is reasonable." Id. at 1417. See supra notes 92-105 and accompanying text for a discussion of the test used to determine whether reasonable articulable suspicion is present. In Alabama v. White, 496 U.S. 325, 330 (1990), the Court referred to the Gates "totality of the circumstances approach" for determining probable cause and then said, "The same approach applies in the reasonable suspicion context, the only difference being the level of suspicion that must be established."
b) Exceptions to the particularity requirement

Although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure," \(^{181}\) "the Fourth Amendment imposes no irreducible requirement of such suspicion." \(^{182}\) Indeed, the Court has approved searches and seizures without particularized justification on several occasions. For example, administrative health and safety inspections are permitted without any basis for believing that hazardous conditions are present in the particular home or business. \(^{183}\) Similarly, routine caretaking inventories need not be based on particularized suspicion. \(^{184}\) Routine traffic stops at fixed checkpoints inside the border to look for illegal aliens do not require particularized justification. \(^{185}\) Nor do stops of all cars at temporary drunk driving checkpoints \(^{186}\) and stops of ships to examine registration papers. \(^{187}\) Drivers of vehicles stopped for traffic violations may be ordered to step out of their cars without particularized justification. \(^{188}\) Border searches and consent searches need not be based on probable cause or reasonable suspicion. \(^{189}\) And protective sweeps of "spaces immediately adjoining the place of arrest from which an attack could be immediately launched" are permitted without probable cause or reasonable suspicion. \(^{190}\)

Exceptions to the particularity requirement are permitted only if at least one of four conditions is met. First, administrative searches and seizures without particularized suspicion must normally be conducted pursuant to standard procedures that limit the discretion of the officials. \(^{191}\) Second, so-called

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182. Id. at 561; cf. Skinner, 489 U.S. at 624 ("[A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable.").
183. See cases cited supra notes 115-123.
184. See cases cited supra notes 124-128.
“minimal intrusions” are permitted without particularized justification and without administrative guidelines. Third, the particularity requirement may waived by consent. Finally, the requirement does not apply during border searches.

2) Was the search or seizure justified in its scope?

To be reasonable, a search or seizure must be “reasonably related in scope to the circumstances which justified the interference in the first place.” In other words, the scope of the intrusion must be limited to actions reasonably likely to achieve the initial purpose of the search or seizure. As the Court has put it, “Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive.”

Here are some standard corollaries of this rule. A search for a particular object must be limited to places capable of containing the object. For example, the government may not search for a stolen car in a desk drawer. When the object of the search is found, the search must stop. A frisk for weapons must ordinarily be limited to an initial pat-down of the suspect’s outer clothing; the police may not reach into the suspect’s pockets unless the pat-down reveals something that feels like a gun or knife. And a protective sweep incident

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195. Terry v. Ohio, 392 U.S. 1, 20 (1968), quoted with approval in New Jersey v. T.L.O., 469 U.S. 325, 341 (1985). A recent confirmation of this point is Horton v. California, 496 U.S. 128, 139-40 (1990), which refers to the requirement that a search be “circumscribed by the exigencies which justify its initiation.”
196. T.L.O., 469 U.S. at 342.
197. Cf. United States v. Ross, 456 U.S. 798, 824 (1982) (“Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.”).
198. Horton v. California, 496 U.S. 128, 140 (1990). “[O]nce all of the items particularly described in a warrant have been found, the search must cease . . . .” Id. at 143 n. 1 (Brennan, J., dissenting).
199. E.g., Terry v. Ohio, 392 U.S. 1, 29 (1968).
to an arrest must be "not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found." 200

3) **Balancing test: did the invasion of privacy outweigh the government interest?**

To determine whether a search or seizure justified in its inception and scope is reasonable, the Court uses a balancing test, weighing the severity of the intrusion (harm) against the government interest (need). 201 In applying the balancing test, the Court considers the totality of the circumstances, 202 but prior cases have focused on several identifiable factors.

In evaluating the intrusion, i.e., the seriousness of the invasion of privacy, the Court has stressed: 1) the duration of the search or seizure, 203 2) the number of persons searched or seized, 204 3) the location, especially whether the individual was taken to the police station, 205 4) the degree of intrusion into core areas of privacy such as the home, the body, and private writings (for example, diaries), 206 5) the manner of treatment (for example, whether deadly force was used), 207 6)

201. The many cases on this point include Skinner v. Railway Labor Executives Ass’n, 489 U.S. 602, 619 (1989) (“the permissibility of a particular practice ‘is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.’”) (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)); Terry v. Ohio, 392 U.S. 1 (1968); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967) (“[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.”).
207. E.g., Tennessee v. Garner, 471 U.S. 1 (1985), which held that use of deadly force to prevent a fleeing felon’s escape is unreasonable absent “probable cause to believe the suspect poses a threat of serious physical harm either to the
the amount of inconvenience involved, whether a warrant was obtained, and whether the information revealed is limited to evidence of crime.

In evaluating the need, the Court has focused especially on the following factors: 1) the probability that criminal activity was present, 2) the seriousness of the crime, 3) the reliability of the procedure in determining whether a crime was involved, 4) the availability of less intrusive alternatives, 5) whether a warrant was obtained, and 6) whether an emergency existed involving a risk of loss of evidence, escape, or harm to persons.

The outcome of the balancing test cannot be determined mathematically or mechanically. The courts must make a judgment based on all relevant factors.

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209. *E.g.*, Michigan v. Summers, 452 U.S. 692 (1981). The Court's reasoning is that a search or seizure is less intrusive when a warrant has been obtained, because the warrant assures that the police have authority to conduct the search or seizure and that the authority is confined by the terms of the warrant.

210. In several cases, the Court characterized intrusions as minimal because the only information revealed was evidence of crime. United States v. Jacobsen, 466 U.S. 109, 123 (1984) (field test of white powder to determine whether it was cocaine); United States v. Place, 462 U.S. 696, 707 (1983) (sniff of luggage by dog trained to detect drugs). *Cf.* Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 625 (1989) (breath tests are "less intrusive" because they "reveal the level of alcohol in the employee's bloodstream and nothing more.").

211. *See Summers*, 452 U.S. at 703.


215. *Summers*, 452 U.S. 692 (1981). The fact that a magistrate issued a warrant demonstrates that the need was sufficient to persuade a detached judicial officer.

216. *Graham*, 490 U.S. at 396 ("whether the suspect poses an immediate threat to the safety of the officers or others"); *Summers*, 452 U.S. at 702 ("the interest in minimizing the risk of harm to the officers").

217. The balancing test plays a complex role in Fourth Amendment cases. When the Court confronts a new type of search or seizure not covered by past cases, the Justices use the balancing test to determine what standard of reasonableness to apply. *See supra* note 201. In general, the Framers' standard requiring a warrant and probable cause is adopted. But if the intrusion is limited or out-
4) Did the search or seizure comply with other applicable rules of reasonableness?

The Supreme Court has developed certain additional, and more specific rules regarding the reasonableness of searches and seizures. For example, the police must "knock and announce" before forcing open the door to a home to conduct a search, unless exigent circumstances are present justifying an exception to this requirement.\(^{218}\) Traditionally, certain kinds of searches have been considered \textit{per se} unreasonable or at least subject to a strong presumption of unreasonableness. The classic example was searches for "mere evidence," which were \textit{per se} violations of the Fourth Amendment until the "mere evidence rule" was thrown out in 1967.\(^{219}\) Another example, which is still arguably good law, is the presumption that so-called "general searches and seizures" are unreasonable.\(^{220}\)

C. Remedies

If the preliminary requirements are met and claimant prevails on the merits by proving that respondent conducted a

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\(^{218}\) Miller v. United States, 357 U.S. 301 (1958). Typical exigencies include danger that evidence will be destroyed and danger of physical harm to the officers.


\(^{220}\) See Galloway, \textit{supra} note 3.
search or seizure invading his or her rights without complying with applicable Fourth Amendment requirements, the final issue is what remedies are in order.

1. **Exclusionary rule**

The exclusionary rule, when applicable, bars courts from admitting evidence obtained in violation of the Fourth Amendment. The rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." Since the rule is not "a personal constitutional right," it is not constitutionally required in every case, but rather is restricted to those situations in which its remedial purpose is most effectively served.

To determine when the exclusionary rule applies, the Court uses a balancing test known as cost-benefit analysis. "Whether the exclusionary sanction is appropriately imposed in a particular case . . . must be resolved by weighing the costs and benefits of preventing the use . . . of . . . [illegally obtained] evidence . . . ." The rule's major costs are interfering with the truth-seeking process, releasing guilty criminals, and creating disrespect for the criminal justice process. The major benefit is deterring the police from violating the Fourth Amendment. To decide whether evidence must be excluded, the Court "has examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process."

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221. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914). Generally, the rule excludes all evidence that is "fruit of the poisonous tree," i.e., evidence derived from the Fourth Amendment violation. The refinements of this rule, including the attenuation, independent source, and inevitable discovery exceptions, will not be discussed in this article.


224. Id. at 908.

225. Id. at 906-07.

a. Prosecution's case-in-chief

The general rule is that illegally seized evidence is inadmissible in a criminal trial as part of the prosecution's case in chief against the person whose rights were invaded. In this context, the need to deter Fourth Amendment violations outweighs the costs of exclusion.

There are two exceptions, however. First, illegally seized evidence may be used in the prosecution's case in chief if the police reasonably relied on a search warrant issued by a neutral, detached magistrate. Second, illegally seized evidence may be used in the case in chief if the police reasonably relied on a statute later held unconstitutional. In these two situations, the Court has concluded that the costs of exclusion outweigh the benefits, because the exclusionary rule cannot deter a police officer who reasonably believes his/her conduct is legal. Whether the reasonable reliance exception will be extended to cover warrantless searches not undertaken in reliance on a statute is an open question that requires careful, particularized cost-benefit analysis.

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228. The Court may some day accept Chief Justice Burger's invitation to recalculate the costs and benefits and repeal the exclusionary rule altogether. See Bivens v. Six Unknown Named Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). But it has not done so yet.

229. United States v. Leon, 468 U.S. 397 (1984). This exception does not apply, however, if 1) the officer knowingly or recklessly misled the magistrate, 2) the magistrate was not neutral and detached, 3) the probable cause determination is "entirely unreasonable," 4) the warrant is facially deficient, or 5) the officers execute the warrant in an unreasonable manner. Id. at 923.


232. One crucial benefit of exclusion in cases not involving warrants is that it gives the police an incentive to get a warrant. That may be enough to tip the balance in favor of exclusion.
b. Other uses

1) Criminal prosecutions

The cost-benefit balancing test has also produced mixed results in criminal prosecutions where the illegal evidence is offered for purposes other than direct proof of guilt in the prosecution’s case in chief. On the one hand, the “impeachment exception” to the exclusionary rule permits the use of illegally seized evidence to impeach defendant’s testimony. Similarly, illegally obtained evidence may be used to obtain a grand jury indictment. The Court has concluded that any incremental deterrent effect in these contexts is speculative and that the costs outweigh the benefits. On the other hand, the impeachment exception does not apply to other defense witnesses, so the exclusionary rule bars use of defendant’s illegally obtained statements to impeach a defense witness other than defendant.

2) Uses outside criminal prosecutions

The exclusionary rule applies in quasi-criminal forfeiture proceedings. The Court has declined, however, to extend the exclusionary rule to purely civil proceedings. In such cases, the Court has stressed that the rule’s main deterrent effect results from barring the illegal evidence from criminal prosecutions, that any incremental deterrent effect from extending the rule to other proceedings is speculative and probably minimal, and that the costs of exclusion outweigh the benefits. Thus, illegal evidence may be admitted in civil tax proceedings and deportation proceedings. Similarly, if de-
fendant had a full and fair opportunity to litigate Fourth Amendment claims in state courts, efforts to invoke the exclusionary rule in later federal habeas corpus proceedings are barred. 242

Arguments to extend the exclusionary rule to new procedural contexts face an uphill battle in the current Supreme Court. On the cost side, the dominant conservative wing typically stresses that the "extreme sanction of exclusion" 243 is a major impediment to the truth-seeking process, results in the release of too many guilty criminals, 244 and generates disrespect for the law. 245 On the benefit side, the same Justices stress the lack of empirical evidence that the exclusionary rule deters at all, 246 the fact that the deterrent effect, if any, is mainly achieved by excluding evidence from the prosecutor's case in chief, 247 and that any incremental deterrent effect from extending the rule is speculative and probably minimal. 248 In short, the Court puts its thumb on the cost side of the balance, and claimants will have a hard time proving sufficient incremental deterrent effect to swing the scales back the other way.

2. Harmless error rule

If evidence is admitted in violation of the exclusionary rule and a conviction ensues, reversal is not necessary if the error was harmless. 249 An error is harmless if the reviewing court concludes beyond a reasonable doubt that the decision is

244. Although the percentage of criminals released because of the exclusionary rule is small, "a large absolute number of felons . . . are released . . . ." Id. at 908 n.6.
245. Id. at 908.
246. "No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect . . . ." United States v. Janis, 428 U.S. 433, 452 n.22 (1976).
247. "Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." Harris v. New York, 401 U.S. 222, 225 (1971).
248. United States v. Calandra, 414 U.S. 338, 351 (1974) ("[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best.").
supported by overwhelming untainted evidence or is otherwise not affected by error.  

3. **Civil suits for damages**

Victims of illegal searches and seizures may sue for damages resulting from violations of Fourth Amendment rights either under 42 U.S.C. 1983 or directly under the Fourth Amendment. Such suits are limited, however, by the rule that the officer has qualified immunity. In other words, a reasonable belief that the search or seizure was constitutional is a defense.

**III. CONCLUSION**

Fourth Amendment analysis proceeds in three steps. First, preliminary requirements (jurisdiction, justiciability, and government action) must be met. Second, the merits of the Fourth Amendment claim must be considered, including the threshold question whether a search or seizure occurred invading claimant's rights and, if so, the central question whether the government complied with the Fourth Amendment's probable cause, warrant, and reasonableness requirements. Third, questions concerning remedies must be addressed. If one approaches Fourth Amendment issues by using this analytical model, the chances of reaching the correct result will hopefully be increased.

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253. Anderson v. Creighton, 483 U.S. 635 (1987). The test is objective reasonableness; the officer's subjective good faith is not an issue.
APPENDIX

On the basis of the foregoing discussion, it is possible to set forth the following, more detailed outline of Fourth Amendment analysis.

FOURTH AMENDMENT; BASIC ANALYSIS

I. Have the preliminary requirements been met?
   A. Does the court have jurisdiction?
   B. Is the claim justiciable?
   C. Was the harm caused by government action?

II. On the merits: Was the Fourth Amendment violated?
   A. Is the Fourth Amendment applicable?
      1. Did a search or seizure occur?
         a. Search (invasion of reasonable expectation of privacy)?
         b. Seizure of person (reasonable person would not feel free to leave)?
         c. Seizure of thing (interference with possession)?
      2. Did the search or seizure invade claimant's personal rights?
   B. Have Fourth Amendment requirements been met?
      1. Compliance with probable cause requirement?
         a. General rule: searches and seizures without probable cause violate the Fourth Amendment
         b. Exceptions
            1) Limited intrusions
            2) Special needs
               a) Public schools
               b) Government workplaces
               c) Probationers and parolees
               d) Closely regulated industries
               e) Health and safety inspections
               f) Inventories
               g) Drug tests
               h) Other special needs
3) Border searches
4) Consent searches
5) Searches incident to arrest

2. Compliance with warrant requirement
   a. Was a warrant required?
      1) Search
         a) General rule: search warrant is required
         b) Exceptions
            (1) Limited intrusions
            (2) Special needs
            (3) Border searches
            (4) Consent searches
            (5) Searches incident to arrest
            (6) Exigent circumstances, i.e., threat of
               (a) Physical harm,
               (b) Loss of evidence, or
               (c) Escape
            (7) Automobile exception
      2) Seizure of person
         a) General rule: warrant is not required
         b) Exceptions
            (1) Entry of home, or
            (2) Misdemeanor not committed in presence of arresting officer
      3) Seizure of thing
         a) General rule: warrant is not required if thing seized is in plain view

3. Compliance with reasonableness requirement
   a. Was the search or seizure justified in its inception?
      1) Particularity requirement
      2) Exceptions to particularity requirement
         a) Minimal intrusions
FOURTH AMENDMENT

(1) Traffic stops at fixed checkpoints near borders or
(2) Stops at drunk driving checkpoints
(3) Orders to step out of stopped cars
b) Administrative guidelines sufficient to control officer’s discretion
c) Consent searches
d) Border stops and searches

b. Was the search or seizure justified in its scope?
c. Did the need (government interest) outweigh the harm (intrusion)? Balancing test focusing on the totality of the circumstances
d. Were other reasonableness tests met?
   1) Knock and announce requirement
   2) Rule against general searches and seizures

III. Remedies
A. Exclusionary rule
   1. Prosecution’s case-in-chief
      a. General rule: evidence resulting from unconstitutional search is inadmissible
      b. Exceptions
         1) Reasonable reliance on warrant
         2) Reasonable reliance on unconstitutional statute
   2. Other uses: evidence is admissible if cost of exclusion outweighs incremental deterrent effect
      a. Other uses in criminal prosecution
         1) Grand jury proceedings (admissible)
         2) Impeachment exception
            a) Admissible to impeach defendant
            b) Not admissible to impeach other defense witnesses
b. Uses outside criminal prosecution
   1) Forfeiture proceedings (inadmissible)
   2) Civil tax proceedings (admissible)
   3) Deportation proceedings (admissible)

B. Harmless error rule: erroneous admission of illegally obtained evidence does not require reversal if harmless beyond a reasonable doubt

C. Civil suit for damages (qualified immunity defense)