OFFICE OF THE STATE'S ATTORNEY
COOK COUNTY, ILLINOIS

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CRIMINAL PROSECUTIONS BUREAU
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SEARCH AND SEIZURE

GENERAL OVERVIEW

Joe Magats, ASA

Cook County State's Attorney's Office

August 2, 2016

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To: All ASAs

From: Joe Magats, ASA

Date: August 2, 2016

Re: Updated Search and Seizure Outline

I. Introduction

The law in the area of search and seizure is extremely detail oriented and fact specific. Cases and motions turn on the specific facts of each case. This outline generally discusses substantive areas in the law of search and seizure and is written with an eye toward defending motions to quash arrest and suppress evidence.

When reading the cases contained in this outline, keep in mind the facts of the case that you are litigating and how those facts compare with the facts in the cases in the outline. Also keep in mind alternate theories of defending these motions. Many, if not most, of the situations that you will encounter in this area lend themselves to alternative arguments to justify the actions of law enforcement personnel in your case. Make all of those alternative arguments. Many times if the alternative arguments are not put forward at the motion, you will be precluded from arguing them on any future appeal. All of your hard work in successfully prosecuting a case will be for naught.

As mentioned above, these cases are fact specific. In litigating and arguing these motions you must put forth the specific underlying facts that support your position. This area of the law, it seems, is always rife with buzzwords and conclusions ("feared for our safety", "exigent circumstances existed", "I did not feel free to leave", etc.) but there are, often, in police reports or litigation, a lack of the facts that led persons to reach the conclusions that they reached. The facts control these cases. From those facts come the conclusions. It is important that all of those specific facts be documented and developed from the time the officer writes the police report through the hearing and arguments on the motion to suppress evidence. As you read through the cases you will find that conclusions without the specific facts that support them are of little value.

II. Motions to suppress evidence

Pursuant to 725 ILCS 5/114-12(b), a defendant's motion to suppress evidence must be in writing and state facts showing why the search and seizure were unlawful. Defendants will often file boilerplate motions that state few, if any, facts. These motions generally state conclusions of law without the facts that lead to the conclusions. In addition the motion must be entitled motion to suppress evidence and it must clearly identify the evidence that is sought to be suppressed. People v. Ramirez, 2013 IL App (4th) 121153, para. 59. If the defendant's motion fails to meet the standards set out in the statute and case law, file a motion to make specific so you know what will be litigated at the hearing on the motion.

Another situation that frequently arises is where the defendant makes a motion to suppress during the trial. Pursuant to 725 ILCS 5/114-12(c) this motion must be made before trial unless the opportunity did not exist or the defendant was unaware of the grounds of the motion.

At the hearing on the motion, the burden is on the defendant to make a *prima facie* case that the search or the seizure is unlawful. The defendant establishing that a warrantless arrest or search was conducted and he was doing nothing unusual at the time generally does this. People v. F.J., 315 Ill.App.3d 1053, 734 N.E.2d 1007, 248 Ill.Dec. 716 (1st Dist. 2000). If the defendant passes this threshold, the burden shifts to the State to prove the validity of the stop or arrest. People v. James, 180 Ill.App.3d 461, 535 N.E.2d 1147, 129 Ill.Dec. 382 (1st Dist. 1989). The standard of proof at a motion to suppress evidence is a preponderance of the evidence.

The fourth amendment does not apply to a search or a seizure, however unreasonable, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any government official. United States v. Jacobsen, 466 U.S. 109, 113 (1984). Simply put, the fourth amendment and the Exclusionary Rule do not apply to citizens acting as private persons. People v. Phillips, 215 Ill.2d 554 (2005); (People v. Radcliff, 305 Ill.App.3d 493, 712 N.E.2d 424, 429-430, 238 Ill.Dec. 702 (5th Dist. 1999). This is because the private search has frustrated any expectation that the information will remain private. Phillips, 215 Ill.2d at 566; People v. Lyons, 2013 IL App (2d) 120392, p. 21

An issue that frequently arises is the use of hearsay at a motion to suppress evidence. Using hearsay to establish probable cause is proper. People v. Beto, 86 Ill.App.3d 622, 408 N.E.2d 293, 41 Ill.Dec. 871 (1st Dist. 1980). It is equally well settled law that an officer, in testifying on a motion to suppress, in explaining why he made a warrantless arrest, can relate what data was observed by another individual and told to the officer. People v. Williams, 27 Ill.2d 542, 190 N.E.2d 303, 304-305 (1963); Draper v. United States, 358 U.S. 307 79 S.Ct. 329, 3 L.Ed. 2d 327 (1959) and United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971). In cases where a group of officers are working together, probable cause for an arrest may be established on the

basis of all of the information possessed by the officers working together. People v. Krogh, 123 Ill.App.3d 220, 462 N.E.2d 790, 793, 78 Ill.Dec. 671 (1st Dist. 1984).

Where a defendant testifies at a hearing on a fourth amendment motion to suppress evidence, his testimony may not be admitted against the defendant at trial on the issue of guilt, unless the defendant fails to object. Simmons v. United States, 390 U.S. 377, 394, 19 L.Ed.2d 1247, 88 S.Ct. 507 (1968). While the defendant's testimony at a motion to suppress evidence is inadmissible in the state's case in chief, the prosecution can use the defendant's testimony to impeach the defendant's testimony at trial. People v. Sturgis, 58 Ill.2d 211, 216, 317 N.E.2d 545 (1974); People v. Rosenberg, 213 Ill. 2d 69, 820 N.E.2d 440, 289 Ill. Dec. 664 (2004).

A defendant cannot challenge the legality of another individual's arrest as a basis for his own motion to suppress evidence. People v. James, 118 Ill.2d 214, 514 N.E.2d 998, 113 Ill.Dec. 86 (1987). The court held that a statement that was obtained as fruit of an illegal arrest of another person provided probable cause for the arrest of the defendant because the statement was specific, unequivocal and reliable. James, 118 Ill.2d at 225.

On appeal, an appellate court will not overturn a trial court's ruling on a motion to suppress evidence unless it was manifestly erroneous. People v. Murray, 137 Ill.2d 382, 560 N.E.2d 309, 311, 148 Ill.Dec. 7 (1990).

III. The exclusionary rule

The fourth amendment does not apply to a search or a seizure, however unreasonable, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any government official. United States v. Jacobsen, 466 U.S. 109, 113 (1984). Simply put, the fourth amendment and the Exclusionary Rule do not apply to citizens acting as private persons. People v. Phillips, 215 Ill.2d 554 (2005); (People v. Radcliff, 305 Ill.App.3d 493, 712 N.E.2d 424, 429-430, 238 Ill.Dec. 702 (5th Dist. 1999).

The exclusionary rule is not intended to be a "strict-liability regimen". See Davis v. United States, 564 U.S. ___, 131 S.Ct. 2419, 2429 (2011). A judge's finding that a Fourth Amendment violation occurred in a case does not in and of itself mean that the exclusionary rule applies thus suppressing the evidence in the case. Illinois v. Gates, 462 U.S. 213, 223, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). "[W]hether the fourth amendment has been violated and whether exclusion is the appropriate sanction are separate issues." People v. Morgan, 388 Ill.App.3d 252, 264, 901 N.E.2d 1049, 327 Ill.Dec. 16 (4th Dist. 2009).

Simply put, there is no "but for" test where evidence discovered through a causal chain that started with an illegal search or seizure automatically becomes in and of itself inadmissible. People v. Henderson, 2013 IL 114040, paragraph 34 citing Wong Sun v. United States, 371 U.S. 471, 487-488, (1963).

The United States Supreme Court has consistently and repeatedly held that exclusion of evidence does not automatically follow a Fourth Amendment violation. See United States v. Leon, 468 U.S. 897, 905-906, 104 S.Ct. 3405, 82 L.Ed 677, (1984); Arizona v. Evans, 514 U.S. 1, 13-14, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995); Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357, 363, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998); Davis v. United States, 564 U.S. ___, 131 S.Ct. 2419, 2426 (2011). This is because "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." United States v. Payner, 447 U.S. 727, 100 S.Ct. 2439, 2445, 65 L.Ed.2d 468 (1980).

Likewise, the Illinois Supreme Court has refused to apply the exclusionary rule in a case where the fourth amendment was violated, People v. Willis, 215 Ill.2d 517 (2005), and has held that there is no constitutional right to have evidence resulting from an illegal search or seizure suppressed at trial. People v. LeFlore, 2015 IL 116799 (2015). While the "exclusionary rule laudably secures constitutional rights through its deterrent effect," People v. Galan, 229 Ill.2d 484, 523 (2008), the rule "also deflects criminal trials form their basic focus by erecting barriers between the jury and truthful, probative evidence." Willis, 215 Ill.2d at 532.

Exclusion of evidence is a court's "last resort" and is not to be its "first impulse". Hudson v. Michigan, 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006). The exclusionary rule applies in cases where the application "result[s] in appreciable deterrence." Leon 468 U.S. 897 at 909 quoting United States v. Janis, 428 U.S. 433, 454, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976). "[T]he abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional." Herring v. United States, 555 U.S. 135, 129 S.Ct. 695, 702, 172 L.Ed.2d 496 (2009).

A. Application of the exclusionary rule

In order for the exclusionary rule to apply, the police conduct in the case "must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring, 129 S.Ct. 695 at 702. "[T]he exclusionary rule serves to deter deliberate, reckless or grossly negligent conduct or in some circumstances recurring or systemic negligence." Id. The test in determining deterrence and culpability is "objective and not an inquiry into the subjective awareness of the arresting officers." Herring, 129 S.Ct. 695 at 703.

Simply stated the inquiry appears to be:

(1) Was the police conduct objectively reasonable and not the product of deliberate, reckless or grossly negligent conduct or the product of recurring or systemic negligence?

(2) Would applying the exclusionary rule meaningfully deter the conduct in question?

(3) Does the deterrent benefit of excluding the evidence outweigh the social costs- does the deterrent effect of exclusion outweigh the social cost of exclusion?

In applying this objective test, keep in mind that "the rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." Herring 129 S.Ct. 695 at 701 quoting Scott, 524 U.S. 357 at 364-365. In short, the exclusionary rule should apply "only where its deterrent benefits outweigh its substantial social costs." People v. Willis, 215 Ill.2d 517, 531-32 (2005).

In Herring, a police officer saw the defendant and checked with two counties to determine whether there were any arrest warrants for the defendant. Upon hearing from one of the counties that there was an arrest warrant for the defendant, the officer placed the defendant under arrest. The officer recovered a pistol and methamphetamine after a search incident to arrest of the defendant. Shortly after the arrest of and recovery of evidence from the defendant, the county that had issued the arrest warrant contacted the officer and told him that there was a mistake in their computer records and the arrest warrant had been recalled five months earlier. Herring, 129 S.Ct. at 698. The defendant filed a motion to suppress evidence. At the hearing, the evidence showed that mistakes like the one that had taken place had not occurred in the past and the officer testified that he never had reason to question the information about the county's warrant. Herring, 129 S.Ct. 704.

The court held that based on the facts of the case, the exclusionary rule did not apply. The court stated "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless or grossly negligent conduct or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level." Herring, 129 S.Ct. 702. In determining deterrence and culpability, the inquiry is "objective and not an inquiry into the subjective awareness of the arresting officers". Herring, 129 S.Ct. 703.

The court also warned that "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should misconduct cause a Fourth Amendment violation." Herring, 129 S.Ct. at 703.

Several Illinois cases have discussed this area of the law. One such case was People v. Morgan, 388 Ill.App.3d 252, 901 N.E.2d 1049, 327 Ill.Dec. 16 (4th Dist. 2009). In Morgan the officers obtained a list of outstanding LaSalle County warrants which contained the defendant's name, date of birth and address. In the past, when the officers obtained such a list they did so on the day the list was printed and the list was printed in the officer's presence. The list in the Morgan case was up to three days old and had not been printed in the officers' presence. Within five minutes of receiving the warrant list, the officers were at the defendant's residence. Prior to going to the defendant's residence

the officers did not verify the validity of the warrant. Once at the residence officers entered and arrested the defendant and recovered drugs. After the defendant's arrest the officers called to check the validity of the warrant and inform the county that the warrant was executed. The officers then learned that the warrant was invalid. Morgan, 388 Ill.App.3d at 255.

The court first held that fact that there was a fourth amendment violation does not automatically trigger the application of the exclusionary rule. "[W]hether the fourth amendment has been violated and whether exclusion is the appropriate sanction are separate issues." Morgan, 388 Ill.App.3d at 264. In determining whether the good faith exception applied the court looked to the test set out in Herring. The court held that the first consideration, what they termed police misconduct, clearly applied. The court held that the officers' reliance on a list that they know to be out of date and failing to attempt to verify the validity of the warrant was misconduct that was "at the very least, gross negligence, if not reckless or willful misconduct." Morgan, 388 Ill.App.3d at 265.

The court then looked at the second consideration, whether applying the exclusionary rule would meaningfully deter the misconduct. The court held that the officers' reliance on an outdated warrant list was conduct that could be deterred. Morgan, 389 Ill.App.3d at 265. Finally the court considered whether the cost of excluding the evidence is outweighed by the strong deterrent effect of the exclusion of the evidence. The court held that a reasonable officer would not have relied on an out of date list and that relying on the old list without making any effort to check the validity of the warrant was the type of reckless conduct that warranted exclusion of the evidence. Morgan, 388 Ill.App.3d 266-67. The court specifically stated that "[o]fficers cannot be willfully blind to the facts and then claim a good-faith reliance precludes suppression of the evidence." Morgan, 388 Ill.App.3d at 267.

Another case in this area is People v. Arnold, 394 Ill.App.3d 63, 914 N.E.2d 1143, 333 Ill.Dec. 331 (2nd Dist. 2009). In Arnold, the officer, who knew the defendant, saw the defendant driving. The defendant eventually ended up going into a store. The officer believed that there was an arrest warrant out for the defendant because the officer had done a warrant check a week earlier and the check revealed an outstanding arrest warrant for the defendant. After he observed the defendant, the officer radioed for verification of the warrant. While waiting for confirmation, the officer went into the store that the defendant had entered and handcuffed the defendant. After handcuffing the defendant, the officer received confirmation that the warrant was valid. A search incident to the arrest led to the defendant being charged with cocaine possession. Arnold, 394 Ill.App.3d 65-67.

At the suppression hearing, the evidence showed that the warrant was not valid at the time of the defendant's arrest. In applying the test set out in Herring the court held that the officer's conduct in handcuffing the defendant prior to receiving confirmation of the warrant's validity was unreasonable. Arnold, 394 Ill.App.3d at 77. The court then looked at whether exclusion of the evidence could deter the conduct. The court determined that the officer's decision to handcuff the defendant without confirming that

there was an active arrest warrant was beyond negligence and was reckless. Accordingly, suppression of the evidence would deter that conduct. Lastly the court stated that "the need to deter the police from handcuffing a citizen without confirming whether there is a valid warrant for his arrest" outweighed the costs of impeding the prosecution of the defendant. Arnold, 394 Ill.App.3d at 77.

In People v. Estrada, 394 Ill.App.3d 611, 914 N.E.2d 679, 333 Ill.Dec. 260 (1st Dist. 2009), the appellate court held that the exclusionary rule should apply in that case. In Estrada, a police officer, in his squad car, observed the defendant, seated in a legally parked vehicle, speaking with another person. The officer saw the defendant drop a plastic grocery type bag over the passenger seat. When the officer pulled up to the defendant's car, the defendant was out of the car and was standing at the rear of the vehicle. The vehicle was locked. The officer observed that the defendant's vehicle had no city vehicle sticker. While the officer checked the status of the defendant's driver's license, which was revoked, the defendant ran from the scene. The defendant was caught and taken into custody for driving on a revoked license. The officer and others then searched the defendant's car and recovered cocaine. The trial court granted the defendant's motion to suppress.

The appellate court affirmed the ruling and specifically held that the exclusionary rule applied to the case. The court stated, "the choices and actions were those of [the officer] alone. He was not impelled by administrative negligence or misinformation. Here, [the officer's] choices and actions were culpable and there is a deterrent to value to excluding evidence recovered in this manner." Estrada, 394 Ill.App.3d at 628.

In all likelihood, courts and defense attorneys will latch on to this distinction between an officer acting on erroneous information and an officer taking action on his own. There is nothing in Estrada or any of the other cases that holds or even intimates that cases where an officer acting on his own are automatically subject to the exclusionary rule. The test and the factors are to be applied in every case where a judge finds that the fourth amendment has been violated.

On the other hand, a court has held that the exclusionary rule should apply, based on its deterrent effect, where the police, following procedures in their department's police manual, conduct a search that violates the fourth amendment. People v. Spencer, 408 Ill.App.3d 1, 11 (1st Dist. 2011).

If a judge finds that the police action in a case violated the fourth amendment, it is imperative that we make the additional argument that exclusion of the evidence is not required and that the record contains all of the evidence that allows us to make the arguments that are outlined above.

B. Exclusionary rule and good faith exception

The exclusionary rule does not apply to cases where officers act pursuant to binding appellate precedent, later overruled, that could reasonably be relied on. Davis v. United States, 564 U.S. ___, 131 S.Ct. 2419 (2011); People v. LeFlore, 2015 IL 116799.

This was at issue in LeFlore. In that case, the officers, without a warrant, installed a GPS tracking device on the defendant's vehicle in order to track its whereabouts. At the time of the installation, a warrant was not required for what the installation of the GPS and subsequent tracking of the vehicle. The defendant was ultimately charged with and convicted of aggravated robbery and other offenses. Evidence discovered as a result of the GPS was used against him in the prosecution of the case. During the pendency of the case the defendant filed a motion to suppress evidence regarding the evidence recovered as a result of the GPS tracking. The motion was denied. The defendant appealed and while the appeal was pending, the United States Supreme Court issued its opinion in United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 948-49, 151 L.Ed.2d 911 (2011) holding that judicial authority is required to install and monitor a GPS tracker on a vehicle in the fashion that was done in the LeFlore case. Based on Jones, the appellate court overturned the defendant's conviction and the state appealed to the Illinois Supreme Court.

The Illinois Supreme Court reversed the appellate court holding, in essence, that there is a good faith exception to the exclusionary rule. The LeFlore court followed Davis and held that the exclusionary rule did not apply because there was binding appellate precedent on which the police officers could have reasonably relied which held that the warrantless installation and attachment of the monitoring device was legal. The court further noted that it was objectively reasonable for the police to rely on the legal landscape at the time. The court further held that there was a complete lack of culpability and that there would be little or no deterrent value to suppressing the evidence in the case. LeFlore, 2015 IL 116799, paragraphs 30-69.

A major factor in this analysis is the lack of culpability in the conduct of the police. The Davis court noted that "[t]he police acted in strict compliance with binding precedent, and their behavior was not wrongful. Unless the exclusionary rule is to become a strict-liability regimen, it can have no application in this case." Davis, 131 S.Ct. at 2429. The LeFlore court also made specific reference to Davis's statement that "in 27 years of practice under Leon's good-faith exception, we have 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct." LeFlore, 2015 IL 116799, paragraph 27 quoting Davis, 131 S.Ct. at 2429.

IV. Search Warrants

A. Grounds for Search Warrants

1. Statutory Authority

725 ILCS 5/108-3 thru 5/108-13 sets out the statutory requirements for a search warrant in Illinois. In general, a judge may issue a search warrant upon the written complaint of any person, under oath, which states facts sufficient to show probable cause and particularly describes the place, person or both to be searched and also particularly describes the things to be seized. See 725 ILCS 5/108-3. Even though the fourth amendment requires only that a valid search warrant be issued by a neutral judicial officer, Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1977), 725 ILCS 5/108-3 specifically requires that a judge issue the search warrant.

The search warrant is to state the time and date of its issuance and a search warrant issued by fax has the same validity as a warrant issued in writing. 725 ILCS 5/108-4.

A search warrant is to be executed within 96 hours from the time the judge issued the warrant and a duplicate copy of the warrant is to be left with any person from whom items are seized. 725 ILCS 5/108-6. If no person is available, the duplicate copy of the warrant is to be left at the place from which the items were seized. Id.

A warrant will not be quashed nor evidence suppressed because of technical irregularities that do not affect the accused's substantial rights. 725 ILCS 5/108-14.

2. Specific Requirements

a) Writing requirement/Time/Date/Judge's signature

As set out in 725 ILCS 5/108-3 a search warrant must be in writing. A judge cannot orally issue a search warrant. People v. Taylor, 198 Ill.App.3d 667, 555 N.E.2d 1218, 144 Ill.Dec. 699 (3rd Dist. 1990). In Taylor, the State's Attorney of Warren County, Illinois contacted a judge by telephone at 4:10 a.m. and read to the judge the complaint for search warrant. The judge authorized the State's Attorney, as an elected public official to have the complaint sworn before and the warrant issued by the State's Attorney. The judge stated that he would sign the warrant later that day in court. The search warrant was then executed. At 11 a.m. the judge signed the warrant and indicated that he had orally authorized the warrant at 4:13 a.m. The Taylor court held that the telephone conversation was an improper means of exercising judicial authority to issue a search warrant pursuant to the statute and that the statute does not authorize long distance findings of fact by telephone and for oral issuance of a warrant without the date, time or judge's signature. Taylor, 555 N.E.2d at 1220. The omissions of the time, date and judge's signature were not ministerial acts or mere technicalities that could be omitted without invalidating the warrant. Id.

Other courts have refused to read the Taylor decision as holding that the omission of the time and date of issuance from the search warrant's face is always fatal. People v. Blake, 266 Ill.App.3d 232, 640 N.E.2d 317, 203 Ill.Dec. 658 (2nd Dist. 1994). The Blake court held that, pursuant to 725 ILCS 5/108-6, the purposes behind having the search warrant show the date and time of issuance are to permit officers executing the search

warrant to determine whether it has expired due to the passage of time and to document the time of issuance for judicial review. Blake, 640 N.E.2d at 321. As it could be determined that the warrant was executed within the requisite time period, the omission of the time and date of issuance did not invalidate the warrant. Id.

While it is presumed that the date and time of issuance as noted by the judge on the warrant controls the warrant's validity, extrinsic evidence is admissible to show or correct an obvious clerical error. People v. Young, 60 Ill.App.3d 49, 376 N.E.2d 712, 717, 17 Ill.Dec. 566 (2nd Dist. 1978). In People v. Lozada, 55 Ill.App.3d 366, 371 N.E.2d 50, 13 Ill.Dec. 355 (1st Dist. 1977) the date of issuance was absent from the face of the search warrant. The defendant filed a motion to quash the search warrant and the trial court refused to consider evidence that the State offered as to the date of issuance. The Lozada court held that it was error for the trial court to unnecessarily restrict the scope of the hearing by refusing to consider testimony that cured the technical error. Lozada, 371 N.E.2d at 52. See also People v. Deveaux, 204 Ill.App.3d 392, 561 N.E.2d 1259, 149 Ill.Dec. 563 (1st Dist. 1990), which allowed extrinsic evidence to correct an obvious clerical error on the search warrant.

The omission of the issuing judge's signature on the copy of the search warrant left with the defendants, while not immaterial, was a technical irregularity that neither prejudiced the defendants nor affected their substantial rights where the officers read the signed original search warrant to the defendants. People v. Harrison, 83 Ill.App.2d 90, 226 N.E.2d 418, 420 (1st Dist. 1967). See also People v. Perdew, 78 Ill.App.2d 331, 223 N.E.2d 308, 310 (1st Dist. 1966) which held that the absence of the issuing judge's signature on the defendant's copy of an arrest warrant did not invalidate an arrest warrant as long as the judge signed the original warrant.

A complainant's failure to sign the complaint for search warrant was held to be a technical defect that did not violate the defendant's rights in People v. Vera, 393 Ill.App.3d 94 (1st Dist. 2009). In Vera, the record showed that the police officer complainant presented his complaint to the court and that the issuing judge signed the complaint and warrant following the notation that the officer had subscribed and sworn to the facts that were contained in the complaint before the court. Vera, 393 Ill.App.3d at 99. The Vera court additionally refused to presume that the judge who issued the search warrant "made a false statement in the search warrant or that he would have issued the search warrant without the oath, affirmation or affidavit." Vera, 393 Ill.App.3d at 99.

If there are omissions on the face of the search warrant, those omissions may be remedied by incorporating by reference a sworn affidavit attached to the warrant. People v. Favela, 288 Ill.App.3d 85, 681 N.E.2d 582, 585, 224 Ill.Dec. 267 (3rd Dist. 1997). See also People v. Bauer, 102 Ill.App.3d 31, 429 N.E.2d 568, 57 Ill.Dec. 670 (2nd Dist. 1981). A defendant's substantial rights may be deemed to be affected if an omission on the face of the warrant actually confused or could have confused the officers attempting to execute it. Favella, *supra*.

i. Oral amendments

At least two Illinois cases have allowed oral amendments to signed search warrants. The first, People v. Trantham, 55 Ill.App3d 720, 722-23, 371 N.E.2d 207, 13 Ill.Dec. 512 (3rd Dist. 1977) upheld a search warrant where after an officer discovered that the wrong apartment number of the apartment to be searched was included in the warrant called the issuing judge and was given approval to change the apartment number in the warrant to the correct number.

In People v. Urbina, 393 Ill.App.3d 1074, 916 N.E.2d 1, 333 Ill.Dec. 882 (1st Dist. 2009) when the officers went to the location to be searched that was in the warrant they realized that the apartment that they wanted to search was across the hall from the apartment listed in the warrant. The officers, on their own, decided to search the apartment that was not listed in the warrant because all of the facts for probable cause pertained to the apartment that was not listed in the warrant. In reversing the trial court's denial of the defendant's motion to suppress, the court stated that the officers "should have contacted the judge who had authorized the search warrant, informed the judge of the ambiguity, requested instructions regarding any necessary change, and subject to the judge's approval, amended the search warrant to reflect the new apartment letter or to redact the apartment letter altogether." Urbina, 393 Ill.App.3d at 1079-1080.

(b) Probable cause requirement

i. General considerations

As 725 ILCS 5/108-3 mandates, there must be probable cause for a search warrant. Probable cause for the issuance of a search warrant must be found in the complaint for the warrant. People v. George, 49 Ill.2d 372, 377, 274 N.E.2d 26, 29 (1971). Questions regarding probable cause are resolved by looking to the totality of the circumstances. Illinois v. Gates, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317, 2332 (1983). There are two elements of probable cause regarding search warrants. The complaint must relate facts, which would cause a reasonable person to believe that a crime has been committed, **and** those facts must cause a reasonable person to believe that evidence can be found in the place to be searched. Id; People v. Batac, 259 Ill.App.3d 415, 631 N.E.2d 373, 379, 197 Ill.Dec. 370 (2nd Dist. 1994). Whether probable cause exists depends on the totality of the facts and circumstances known to the affiant. People v. Griffin, 178 Ill.2d 65, 77, 687 N.E.2d 822, 829, 227 Ill.Dec. 338 (1997). The complaint or affidavit for the search warrant must not merely set out conclusions but must state facts and circumstances that show the existence of probable cause. Franks v. Delaware, 438 U. S. 154, 165, 57 L.Ed.2d 667, 98 S.Ct. 2674, 2681 (1978); People v. Greer, 91 Ill.App.3d 304, 414 N.E.2d 831, 832, 46 Ill.Dec. 778 (5th Dist. 1980).

Courts are to interpret affidavits and evidence offered in support of a search warrant in a common sense, realistic manner and are not to be unduly technical and a reviewing court reviewing a determination of probable cause for a search warrant is not to be unduly technical but must consider the probabilities based on practical considerations of everyday life. Batac, *supra*. In assessing the validity of a search

warrant, a reviewing court may consider only information brought to the attention of the issuing judge or trial court. People v. Velez, 204 Ill.App.3d 318, 562 N.E.2d 247, 254, 149 Ill.Dec. 783 (1st Dist. 1990).

Notwithstanding this four-corner rule, the Illinois Supreme Court in City of Chicago v. Adams, 67 Ill.2d 429, 367 N.E.2d 1299, 10 Ill.Dec. 533 (1977), allowed the judge who issued a search warrant to go beyond the complaint for search warrant to find sufficient indicia of reliability of the informant in the complaint. In Adams, the informant was present in court before the issuing judge and had been sworn when the complaint for search warrant was presented to the issuing judge. Adams, 367 N.E.2d at 1301.

Two cases have shown a willingness by some courts to move even further away from the four corner rule in situations where the informant used in a complaint for search warrant was neither present before the issuing judge or under oath. In People v. Ward, 326 Ill.App.3d 897, 762 N.E.2d 685, 261 Ill.Dec. 116 (5th Dist. 2002) the defendant claimed that the search warrant was invalid because the complaint did not contain sufficient indicia of reliability of the informant or any corroboration of the informant on the part of the police officer affiant and that the trial court erred by looking beyond the four corners of the search warrant to find sufficient indicia of reliability. Ward, 762 N.E.2d at 692. The Ward court held that, even though the informant was not present in court and sworn as in Adams, the Illinois Supreme Court in Adams never bound courts to a rigid four corners approach in determining the search warrant's validity and the trial court committed no error in going beyond the four corners of the warrant in determining the validity of the warrant. Ward, 762 N.E.2d at 691. The Illinois Supreme Court denied the defendant's leave to appeal. People v. Ward, 198 Ill.2d 630 (2002).

The Ward decision was followed in People v. Hughes, 343 Ill.App.3d 506, 798 N.E.2d 763, 278 Ill.Dec. 379 (5th Dist. 2003). In this case the defendant claimed the complaint for search warrant did not allege probable cause because it did not state when the alleged criminal activity occurred and that in determining whether the complaint for search warrant established probable cause, the judge went beyond the four corners of the document. Hughes, 798 N.E.2d at 768. The court disagreed and held that in determining whether there is probable cause for a search warrant, an issuing judge may go outside the four corners of the document in order to obtain additional facts supporting probable cause. Id. The Illinois Supreme Court denied the defendant's leave to appeal at People v. Hughes, 207 Ill.2d 618, 807 N.E.2d 979, 283 Ill.Dec. 138 (2004).

It is important to keep in mind that both the Ward and the Hughes courts stated that the better practice is that all of the facts necessary for probable cause be reduced to writing and present in the complaint for search warrant. Ward, 762 N.E.2d at 691; Hughes, 798 N.E.2d at 768.

The judge who issues a search warrant is allowed to draw reasonable inferences from the material supplied in support of the complaint for search warrant. People v. Hancock, 301 Ill.App.3d 786, 704 N.E.2d 431, 405, 235 Ill.Dec. 82 (4th Dist. 1998). In

short, all efforts should be made to avoid hypertechnical interpretations and doubtful cases should be determined largely by the preference that the law accord to warrants. People v. Mitchell, 61 Ill.App.3d 99, 377 N.E.2d 1073, 1076, 18 Ill.Dec. 437 (1st Dist. 1978).

The determination of probable cause is to be made on a case-by-case basis. People v. Thompkins, 121 Ill.2d 401, 435, 521 N.E.2d 38, 52, 117 Ill.Dec. 927 (1988). It is the probability of criminal activity rather than proof beyond a reasonable doubt that is the standard for determining probable cause to issue a search warrant. People v. Beck, 306 Ill.App.3d 172, 713 N.E.2d 596, 601, 239 Ill.Dec. 65 (1st Dist. 1999).

Probable cause can be established by evidence that is not admissible in a criminal trial and hearsay may be the basis for the issuance of a search warrant if there is a substantial basis for crediting the hearsay. Jones v. United States, 362 U.S. 257, 269, 42 L.Ed.2d 697, 80 S.Ct. 725 (1960); People v. Close, 60 Ill.App.2d 477, 208 N.E.2d 644, 647 (3rd Dist. 1965). A complaint for search warrant may be based upon multiple affidavits to support the issuance of the warrant, but before the warrant may issue, the testimony upon which the judge acts in issuing the warrant must be reduced to writing and verified in a formal complaint. People v. Dinger, 106 Ill.App.3d 662, 435 N.E.2d 1348, 1350, 62 Ill.Dec. 376 (4th Dist. 1982). The fact that the affidavit contains "boiler plate" language does not address the veracity of the affidavit. People v. Elworthy, 214 Ill.App.3d 914, 574 N.E.2d 727, 734, 158 Ill.Dec. 614 (1st Dist. 1991).

The issuance of a search warrant does not automatically make legal any searches, seizures or other police action that came before the issuance of the search warrant. People v. Scaramuzzo, 352 Ill. 248, 253 (1933). If the initial search or seizure is unlawful then it cannot be the grounds for issuing a search warrant and any evidence obtained is inadmissible. People v. Ferris, 2014 IL App (4th) 130657, para. 44.

ii. Establishing probable cause

Probable cause to issue a search warrant can be established in two ways. Probable cause may be shown through facts within the personal knowledge of the affiant. As stated earlier, hearsay may also form the basis of probable cause to issue a warrant. People v. Close, 60 Ill.App.2d 477, 208 N.E.2d 644, 647 (3rd Dist. 1965).

a) Personal knowledge

Where the affiant appears before the judge who issued the warrant, and the affiant recites facts that the affiant personally observed, there is no constitutional requirement that the reliability of the affiant be established. People v. Skinner, 136 Ill.App.3d 119, 483 N.E.2d 399, 401, 91 Ill.Dec. 117 (3rd Dist. 1985); People v. Smith, 72 Ill.App.3d 956, 390 N.E.2d 1356, 1362, 28 Ill.Dec. 766 (1st Dist. 1979). Accordingly, under these circumstances, there is no need for additional information in the affidavit relating to the informant's reliability. People v. Moser, 356 Ill.App.3d 900, 827 N.E.2d 1111, 1121, 293 Ill.Dec. 230 (2nd Dist. 2005).

When an informant appears before the judge issuing the search warrant, the informant is under oath and any statement that the informant makes is subject to that oath; moreover the judge has the opportunity to personally observe the demeanor of the informant and to assess the informant's credibility. People v. Phillips, 265 Ill.App.3d 438, 637 N.E.2d 715, 721, 202 Ill.Dec. 182 (4th Dist. 1994).

Having the affiant sign the affidavit by using a fictitious name may protect the identity of an affiant who appears before a judge. People v. Jackson, 37 Ill.App.3d 279, 345 N.E.2d 509, 511 (4th Dist. 1976). An affidavit signed with a fictitious name does not create a constitutional violation. People v. Stansberg, 47 Ill.2d 541, 544-545, 268 N.E.2d 431, 433 (1971).

b) Hearsay

Probable cause can be established by evidence that is not admissible in a criminal trial and hearsay may be the basis for the issuance of a search warrant if there is a substantial basis for crediting the hearsay. Jones v. United States, 362 U.S. 257, 269, 42 L.Ed.2d 697, 80 S.Ct. 725 (1960); People v. Close, 60 Ill.App.2d 477, 208 N.E.2d 644, 647 (3rd Dist. 1965).

The affidavit for search warrant must establish that, under the totality of the circumstances, given all of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of the person supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be located in a particular place. People v. Exline, 98 Ill.2d 150, 155, 456 N.E.2d 112, 115, 74 Ill.Dec. 610 (1983); Illinois v. Gates, 462 U.S. 213, 238, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983). The sufficiency of the complaint rests on whether the complaint, considered as a whole, adequately establishes that there is a fair probability that evidence of a crime will be found in a particular place. People v. Jones, 105 Ill.2d 342, 357, 475 N.E.2d 832, 839, 86 Ill.Dec. 453 (1985); People v. Sellers, 237 Ill.App.3d 545, 604 N.E.2d 993, 995, 178 Ill.Dec. 470 (3rd Dist. 1992).

There must be facts in the affidavit that support the reliability of the informant. The affiant must do more than label the informant as reliable as that is nothing more than the affiant's conclusion without any supporting facts. People v. Pelton, 27 Ill.App.3d 781, 327 N.E.2d 360, 362 (3rd Dist. 1975). The affidavit must set out facts that establish the reliability of the information and the informant. People v. Thomas, 24 Ill.App.3d 932, 321 N.E.2d 696, 698 (3rd Dist. 1974). Generally speaking, under the totality of the circumstances, the affidavit must establish that the informant is reliable and the informant's information is credible.

1) Reliability of the informant

Keep in mind that where an affiant appears before the judge who issued the warrant, and the affiant recites facts that the affiant personally observed, there is no

constitutional requirement that the reliability of the affiant be established. People v. Skinner, 136 Ill.App.3d 119, 483 N.E.2d 399, 401, 91 Ill.Dec. 117 (3rd Dist. 1985); People v. Smith, 72 Ill.App.3d 956, 390 N.E.2d 1356, 1362, 28 Ill.Dec. 766 (1st Dist. 1979). Accordingly, under these circumstances, there is no need for additional information in the affidavit relating to the informant's reliability. People v. Moser, 356 Ill.App.3d 900, 827 N.E.2d 1111, 1121, 293 Ill.Dec. 230 (2nd Dist. 2005); People v. Kornegay, 2014 IL App (1st) 122573.

When an informant appears before the judge issuing the search warrant, the informant is under oath and any statement that the informant makes is subject to that oath; moreover the judge has the opportunity to personally observe the demeanor of the informant and to assess the informant's credibility. People v. Phillips, 265 Ill.App.3d 438, 637 N.E.2d 715, 721, 202 Ill.Dec. 182 (4th Dist. 1994). See also People v. Kornegay, 2014 IL App (1st) 122573.

In these situations, while an on the record exchange between the court and the informant would help in supporting a finding of an informant's reliability, there is no requirement that such questioning take place as the presence of the informant and the court's ability to question the informant are "indicia of reliability because they eliminate some of the ambiguity that accompanies an unknown hearsay declarant." United States v. Johnson, 289 F.3d 1034, 1040 (7th Cir. 2002). The Johnson holding was followed in People v. Smith, 372 Ill.App.3d 179, 865 N.E.2d 502, 310 Ill.Dec. 178 (1st Dist. 2007). See also People v. Kornegay, 2014 IL App (1st) 122573.

In the past, what made proceeding in this manner of establishing the reliability of an informant-having the informant sign the affidavit as a co-affiant and appear in front of the issuing judge-most effective was that there was virtually no way for an defendant to mount a Franks challenge to these types of a warrants. As the opinion clearly states, Franks only applies to governmental informants. Franks v. Delaware, 438 U.S. 154, 170-71, 57 l.Ed.2d 667, 98 S.Ct. 2674 (1978). Where an informant appears before a magistrate to testify regarding the allegations contained in the complaint for search warrant, "the case falls outside the scope of Franks." People v. Gorosteata, 371 Ill.App.3d 655, 666, 863 N.E.2d 709, 309 Ill.Dec. 77 (1st Dist. 2007). See also Phillips, *supra*, State v. Moore, 54 Wash.App 211, 773 P.2d 96 (1989), State v. Jensen, 259 Kan. 781, 790, 915 P.2d 109, 116 (1996) holding that even where the magistrate asked no questions of the informant and failed to probe the informant's reliability the defendant was not entitled to a Franks hearing.

This is no longer well settled law. Illinois courts have reached the opposite conclusion and held that the defendant was entitled to a Franks hearing. The court in People v. Caro, 381 Ill.App.3d 1056, 890 N.E.2d 526, 321 Ill.Dec. 804 (1st Dist. 2008) refused to follow Gorosteata and allowed the defendant to challenge a warrant signed by a non-governmental informant. Likewise, People v. Chambers, 2014 IL App (1st) 120147, rejected Gorosteata, and followed Caro.

a) Prior history

One of the most effective and common ways of demonstrating the reliability of an informant is establishing the informant's prior history of reliability. The court in People v. Brumfield, 100 Ill.App.3d 382, 426 N.E.2d 1012, 1016, 55 Ill.Dec. 687 (1st Dist. 1981) held an informant reliable where the affiant swore that he knew the informant for two years, and during that time, the informant had given the affiant narcotics information four separate times. On each of these four times, narcotics were recovered and arrests were made. The affiant further related that two of those cases were still pending, a third was discharged and the fourth resulted in a conviction. Id.

The more times an affiant has used an informant the better off you will be regarding probable cause. There is no magic number as to how many times an informant must be used before being deemed reliable. The Brumfield court held that the information was reliable and the informant had given information four times. Id. See also, People v. Thomas, 62 Ill.2d 375, 342 N.E.2d 383, 386 (1975) where the informant provided information four separate times and People v. Friend, 177 Ill.App.3d 1002, 533 N.E.2d 409, 412, 127 Ill.Dec. 537 (2nd Dist. 1988) where the informant provided information three separate times. The court in People v. Dawe, 115 Ill.App.3d 990, 451 N.E.2d 32, 33-34, 71 Ill.Dec. 544 (3rd Dist 1983) held that an informant who the police had used only once prior was reliable.

The fact that the informant has given information in the past but the information did not lead to arrests or convictions or that the affidavit does not mention that the information led to arrests or convictions does not, in and of itself mean that the information is unreliable. Arrests are not necessary to verify past information from an informant. People v. Thomas, 24 Ill.App.3d 932, 321 N.E.2d 696, 698 (3rd Dist. 1974). To hold that an informant is reliable only when there has been a showing of conviction resulting from the prior information is unrealistic and unnecessarily rigid. People v. Mitchell, 32 Ill.App.3d 650, 336 N.E.2d 44, 46 (1st Dist. 1975). The true test of an informant's reliability is the accuracy of the individual's information and not the arrests and convictions that are the result of the information. See People v. Lawrence, 133 Ill.App.2d 542, 273 N.E.2d 637, 639 (1st Dist. 1971); People v. Petrus, 98 Ill.App.3d 514, 424 N.E.2d 755, 758 54 Ill.Dec. 5 (1st Dist. 1981); People v. Johnson, 237 Ill.App.3d 860, 605 N.E.2d 98, 103, 172 Ill.Dec. 659 (3rd Dist. 1992).

When the test used is "totality of the circumstances" some deficiency in an informant's reliability may be overcome by a showing of some other indicia of the informant's reliability. People v. Friend, 177 Ill.App.3d 1002, 533 N.E.2d 409, 419, 127 Ill.Dec. 537 (2nd Dist. 1988).

b) Other methods

An informant's prior track record is not the only way that an informant's reliability can be established. The court in People v. Jefferson, 25 Ill.App.3d 445, 323 N.E.2d 495, 498 (1st Dist. 1974), noted that "Just as there must be a first for everything in life, so must there be a first time for an informant to give information." In Jefferson, the

officer received an anonymous call from an individual regarding drug sales at an apartment building. The officer neither knew the individual nor how the informant knew the information. The officer conducted a three-day surveillance of the building during which he saw numerous individuals that he had previously arrested for narcotic offenses enter and exit the building. The officer also followed some of the persons and saw them go into Apartment 301 of the building. He also saw two individuals knock on the door to Apartment 301 and exchange money for a tin foil packet, which the officer knew from his experience, was used in the sale of narcotics. In holding that there was probable cause to issue the search warrant the court held that the officer's observations sufficiently corroborated the information that the officer received from the anonymous informant. Jefferson, 323 N.E.2d at 498.

Adequate corroboration of an informant was shown in People v. Canet, 218 Ill.App.3d 855, 578 N.E.2d 1146, 161 Ill.Dec. 500 (1st Dist. 1991). In that case an informant told the officer that drugs were being sold in the third floor apartment of a building. The officer and the informant formulated a plan where the informant would purchase cocaine from the apartment. The officer searched the informant for money and drugs and found neither. The officer then drove the informant to the apartment and gave the informant fifty dollars. The officer watched the informant go into the building and then a short time later returned with a bag of cocaine. The Canet court held that as the officer's investigation corroborated part of the details of the informant's tip, there was, under the totality of the circumstances, probable cause to issue a search warrant for the apartment where the informant said that he had purchased cocaine. Canet, 578 N.E.2d at 1153.

The fact that an informant made declarations against penal interests may support a finding that the informant's statements are reliable. People v. Sellers, 237 Ill.App.3d 545, 604 N.E.2d 993, 996, 178 Ill.Dec. 470 (3rd Dist. 1992). In Sellers the defendant was the victim of a residential burglary. The defendant's nephew, Dustin Lawrence, broke into the defendant's home and took cash and personal checks. The defendant's wife identified Lawrence as he fled the scene. The defendant called the police. A little over two weeks later, Lawrence was arrested and confessed that he had burglarized the defendant's house, stolen a check, forged the defendant's signature on the check and then cashed it. Lawrence further told the police that while he was burglarizing the defendant's house he saw cannabis. A complaint for search warrant was prepared that stated that while Lawrence was in the defendant's house Lawrence saw cannabis, other drugs and a scale. The complaint further stated that Lawrence knew that the defendant had been selling drugs at the defendant's residence for the last six years and that Lawrence had bought drugs from the defendant in the past. The Sellers court held that Lawrence's personal observations while burglarizing the defendant's home combined with his statements against penal interest that he personally bought illegal drugs from the defendant, that he had burglarized the defendant's home, that he had illegally forged and negotiated a check, under the totality of the circumstances were enough for probable cause to issue the search warrant. Sellers, 604 N.E.2d at 995-996.

In addition to an informant's statements against penal interest and independent corroboration of the informant's tip, courts may consider other factors in examining the totality of the circumstances in assessing an informant's reliability. Courts can look to additional factors such as the affiant's own knowledge of the defendant's reputation or prior criminal activities and a more than ordinarily detailed description of the suspected criminal activities. People v. Clark, 95 Ill.App.3d 496, 420 N.E.2d 259, 261, 50 Ill.Dec. 942 (2nd Dist. 1981).

When information is provided to the affiant by a fellow police officer, the officer is presumed reliable and there is no requirement that the officer be shown to be reliable. People v. Powe, 48 Ill.2d 506, 272 N.E.2d 28, 31 (1971). In executing a search or seizure a police officer may properly rely on information from other police officers even if the officer is personally unaware of the underlying facts. People v. Price, 195 Ill.App.3d 701, 552 N.E.2d 1200, 1205, 142 Ill.Dec. 459 (1st Dist. 1990); People v. Carter, 288 Ill.App.3d 658, 681 N.E.2d 541, 545, 204 Ill.Dec. 226 (1st Dist. 1997).

2) Credibility of the information

In assessing the totality of the circumstances, not only must the informant be reliable, but the informant's information must also be credible. See People v. Loera, 250 Ill.App.3d 31, 619 N.E.2d 1300, 189 Ill.Dec. 251 (2nd Dist. 1993). The affidavit must establish how the informant knows that information and why the issuing judge can rely on the information.

The fact that an informant personally received white powder from the defendant and then turned the powder over to the police who then tested it and found it to be cocaine was held sufficient to show that the informant's information was credible. People v. Carton, 95 Ill.App.3d 937, 420 N.E.2d 753, 758, 51 Ill.Dec. 339 (3rd Dist. 1981).

An informant's credibility was established where the affiant related that the informant stated that the informant had been a heroin user for over five years and when the informant used a portion of the substance he purchased from the defendant he received the same effect that he has been receiving from using heroin over the past five years. People v. Walker, 34 Ill.App.3d 120, 399 N.E.2d 265, 266 (1st Dist. 1975).

A police officer's past experience, observations and belief that a substance is an illegal substance may establish credibility. People v. Curry, 84 Ill.App.3d 256, 405 N.E.2d 373, 39 Ill.Dec. 620 (5th Dist. 1980). In Curry, the affidavit stated that the police officer "has had occasion to come into contact with and identify cannabis on numerous occasions and is capable of identifying cannabis by sight." Curry, 405 N.E.2d at 376. The Curry court held that this allegation in the affidavit was sufficient to establish that the officer was experienced in dealing with cannabis and that his information was reliable. Id.

An officer's observations after receiving a tip from an informant may show that the information is credible. People v. Isenberg, 52 Ill.App.3d 426, 367 N.E.2d 364, 366-367, 9 Ill.Dec. 930 (1st Dist. 1977). After receiving information from an informant that drugs were being sold at an apartment building, the officer went to the building and saw many known drug users enter the building and leave four to five minutes later. During his surveillance, the officer spoke to a woman who was leaving the building. The woman told the officer that she had bought drugs from a man in the building and had done so for the past month. The officer observed that woman's eyes were glassy and that she was swaying on her feet. The officer believed the woman was under the influence of drugs. The Isenberg court held that the officer's investigation, including his observations of the apartment building, established that the information that the informant provided was reliable. Isenberg, 367 N.E.2d at 367.

An affiant's knowledge from prior experience that stolen property was frequently taken to the defendant's apartment for sale by those who stole the property was held to be a factor in determining the validity of the affidavit and established probable cause for issuing a warrant. People v. Robinson, 53 Ill.App.3d 99, 369 N.E.2d 247, 249 (1st Dist. 1977).

iii. Practical considerations

As stated above, only those factors that are documented in the complaint for search warrant can be used to determine probable cause to issue the search warrant. Any factors that are not listed in the complaint cannot be used as evidence at any hearing to determine whether there was probable cause for a judge to issue a search warrant.

Included in the complaint should be facts about the police officer who is the affiant of the warrant. The complaint should include information regarding what department employs the officer, how long the officer has been with that department, how long the officer has been a police officer, the officer's current assignment, the officer's duties in that assignment and any other past assignments or special expertise that the officer may have that is relevant to the issue of probable cause for issuing the search warrant.

The complaint should also include facts regarding the history of the investigation. The most important item is showing how the officer learned the information. If the officer learned the information from a confidential informant (C.I.), the complaint should include the number of prior cases where the C.I. had provided information and whether anything was recovered. If narcotics were recovered, the complaint should state that the crime lab confirmed that the recovered items were narcotics. If the C.I's past information led to arrests make sure that fact is recorded and also state whether those past cases are currently pending and if any convictions resulted from those prior cases.

Also document when the officer spoke to the C.I. and what the C.I. told the officer including such things as: when was the C.I. at the location, with whom did the C.I.

speak at the location, what did they talk about, what did the C.I. see, and, importantly, how the C.I. knows that drugs or contraband will be at the location in the future.

The complaint should also contain what steps the officer took to verify what the C.I. told the officer such as: the officer going to the location with the C.I. to verify the location, the officer finding the defendant's name on the mailbox, conducting utility checks of the location and the results, criminal history check of the defendant, showing the C.I. a photo array with the defendant's photograph, conducted a surveillance of the location, and any other fact that corroborates the C.I.'s information

If a C.I. acts at the direction of the officer, such as a controlled purchase of narcotics, the history of the transaction should also be included in the complaint in order to document the reliability of the information. This should include such things as: the officer searched the C.I. for drugs and money prior to the sale and was found to be free of those items or any other contraband, the officer gave the C.I. money with the serial number pre-recorded to make the purchase, surveillance was maintained during the controlled buy, after the buy the C.I. gave the officer the drugs that the C.I. purchased and the C.I was searched and found to be free of narcotics and money and that the dope bought was tested and found to be narcotics.

In short, the affidavit must contain everything that was done or learned that would lead someone to believe that there is probable cause to issue the warrant. Oftentimes the complaint for search warrant will contain only the highlights of the investigation and not contain many other things that were done or additional factors that exist that would bolster probable cause. These cases are fact specific and the proof is in the details. No one ever lost a motion or had a warrant tossed because there was too much probable cause to issue a search warrant. The goal of these cases is not simply to have a judge sign a warrant but to have the case successfully prosecuted.

c) Requirement of Freshness

Another component of probable cause is that the information that forms the basis for probable cause must be fresh. That is, there must be some evidence that shows that the facts upon which the warrant was issued were still in existence at the time the warrant was issued. See People v. Thompkins, 121 Ill.2d 401, 521 N.E.2d 38, 52 117 Ill.Dec. 927 (1998). To justify a present search, probable cause must be current and not rest upon facts which existed in the past unless there is a reason to believe those facts are still in existence. Brinegar v. United States, 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302 (1949). The term staleness refers to the amount of time that has elapsed between the facts alleged in the affidavit in support of the search warrant and issuance of the warrant. People v. Beck, 306 Ill.App.3d 172, 713 N.E.2d 596, 601, 239 Ill.Dec. 65 (1st Dist. 1999).

There is no cutoff period of time in days or weeks or time fixed specifically by law that renders information stale. Thompkins, *supra*.; People v. Mason, 15 Ill.App.3d 404, 304 N.E.2d 466, 468 (4th Dist. 1973). What is important is whether the affidavit refers to an isolated crime or an ongoing course of criminal conduct. Where an affidavit

recites an isolated violation it is not unreasonable to imply that probable cause dwindles rapidly with the passage of time. People v. McCoy, 10 Ill.App.3d 1054, 295 N.E.2d 483, 486 (1st Dist. 1973). Where facts indicate a course of conduct, the passage of time becomes less significant. Id. In short, when probable cause evaporates depends on the nature of the criminal activity and depends on all of the facts and circumstances of the case. Mason, 304 N.E.2d at 467.

In rejecting an arbitrary cutoff period beyond which probable cause lapses, courts have looked at other factors in addition to time. Courts are to look to factors including "the nature of the object sought, its location on the premises and the state in which it was observed. The nature of the object would encompass such considerations as whether it is large or small, moveable or fixed, disposable or permanent and innocuous or incriminating. The location of an object on the premises would involve, for example, whether it was in plain sight on a table, locked in a safe, on a beam in a cellar or secreted behind a bricked-in wall. The state in which the object was seen is especially important today because modern technology and equipment have the sophisticated capacity to ascertain whether matter-in whatever form it may be-is present or even may have once been present. This technology can detect, for example, a blood stain on clothes, furniture or rug; a gas that evaporates; a solid that dissolves and disappears, or one that changes into a powder or a liquid that seeps into a fabric, or dust that is suspended in air and whose particles may later be found on the top ledge of a door. The inquiry with respect to probable cause in the case of an observation of an isolated incident should focus on all of the relevant circumstances, including element of time lapse, to determine the probability of the continued existence of the object sought at the last place where it was seen. The overall approach should be one of flexibility and common sense." People v. Thompkins, 121 Ill.2d 401, 521 N.E.2d 38, 52-53, 117 Ill.Dec. 927 (1988), quoting United States v. Belltempo, 675 F.2d 472, 478 (2nd Cir. 1982). Even with these additional factors, however, courts have held that the single most important factor in determining whether probable cause is valid or stale is whether the defendant was engaged in a continuing course of criminal conduct. People v. Beck, 306 Ill.App.3d 172, 713 N.E.2d 596, 602, 239 Ill.Dec. 65 (1st Dist. 1999).

Courts have held search warrants to be valid in the following cases notwithstanding a defendant's staleness claims:

1. People v. Donath, 357 Ill.App.3d 57, 827 N.E.2d 1001, 1011-1012, 293 Ill.Dec. 120 (1st Dist. 2005). Six months between the defendant uploading 304 images of child pornography and issuance of search warrant was not excessive as acts of uploading and distributing the child porn gave stronger support to the inference that child porn would be found on the defendant's computer and the defendant would have had to possess the images in order for him to distribute them;

2. United States v. Hernandez-Escarsega, 886 F.2d 1560, 1566-67 (9th Cir. 1999). The information in the warrant was not stale even though the most

recent event was one year earlier as the affidavit detailed numerous examples of the defendant's involvement with drugs over the course of several years;

3. United States v. Robins, 978 F.2d 881, 892 (5th Cir. 1992). Six months was not excessive where there were allegations of large scale cannabis trafficking;

4. People v. Mason, 15 Ill.App.3d 404, 304 N.E.2d 466, 468-69 (4th Dist. 1973). 116 days between when wallet was stolen and issuance of search warrant;

5. People v. Thompkins, 121 Ill.2d 401, 521 N.E.2d 38, 52-53, 117 Ill.Dec. 927 (1988). Search warrant issued 83 days after triple murder occurred;

6. People v. Stephens, 12 Ill.App.3d 215, 297 N.E.2d 224, 225-226 (2nd Dist. 1973). Search warrant issued twelve days after robbery proceeds observed in an apartment;

7. People v. Montgomery, 27 Ill.2d 404, 189 N.E.2d 327, 328 (1963). Eight days between affiant observing narcotics at defendant's home and affiant signing affidavit was not unreasonable. The Montgomery court cited to 162 ALR 1414 where the author of that publication stated that, at that time, an interval of less than twenty days had never been held unreasonable. Id. It should go without saying, however, that this may no longer be the case.

d) Requirement of Specificity

In order for a search warrant to be valid, the warrant must particularly describe the person or place to be searched and the items to be seized. 725 ILCS 5/108-3. The rationale behind the specificity requirement is to prevent the use of general warrants that would give police broad discretion to search and seize. People v. Burmeister, 313 Ill.App.3d 152, 728 N.E.2d 1260, 1266, 245 Ill.Dec. 903 (2nd Dist. 2000).

i. Specificity of Location/Person Searched

A search warrant is sufficiently specific if it enables the police officer executing the warrant, with reasonable effort, to identify the place intended to be searched. People v. Edwards, 35 Ill.App.3d 807, 342 N.E.2d 800, 802 (1st Dist. 1976). There is no requirement that the description in the warrant be technically correct; rather, the warrant must only identify the place intended to be searched to the exclusion of all others. People v. Watson, 26 Ill.2d 203, 186 N.E.2d 326, 327 (1962).

The test regarding sufficiency of the description is whether the place or person is so described as to leave the officers no doubt and no discretion as to the premises or persons to be searched. People v. Economy, 259 Ill.App.3d 504, 631 N.E.2d 827, 833, 197 Ill.Dec. 605 (4th Dist. 1994). Specificity is determined on a case-by-case basis and the degree of particularity required varies with the nature of the case and the material or items to be seized. Id.

When "a search warrant raises questions in an officer's mind as to which premises to search, the warrant should not be executed, because officers are prohibited from using their own discretion to determine which premises to search." People v. Urbina, 393 Ill.App.3d 1074, 1078, 916 N.E2d 1, 333 Ill.Dec. 882 92nd Dist. 2009).

In cases where the location to be searched is a building with multiple, separate units the search warrant "must specify the precise unit that is the subject of the search" in order to comply with the particularity requirement. United States v. White, 416 F.3d 634, 637 (7th Cir. 2005).

A search warrant that expressly includes only a defendant's residence can also authorize searches within the curtilage of the home described in the warrant. This was the situation in People v. Valle, 2015 IL App (2d) 131319. In Valle, a search warrant was issued for the defendant and his residence. During the execution of the warrant, the officers searched a detached garage and recovered cocaine for which the defendant was charged and convicted. The defense filed a motion to suppress arguing that the search exceeded the scope of the warrant as it limited any search to the defendant's person and the residence described in the warrant. The appellate court disagreed holding that the garage was located within the curtilage of the home. "Necessarily, if the curtilage is considered part of the home for purposes of the fourth amendment's protection against warrantless searches, then the curtilage must be considered part of the home for purposes of a warrant to search that home. In other words, a warrant to search the home legitimizes the search of those areas considered under the fourth amendment to be part of that home." Valle, 2015 IL App (2d) 131319, paragraph 14.

Errors or omissions in the address of the location to be searched do not automatically invalidate a search warrant. People v. Powless, 199 Ill.App.3d 952, 557 N.E.2d 946, 957, 146 Ill.Dec. 4 (2nd Dist. 1990). In Powless, the warrant contained an erroneous address of the location to be searched. The Powless court held that because there was no evidence that the officers who executed the warrant had any doubt or exercised any discretion regarding the premises that they were authorized to search, there was no violation of the defendant's rights. Powless, 597 N.E.2d at 946. The court reasoned that because the officer's knew which building they intended to search and there were no other buildings in the area that matched the description in the warrant, there was sufficient identification of the location to be searched in the warrant. Id.

Referring to the affidavit for search warrant can aid in finding that a warrant has the requisite specificity under the law. People v. Bauer, 102 Ill.App.3d 31, 429 N.E.2d 568, 571, 57 Ill.Dec. 670 (2nd Dist. 1981). In Bauer, the search warrant failed to state the name of the city where the address that was the subject of the warrant was located. The search warrant stated that the residence was located at 1024 Oakley Avenue in Winnebago County. The Bauer court held that because the affidavit stated "[t]hat 1024 Oakley Avenue was a one family dwelling, grey in color with red trim on top located on the west side of Oakley. This location is within the State of Illinois, County of Winnebago, City of Rockford" and that the defendant introduced no evidence to establish

the existence of any single family home, gray with red trim dwelling located in Winnebago County other than the one that the police searched, the failure to designate the city on the warrant itself was a technical deficiency that did not create a reasonable probability of confusion. Bauer, 429 N.E.2d at 570-571.

Inaccuracies in the description in a search warrant regarding a residence to be searched will not necessarily invalidate a warrant if the officer who applied for the warrant also executed the warrant. People v. Burmeister, 313 Ill.App.3d 152, 728 N.E.2d 1260, 1267, 245 Ill.Dec. 903 (2nd Dist. 2000); People v. Redmond, 43 Ill.App.3d 682, 357 N.E.2d 204, 206, 2 Ill.Dec. 227 (1st Dist. 1976). In Redmond, there was a discrepancy between the search warrant describing the apartment to be searched, as the ground floor apartment while the apartment was located on the first floor. The court held that the discrepancy did not affect the defendant's substantial rights in part because the officer who served the warrant was the same person who swore to the complaint for search warrant. Redmond, 357 N.E.2d at 206.

The same general principles of specificity govern the description of a person whom a search warrant authorizes be searched. A search warrant must describe the person to be searched with sufficient particularity to avoid leaving the executing officer any doubt or discretion regarding who is to be searched. People v. Curry, 100 Ill.App.3d 405, 426 N.E.2d 1118,1122, 55 Ill.Dec. 279 (1st Dist. 1981); People v. Hicks, 49 Ill.App.3d 421, 364 N.E.2d 440, 445, 7 Ill.Dec. 279 (1st Dist. 1977). In Curry, the warrant stated the defendant's full name, an alias for her first name, height, weight, a description of her complexion and a range of the defendant's age. Curry, 426 N.E.2d at 1119.

There is no blanket prohibition against a search warrant failing to contain the name of the person to be searched. A search warrant that does not have any name or a warrant with only a first name may be valid on its face if the warrant includes other facts such as a physical description and a location where the person may be found and the warrant describes the person to be searched in such a manner as to leave the executing officer no doubt or discretion as to where to search. People v. Simmons, 210 Ill.App.3d 692, 569 N.E.2d 591, 595, 155 Ill.Dec. 410 (2nd Dist. 1991). In Simmons, the description of the individual was that of a young black male, five feet eight inches tall, weighing 180 pounds, approximately twenty-two years of age. Id. The court further held that the description was more limited than it appeared as most blacks have dark hair and dark eyes. Id. The court further held that the description would fit a large number of people in the city where the warrant was executed and was prohibited as a general warrant. Id.

The Simmons court held that the description could have been held to be sufficiently specific had the affiant in support of the warrant participated in its execution as the affiant knew the person described in the search warrant. Simmons, 591 N.E.2d at 595. The Simmons court reasoned that the chance for a mistake in executing the warrant is greatly decreased because the officer executing the warrant already knows whom he is supposed to search. Simmons, 591 N.E.2d at 595 citing State v. Malave, 127 N.J.Super. 151, 361 A.2d 706, 708 (1974).

Along the same lines, an informant's on the scene identification of the defendant was held to be sufficient to cure a grossly inaccurate description of the defendant in the search warrant. People v. Velez, 204 Ill.App.3d 318, 562 N.E.2d 247, 254, 149 Ill.Dec. 783 (1st 1990).

ii. Specificity of items to be seized

The requirement of specificity likewise applies to the description of the property to be seized. A minute and detailed description of the property to be seized is not required, but the property must be so definitely described that the officer making the search will not seize the wrong property. People v. Collins, 70 Ill.App.3d 413, 387 N.E.2d 995, 1005, 26 Ill.Dec. 165 (1st Dist. 1979) quoting People v. Prall, 314 Ill. 518, 145 N.E. 610, 612 (1924). In determining the adequacy of a description a court must avoid placing an emphasis upon technical detail at the expense of common sense. Collins, 387 N.E.2d at 1005. The warrant must not allow the police to use their unfettered discretion in determining which objects to seize. Id.

A warrant that describes the items to be seized as exactly as is possible at the current stage of an investigation is permissible. People v. Wolski, 83 Ill.App.3d 17, 403 N.E.2d 528, 533, 38 Ill.Dec. 297 (2nd Dist 1980). In Wolski, the defendant challenged the search warrant because the complaint failed to list any of the items to be searched for and seized and because the warrant called for the seizure of "articles of clothing with blood or male or female secretions thereon." Wolski, 403 N.E.2d at 533. The court held that any defect regarding the complaint was a technical defect that did not affect the defendant's substantial rights and that reading the complaint and the search warrant together described the items to be seized as exactly as was possible at that stage of the investigation and sufficiently limited the discretion to be exercised by the officers in conducting the search. Id.

Simply put, in determining whether a search warrant gives adequately sufficient information regarding items to be seized, the court should consider what degree of descriptive detail is reasonable given the nature of the items involved and the progress of the police investigation at the time the warrant was issued. People v. Capuzi, 308 Ill.App.3d 425, 720 N.E.2d 662, 667, 242 Ill.Dec. 41 (2nd Dist. 1999).

Depending on the nature of a case, a general description of the items to be searched for and seized may suffice. This was the situation in People v. Mitchell, 61 Ill.App.3d 99, 377 N.E.2d 1073, 18 Ill.Dec. 437 (1st Dist. 1978). In Mitchell the defendant was convicted of murder. A search warrant in the case authorized the search of the defendant's home and directed the seizure of "any clothing, weapons, instruments, articles or contraband which may have been used in the commission of or which constitute evidence of the offense of murder." Mitchell, 377 N.E.2d at 1075. The Mitchell court held that a more detailed description of the items was not possible under the circumstances of the case and that precise description of the property necessarily yields to the concern inherent in the need for obtaining available evidence as soon as

possible before there is an opportunity for the destruction or alteration of the evidence. Mitchell, 377 N.E.2d at 1076. The court further held that it was significant that the officer who investigated the welfare of the victim and observed the crime scene was the same individual who secured and executed the warrant. Id. The court stated that the warrant was adequately specific because it was limited by reference to the offense of murder and further limited in fact by the information contained in the complaint and found at the scene of the crime, information of which the executing officer was aware. Mitchell, 377 N.E.2d at 1077.

A general description of the property to be seized will not suffice, however, if the police have a specific description of the property available to them. People v. Batac, 259 Ill.App.3d 415, 631 N.E.2d 373, 379, 197 Ill.Dec. 370 (2nd Dist. 1994). A general description of property will not be enough if the items to be seized impact a First Amendment right, as when books and other papers are sought in an attempt to determine whether the ideas or opinions expressed in those books or papers may form the basis of a criminal complaint. Stanford v. Texas, 379 U.S. 476, 13 L.Ed. 2d 431, 85 S.Ct. 506, 511-12 (1965). Where items of a specific nature are to be seized, a description of the characteristics of that property is sufficient especially where, to a trained officer, the items are easily identified as contraband. See People v. Curry, 56 Ill.2d 162, 306 N.E.2d 292 (1973) and People v. McCarty, 356 Ill.App.3d 552, 826 N.E.2d 957, 292 Ill.Dec. 521 (5th Dist. 2005).

B. Execution of the search warrant

1. Time of execution

725 ILCS 5/108-6 provides that a search warrant is to be executed within 96 hours from when it was issued. There does not appear to be any real legal reason why the legislature established 96 hours as the cutoff time. The Revised Committee Comments to 725 ILCS 5/108-6 note that the time limit "is an arbitrary figure with an eye to giving the officer some leeway as a practical matter, and at the same time denying him unbridled discretion." A search warrant's authorization to search expires upon the execution of the warrant and any reentry to the searched location requires some other legally sound justification. People v. Carter, 2016 IL App (3d) 140958, paragraph 27, citing State v. Trujilo, 624 P.2d 44, 48 (N.M. 1981).

2. Who may execute a search warrant

725 ILCS 5/108-5 provides that a search warrant is to be directed for execution to all peace officers of the state. The statute also provides that a judge issuing a warrant may direct the warrant to be executed by any person specially named in the warrant.

Police officers may execute search warrants anywhere in the state and not just in their own jurisdiction. People v. Carnivale, 61 Ill.2d 57, 329 N.E.2d 193 (1975). The Carnivale court reasoned that limiting a police officer to the territorial limits of the officer's own city or county would needlessly hamper and unnecessarily delay the

execution of a search warrant which must be executed within the time prescribed by the statue. See also People v. Fragoso, 68 Ill. App.3d 428, 386 N.E.2d 409, 25 Ill. 138 (1st Dist. 1979).

3. Use of force in executing a search warrant

(a) Generally

725 ILCS 5/108(a) provides that all necessary and reasonable force may be used to effect entry into a building or property to execute a search warrant.

Because Illinois has no statutory a requirement that officers knock and announce their purpose before entering a dwelling, the propriety of such an entry must be determined by constitutional standards. People v. Condon, 148 Ill.2d 96, 592 N.E.2d 951, 954, 170 Ill.Dec. 27 (1992). The purpose of the knock and announce rule is to notify the person inside of the presence of the police and of the impending intrusion, give that person time to respond, avoid violence and protect privacy as much as possible. Id. The failure of law enforcement officers to knock and announce is not a *per se* constitutional violation but the presence or absence of such an announcement is an important consideration in determining whether a subsequent entry to arrest or search is reasonable. Id. If at the time of an unannounced entry the defendant is not present and there is no property damage resulting form the unannounced entry, there is no violation of the defendant's constitutional rights. People v. Hancock, 301 Ill.App.3d 786, 704 N.E.2d 431, 235 Ill.Dec. 82 (4th Dist. 1992).

The United States Supreme Court has held that violation of the "knock and announce" rule does not require suppression of evidence found in a search. Hudson v. Michigan, 547 U.S. 586, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006). The appropriate remedy under Hudson is suing the police.

(b) Sufficient time before entry

There are no rigid rules for determining whether the police have allowed sufficient time before forcing entry into a dwelling but the pause of only a few seconds before breaking in a door is not sufficient time to allow the defendant to respond. People v. Riddle, 258 Ill.App.3d 253, 630 N.E.2d 141, 196 Ill.Dec. 444 (2nd Dist. 1994).

While a wait of a few seconds was insufficient in Riddle, the Illinois Supreme Court in People v. Saechao, 129 Ill.2d 522, 544 N.E.2d 745, 750, 136 Ill.Dec. 59 (1989) held that where five to ten seconds elapsed between announcement and entry, during which time the police officers stood at the threshold of the residence and received no response form the occupants, the period of time that elapsed before the officers entered the residence was sufficient. The Saechao court further held that even though the officers announced their authority but not their purpose, the knock and announce criteria were substantially met and the search was constitutional. Id.

A ten-second gap between the police announcing their office and breaking down the defendant's door was held to be sufficient as a large amount of cocaine was possibly located inside of the home and one or more residents were possibly present inside. People v. Moser, 356 Ill.App.3d 900, 827 N.E.2d 1111, 1121-22, 293 Ill.Dec. 230 (2nd Dist 2005). Another ten-second gap between announcement and entry was upheld in People v. Kelver, 258 Ill.App.3d 153, 630 N.E.2d 1284, 1287, 197 Ill.Dec. 160 (2nd Dist. 1994). Fifteen second gaps where upheld in People v. Cobb, 97 Ill.2d 465, 455 N.E.2d 40, 74 Ill.Dec. 1 (1983) and in People v. Mathes, 69 IllApp.3d 275, 387 N.E.2d 39, 41, 25 Ill.Dec. 582 (3rd Dist. 1979).

The United States Supreme Court, in United States v. Banks, 124 S.Ct. 521, 157 L.Ed.2d 343, 124 S.Ct. 521 (2003), while choosing not to adopt a bright-line rule, unanimously held that a fifteen to twenty second wait between announcement and entry was reasonable given the facts of the case and satisfied the Fourth Amendment.

(c) Use of subterfuge

Absent the use of force, there is no prohibition against the use of subterfuge to gain entry to a home to execute a search warrant. People v. Bargo, 64 Ill.App.3d 1011, 382 N.E.2d 83, 84, 21 Ill.Dec. 789 (1st Dist. 1978). In Bargo, the police officer dressed as a United States postman and the defendant allowed the officer into her home at which time the officer identified himself. Bargo, 382 N.E.2d at 87.

A police officer intentionally activating the defendant's car alarm to get the defendant to exit his apartment and thereby simplifying the execution of a search warrant was held to be proper in People v. Witherspoon, 216 Ill.App.3d 323, 576 N.E.2d 1030, 1036, 160 Ill.Dec. 76 (1st Dist. 1991). See also People v. Sunday, 109 Ill.App.3d 960, 441 N.E.2d 374, 65 Ill.Dec. 461 (2nd Dist. 1982) also affirming the use of subterfuge in the execution of a search warrant.

(d) Insufficient evidence for unannounced or forced entry

1. People v. Wright, 183 Ill.2d 16, 697 N.E.2d 693, 231 Ill.Dec. 908 (1998): Even though the defendant was an alleged gang member, and during the weeks leading up to the execution of the warrant there was transient presence of other gang members who had violent backgrounds at his residence, an unannounced entry was unreasonable;

2. People v. Oullette, 78 Ill.2d 511, 401 N.E.2d 507, 36 Ill.Dec. 666 (1979): Officer's personal knowledge of the defendant's possession of a handgun and officer's testimony that he was informed that drugs were kept in a gray box on a dresser near the defendant's bathroom and that the defendant never permitted anyone to enter the premises until the visitor fully identified himself was not enough to allow an unannounced entry into the residence as there was insufficient evidence to show the likelihood that the handgun would be used against the officer;

3. People v. Stephens, 18 Ill.App.3d 817, 310 N.E.2d 755 (1st Dist. 1974): the belief that the defendant was in possession of a narcotic that might readily be destroyed was insufficient reason to uphold an unannounced entry into the defendant's apartment;

4. People v. Conner, 56 Ill.App.3d 565, 371 N.E.2d 106, 13 Ill.Dec. 411 (1st Dist. 1977): The presence of easily disposable narcotics coupled with the fortress-like qualities of the defendant's building and the fact that numerous search warrants had been executed at the same premises in the past did not justify an unannounced entry into the defendant's residence;

5. People v. Richard, 34 Ill.App.3d 621, 339 N.E.2d 400 (1st Dist. 1975): As there was no prior conduct of the defendant to suggest that an announcement would result in the destruction of evidence or any movement of the defendant while the officers were outside the door, there was insufficient justification for an unannounced entry;

6. People v. Condon, 148 Ill.2d 96, 592 N.E.2d 951, 170 Ill.Dec. 271 (1992): The belief that there were several weapons in the house to be searched did not justify an unannounced entry as there was no evidence that the officers reasonably believed that the weapon or weapons would be used against them if they proceeded with the ordinary announcement. The presence of weapons alone does not justify an unannounced entry. See also People v. Krueger, 175 Ill.2d 60, 675 N.E.2d 604, 221 Ill.Dec. 409 (1996);

7. People v. Riddle, 258 Ill.App.3d 253, 630 N.E.2d 141, 196 Ill.Dec. 444 (2nd Dist. 1994): The presence of drugs, guns and a pit bull on the defendant's premises did not justify a simultaneous knock, announce and entry as there was no evidence that the defendant would use the gun against the officers, or that the defendant had quick means to dispose of the drugs and there was no showing other than the term pit bull to show the basis for determining whether the dog was dangerous.

e) Sufficient evidence for unannounced or forced entry

1. People v. Mathes, 69 Ill.App.3d 275, 387 N.E.2d 39, 25 Ill.Dec. 582 (3rd Dist. 1979): Manner of entry was reasonable where the police gave loud oral announcements of authority and purpose, repeatedly knocked on wooden door and waited fifteen seconds and received no response before they began to forcibly enter through the front door;

2. People v. Conner, 78 Ill.2d 525, 401 N.E.2d 513, 36 Ill.Dec. 672 (1979): Officer's belief that defendant possessed narcotics, their knowledge that defendant kept buckets of water near a toilet to facilitate the disposal of

contraband, their knowledge of the impregnable security maintained on the doors and windows of the apartment and their knowledge that on a prior unexpedited search warrant execution guard dogs had been loosed on the officers all justified an unannounced forced entry into the defendant's apartment;

3. People v. Fant, 66 Ill.App.3d 991, 384 N.E.2d 563, 23 Ill.Dec. 769 (3rd Dist. 1978) and People v. Boykin, 65 Ill.App.3d 738, 382 N.E.2d 1369, 22 Ill.Dec. 614 (3rd Dist. 1978): Forcible entry allowed where officers knocked and announced but received no response from within defendant Fant's house and the officers heard scuffling noses that sounded like people running away from inside the apartment and reasoned that the occupants of the house might be destroying evidence. Fant and Boykin were co-defendants.

4. People v. Jackson, 37 Ill.App.3d 279, 345 N.E.2d 509 (4th Dist. 1976): The evidence that the officers believed that the defendant possessed marijuana which could easily be destroyed, knocked several times on defendant's door and called out to him but received no response and saw movement behind a window curtain justified an unannounced entry;

5. People v. Maiden, 210 Ill.App.3d 390, 569 N.E.2d 120, 155 Ill.Dec. 120 (1st Dist. 1991): The officers had justification to make an immediate and forced entry into the defendant's home where the officers saw the defendant standing in front of his house and when the defendant became aware of the officers' presence he ran into the house and locked the door, thereby refusing the officers entrance into the home, as it was reasonable for the officers to believe that the defendant was either attempting to destroy evidence or arm himself;

6. People v. Hardin, 179 Ill.App.3d 1072, 535 N.E.2d 1044, 129 Ill.Dec. 279 (2nd Dist. 1989): Statement that defendant made to the officers six months before during a prior search warrant at the defendant's home stating that the officers were fortunate that the defendant did not get his gun justified the same officers' failure to knock and announce before executing a subsequent warrant at the defendant's home as the defendant's prior statement created a reasonable apprehension of danger;

7. People v. Seaberg, 262 Ill.App.3d 79, 635 N.E.2d 126, 200 Ill.Dec. 25 (2nd Dist. 1994): The police had a reasonable apprehension of danger justifying a forced unannounced entry where the defendant handled a pistol in the presence of an undercover officer while transacting a cocaine sale three weeks prior to the search and the defendant told the undercover officer that he always kept the pistol loaded coupled with the fact that just prior to the forced entry officers telephoned the defendant and engaged

him in conversation in order to lessen the defendant's access to the gun during the unannounced forced entry;

8. People v. Miller, 87 Ill.App.3d 1055, 409 N.E.2d 505, 42 Ill.Dec. 890 (2nd Dist. 1982): An informant's statements to the police to the effect that the defendant was cautious in his drug dealing and the fact that the police faced two locked doors and a flight of stairs before entry to where the defendant stored his drugs justified the lack of announcement.

Just as in almost every other area of search and seizure, the facts of the case will go a long way in determining whether an unannounced, forced entry is justified. The same principle applies where officers, in executing a search warrant, decide to make an unannounced forced entry based on things that happen at the location of the search warrant. It is important that the officers note what specific **facts** lead them to make the forced entry in their police reports as well as be able to articulate those facts at a hearing on a pre-trial motion.

4. Scope of search

In looking for items named in a search warrant, the officers are free to search anywhere the object of the search could reasonably be expected to be found. People v. Economy, 259 Ill.App.3d 504, 631 N.E.2d 827, 833, 197 Ill.Dec. 605 (4th Dist. 1994). See also People v. Ingram, 143 Ill.App.3d 1083, 494 N.E.2d 148, 98 Ill.Dec. 221 (4th Dist. 1986). Ingram held that fingerprint evidence taken from a pistol was admissible where the seized pistol was not described in the search warrant, as the pistol was a receptacle for the fingerprints, which were specifically named in the warrant. Ingram, 494 N.E.2d at 151.

It is important to keep in mind that any search, even one that is conducted pursuant to a warrant, must be reasonable in its scope and intensity. Looking in places where objects of the search could not reasonably be expected to be found will convert the search into an unacceptable general search. People v. Brown, 153 Ill.App.3d 307, 505 N.E.2d 405, 408, 106 Ill.Dec. 99 (3rd Dist. 1987). In Brown, the officers were searching for stolen stereo equipment including a cartridge, which is the small unit on a turntable that includes the needle. In looking for the cartridge, the officers looked through photo albums and the defendant's personal papers. The court held that the search was converted into an unacceptable search because not only were these areas that the cartridge could not reasonably be expected to be located but also because the officers failed to search in the most obvious location for the cartridge-among the other stereo equipment that was discovered at the defendant's residence. Id.

Additionally, an officer, in executing a search warrant may seize other illegal or evidentiary items under the plain view doctrine. The plain view doctrine allows a police officer to seize an item when (1) the officer is lawfully located in the place where he observed the object, (2) the object is in plain view, and (3) the incriminating nature of the

item is immediately apparent. People v. Madison, 264 Ill.App.3d 481, 637 N.E.2d 1074, 202 Ill.Dec. 338 (1st Dist. 1994).

Items that are neither in plain view nor are not specifically named in a search warrant may still be subject to a valid search and seizure pursuant to the search warrant. This was the situation in People v. Kruger, 327 Ill.App3d 839, 764 N.E.2d 138, 261 Ill.Dec. 847 (4th Dist. 2002). In Kruger, the defendant was convicted of first-degree murder and during the investigation of the murder the police obtained a search warrant for the defendant's vehicle. The warrant authorized a search of the defendant's vehicle and the seizure of "clothing belonging to [defendant], clothing bearing evidence of bloodstains, shoes, crowbar, ski mask and gloves, any bludgeon, tire iron, or object capable of causing the blunt force trauma to the victim or other items which constitute the evidence of murder." Kruger, 764 N.E.2d at 139. The police executed the search warrant and seized clothing, a chrome casing, a steering wheel cover, a door strap, and an ashtray as well as the recovery of fingerprint lists and the swab of a visible stain on the chrome casing taken from the defendant's car. Id. Approximately two months after the officer's executed the warrant, a blood stain on the chrome casing taken from the defendant's car was analyzed and found to contain DNA that matched the victim's profile. Kruger, 764 N.E.2d at 140. The trial court granted the defendant's motions to suppress the recovered fingerprint and DNA evidence as the court found that they were not in plain view or described in the warrant. Id.

The appellate court reversed the trial court's ruling. The Kruger court held that as the search warrant authorized the search of the defendant's vehicle, the search could include a search for fingerprint and blood samples and that it was not necessary that the search warrant state that the search would be performed by the use of fingerprint lifts or swabs. Kruger, 746 N.E.2d at 142. The court also noted that the search of the defendant's vehicle was conducted reasonably as it did not involve destructive testing or extensive disassembly of the vehicle. Id. As to the chrome casing, which was not mentioned in the warrant, the court held that the police could seize it if it had "potential evidentiary value as a receptacle of the described item, absent flagrant disregard for the limitations of the search warrant" and it was also subject to lawful seizure "if it had sufficient nexus to the described items and could not practically be tested inside the vehicle."

A search warrant that expressly includes only a defendant's residence can also authorize searches within the curtilage of the home described in the warrant. This was the situation in People v. Valle, 2015 IL App (2d) 131319. In Valle, a search warrant was issued for the defendant and his residence. During the execution of the warrant, the officers searched a detached garage and recovered cocaine for which the defendant was charged and convicted. The defense filed a motion to suppress arguing that the search exceeded the scope of the warrant as it limited any search to the defendant's person and the residence described in the warrant. The appellate court disagreed holding that the garage was located within the curtilage of the home. "Necessarily, if the curtilage is considered part of the home for purposes of the fourth amendment's protection against warrantless searches, then the curtilage must be considered part of the home for purposes

of a warrant to search that home. In other words, a warrant to search the home legitimizes the search of those areas considered under the fourth amendment to be part of that home." Valle, 2015 IL App (2d) 131319, paragraph 14.

a) Search of items removed from location of search

A situation that often arises is where the police, while executing a search warrant, remove items from the location of the search and then, at a later time, search the removed items. This usually arises where the police seize computers, pagers, cell phones or locked containers such as safes or strong boxes, remove them from the location of the search and then search the items at a later date. It is important to keep in mind that the search warrant authorizes a search of only what is named in the warrant. This is usually a person or place. When the police remove items from the location named in the warrant, transport them to a different location and then open and search the items, this search is not authorized in the search warrant unless it is specifically mentioned in the warrant. A new warrant or consent to search the item is needed. See People v. Philips, 346 Ill.App.3d 487, 805 N.E.2d 667, 282 Ill.Dec. 48 (3rd Dist. 2004).

There have been exceptions to this rule. Some courts have upheld the off-site examination of computer equipment seized pursuant to a valid search warrant. See United States v. Hay, 231 F.3d 630, 637 (9th Cir. 2000); United States v. Lacy, 119 F.3d 742, 746-47 (9th Cir. 1997); United States v. Upham, 168 F.3d 532, 536 (1st Cir. 1999); People v. Donath, 357 Ill.App.3d 57, 827 N.E.2d 1001, 1013, 293 Ill.Dec. 120 (1st Dist. 2005).

The Lacy court reasoned that an off-site examination of the defendant's computer for contraband was justified because of the time, expertise and controlled environment needed for a proper analysis of the defendant's computer. Lacy, 119 F.3d at 746-47. A portion of the affidavit for the search warrant in the Donath case "focused on the difficulty in searching a computer at the place where it is recovered due to the need for an extensive search. Because computer evidence is very vulnerable to intentional or unintentional modification, a controlled environment is necessary to protect the evidence contained therein." Donath, 827 N.E.2d at 1005.

5. Detention and search of persons on premises

a) General considerations

725 ILCS 5/108-9 provides that a person executing a search warrant may reasonably detain to search any person in the place at the time to protect the officer from attack or to prevent disposal or concealment of any instrument, articles or things particularly described in the warrant. This section pertains to individuals who are not named in the search warrant and are present at the location where the warrant is executed. This section, however, does not authorize routine searches of anyone who happens to be on the premises regardless of the circumstances. People v. Boykin, 65 Ill.App.3d 738, 382 N.E.2d 1369, 1372, 22 Ill.Dec. 614 (3rd Dist. 1978). Even though the statute does not

require it, persons searched under the authority of this section must have a sufficient connection with the premises or with the person described in the search warrant. People v. Gutierez, 109 Ill.2d 59, 485 N.E.2d 845, 846 92 Ill.Dec. 799 (1985).

The definition of "person at the place" includes persons who approach the premises during the execution of a search warrant. People v. Chestnut, 398 Ill.App.3d 1043, 1053, 921 N.E.2d 811, 336 Ill.Dec. 955 (4th Dist. 2010) citing United States v. Jennings, 544 F.3d 815, 818 (7th Cir. 2008).

The factors that a court is to consider regarding the issue of sufficient connection include the status of the person, where the person resided, the person's conduct and the purpose of the person's presence. Gutierez, 485 N.E.2d at 846. Independent probable cause must be shown in order to conduct a search of a person located on the premises but whose search is not authorized by a warrant. Id. The language "reasonably detain to search" in the statute requires that the officer can express at least an articulable and reasonable suspicion that either a search or detention or both of the individual is for an enumerated purpose of the statute. People v. Miller, 74 Ill.App.3d 177, 392 N.E.2d 271, 29 Ill.Dec. 714 (1st Dist. 1979). Each search is to be judged by a test of reasonableness and the essential question is whether the circumstances confronting the officer at the time of the search are such as to warrant a person of reasonable caution to believe the action taken was appropriate. People v Campbell, 67 Ill.App.3d 748, 385 N.E.2d 171, 174, 24 Ill.Dec. 404 (3rd 1979). The determination of what is a reasonable detention under this section is fact specific. People v. Hess, 314 Ill.App.3d 306, 732 N.E.2d 674, 678, 247 Ill.Dec. 619 (4th Dist. 2000).

This issue was looked at in great detail in People v. Conner, 358 Ill.App.3d 945, 832 N.E.2d 442, 295 Ill.Dec. 291 (1st Dist. 2005). In Conner, the defendant was appealing his conviction for UUW by Felon. He was present in an apartment when the police executed a search warrant. The defendant was not named in the search warrant. During the execution of the search warrant, the police detained and handcuffed the defendant. The police then ran a name check on the defendant and found that he was wanted on an outstanding arrest warrant. A subsequent investigation led the police to the pistol for which the defendant was convicted of possessing. The Conner court looked to the United States Supreme Court's decisions in Michigan v. Summers, 452 US 692, 69 L.Ed.2d 340, 101 S.Ct. 2587 (1981) and in Muehler v. Mena, 544 U.S. 93, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005) in determining that the defendant was lawfully detained and handcuffed during the execution of the search warrant.

In determining the justification for detaining an occupant of a location being searched pursuant to a valid search warrant, the Summers court noted the inquiry is to look at both the law enforcement interest and the nature of the articulable facts supporting the detention. Summers, 425 U.S. at 702. The Court found three law enforcement interests that support detention. Those interests are: (1) preventing flight in the event that incriminating evidence is found during the search; (2) minimizing the risk of harm to the police and occupants if the police routinely exercised unquestioned command of the situation; and (3) facilitating the orderly completion of the search by having the occupant

of the premises present to open locked doors and containers to avoid the use of force which could damage the property and could delay the completion of the search. Summers, 452 U.S. at 702-03. With respect to the nature of the articulable facts that support the detention, the Summers court held that the existence of a valid search warrant, issued by a neutral and detached magistrate to search a home for criminal activity establishes probable cause that some individual in that home was committing a crime which, thereby, gave an objective justification for detaining the occupants of a home. Summers, 452 U.S. at 703.

Applying the Summers analysis, the Conner court first balanced the nature of the intrusions against the governmental interests in justifying it. The Conner court held that there was a valid search warrant to search the apartment in which the defendant was an occupant and, therefore, the police had probable cause to believe that the law was being violated which authorized a substantial invasion of privacy of the persons living in the apartment. Conner, 832 N.E.2d at 452. The Conner court held that the defendant was merely detained in order for the police to take control of the situation before conducting a search and that the police did not exploit the defendant's detention or unduly prolong it. Conner, 832 N.E.2d at 452-53.

The Conner court next considered the governmental interests justifying the defendant's detention. The Conner court held that there was an objective justification for the defendant's detention as there was a search warrant for the apartment. Conner, 832 N.E.2d at 453. Even though the defendant did not reside in the apartment it was "significant that he was present in a house that a neutral magistrate had found probable cause to believe contained narcotics." *Id*. Additionally, the court reasoned, the defendant was not simply some innocent bystander in the house as he "voluntarily connected himself to this house and its occupants." *Id*. There was an additional law enforcement interest in preventing flight should the police find incriminating evidence and in holding the defendant to prevent him from interfering with the search warrant's execution. *Id*.

The Conner court then turned to whether the police had a valid law enforcement interest in minimizing the risk of harm to the officers. Even though there was no mention of any specific threat to the officers, the court commented that the execution of a search warrant is the type of police activity that may lead to sudden violence and attempts to hide of destroy evidence as there was testimony that the defendant was detained for the officer's safety. *Id*. The court specifically stated, "[w] hen the officers entered…to search for narcotics, they faced a confined, unfamiliar environment that was likely to be dangerous." *Id*. The court held that the dual concerns of officer safety and evidence preservation justified the restraining of the defendant and other individuals in the apartment and that "[t] he character of the intrusion on defendant and its justification were reasonable and proportional to law enforcement's legitimate interest in preventing flights in the event that incriminating evidence was found and in minimizing the risk of harm to the officers. *Id*.

The court held that the final justification of the Summers analysis, facilitating the orderly completion of the search if the occupants of the premises were present to open

locked doors and containers to prevent damage to property, was not present, it was not dispositive of the case as the intrusion on the defendant was slight and nearly all of the law enforcement interests were present. Conner, 832 N.E.2d at 454.

Next the court determined whether the police's handcuffing of the defendant was justified. The court looked to Muehler v. Mena, 544 U.S. 93, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005) where the United States Supreme Court held that the authority to use reasonable force is inherent in the ability to detain an occupant in the location being searched. Muehler, 161 L.Ed.2d at 307. The Muehler court further held that using handcuffs in inherently dangerous situations minimizes the risk of harm to officers and occupants and that it is reasonable to use handcuffs when there is need to detain multiple individuals. Muehler, 161 L.Ed.2d at 308. In applying Muehler, the Conner court held that the officers' need to detain and handcuff several people, including the defendant, to prevent them from interfering in the search was reasonable. Conner, 832 N.E.2d at 454-55. The court also noted that the defendant's detention lasted only a few minutes. Conner, 832 N.E.2d at 455.

Even though a person on the premises may be detained and searched, the police may not conduct any "custodial interrogation" of the individual unless they have "an articulable basis for suspecting criminal activity." Summers, 452 U.S. at 699; Conner, 832 N.E.2d at 447; People v. Chestnut, 398 Ill.App.3d 1043, 1053, 921 N.E.2d 811, 336 Ill.Dec. 955 (4th Dist. 2010).

b) Detention/Search of persons on premises upheld

1. People v. Gutierez, 1089 Ill.2d 59, 485 N.E.2d 845, 92 Ill.Dec. 799 (1985): The facts that the defendant answered the door of the premises, attempted to forcibly bar the officers from entering the premises, was nervous and unable to sit down after being told by the officers to do so, and had bulges in the pockets of his pants satisfied the requirements of 725 ILCS 5/108-9.

2. People v. Campbell, 67 Ill.App.3d 748, 385 N.E.2d 171, 7 Ill.Dec. 279 (3rd Dist. 1979): A search of the defendant's purse was reasonable in light of the facts that the police were executing a search warrant for narcotics and had already discovered a large quantity of narcotics when the defendant, with whom the officers were familiar, entered the room without knocking or otherwise announcing her presence.

3. People v. Redmiles, 191 Ill.App.3d 198, 547 N.E.2d 724, 138 Ill.Dec. 557 (4th Dist. 1989): The defendant's turning around and running back into the house after seeing approximately nine to twelve police officers created a sufficient connection to the premises and probable cause to search the defendant during the execution of a search warrant.

4. In re C.K., 250 Ill.App.3d 834, 620 N.E.2d 569, 189 Ill.Dec. 601 (2nd Dist. 1993): The facts that juvenile was found asleep, on the floor at 5:30 a.m. in a bedroom where cocaine was in plain view was sufficient grounds to search the juvenile. The court further held that the juvenile was not a social guest in the residence as he was in a location at a time when one would not normally expect to find a social guest. C.K., 620 N.E.2d at 571. The court further held the determination of probable cause is a common sense one and that the officers were not required to conduct a thorough investigation of the juvenile's connection with the premises. Id.

5. People v. Pittman, 216 Ill.App.3d 598, 575 N.E.2d 967, 159 Ill.Dec. 160 (4th Dist. 1991): There was sufficient evidence to allow the police to order the defendant to the ground, handcuff him and search him where he was one of a group of individuals present in a room with marijuana and drug paraphernalia in plain view on a nearby coffee table.

6. People v. Sunday, 109 Ill.App.3d 960, 441 N.E.2d 374, 65 Ill.Dec. 461 (2nd Dist. 1982) and Michigan v. Summers, 452 U.S. 692, 69 L.Ed.2d 340, 101 S.Ct. 2587 (1981): It is constitutionally permissible to detain an occupant of the premises who was found on the steps of the house described in a search warrant to be searched for contraband.

(c) Detention/Search of persons on premises not upheld

1. People v. Miller, 74 Ill.App.3d 177, 392 N.E.2d 271, 29 Ill.Dec. 714 (1st Dist. 1979): There were insufficient grounds to search the defendant where police, after completing search of an apartment pursuant to a search warrant, answered a knock on the apartment door and ordered the defendant into the apartment and then searched her as the search authorized by the warrant had been completed, the defendant's connection with the apartment was not apparent and the officers could not articulate any specific facts that would indicate the necessity to detain and search the defendant.

2. People v. Simmons, 210 Ill.App.3d 692, 569 N.E.2d 591, 155 Ill.Dec. 410 (2nd Dist. 1991): A person may not be searched during the execution of a search warrant simply because that person happens to be present on the premises unless there is a sufficient connection between the person searched and the premises or independent probable cause to search the person. The facts of this case are similar to the facts in Pittman (#5 above).

3. People v. Kathleen Gross, 124 Ill.App.32d 1036, 465 N.E.2d 119, 80 Ill.Dec. (3rd Dist. 1984): A person's mere presence at an apartment during the execution of a search warrant naming others did not, without more, did not justify a search of the defendant's person and purse.

4. People v. Merriweather, 261 Ill.App.3d 1050, 634 N.E.2d 361, 199 Ill.Dec. 522 (2nd Dist. 1994): Defendant was held not to be "in the place at the time" as called for in the statute where officers were executing a search warrant for the second floor apprehended the defendant either outside the ground floor entrance to the building or just outside the first floor apartment as no evidence placed the defendant in the second floor apartment.

5. Illinois v. Yabarra, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979): A search warrant authorizing the search of a bar and bartender, without more, did not justify search of customers in the bar.

6. People v. Chestnut, 398 Ill.App.3d 1043, 921 N.E.2d 811, 336 Ill.Dec. 955 (4th Dist. 2010): Search of defendant who rang door bell of home where search warrant was being executed, was allowed into home by police, who appeared nervous and unzipped his coat was not upheld as defendant's activities did not suggest a reasonable suspicion of criminal activity.

(d) Detention of persons while a warrant is obtained

The United States Supreme Court in Illinois v. McArthur, 531 U.S. 326, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001) allowed the police to prevent an individual from entering his home while other police officers obtained a search warrant for the defendant's home. In McArthur, the defendant's wife asked the police to accompany her to her home where she lived with the defendant in order to keep the peace while she removed her belongings from the residence. When the wife came out of the home she told the police that the defendant hid marijuana under a couch inside the home. The officers asked the defendant if they could search the home and the defendant refused. One of the officers went to obtain a search warrant for the home while the other officer remained at the scene. The defendant came out of the home and a police officer told the defendant that he could not go back into his home unless he was accompanied by the police officer. The defendant was prevented from entering his home for two hours. The other officer returned with a search warrant for the home and the search resulted in the officers finding marijuana and drug paraphernalia in the home. The court held that the warantless seizure of the defendant was reasonable and was lawful under the circumstances. The court considered several factors in reaching its conclusion. The court held that the police had probable cause to believe that the defendant's home contained evidence of a crime and contraband and had good reason to fear that, unless restrained, the defendant would destroy the drugs before the police could return with a warrant. McArthur, 121 S.Ct. at 950. The court also held that the police made reasonable efforts to reconcile their law enforcement needs with the demands of privacy in that they neither searched the home nor arrested the defendant until they obtained a warrant and imposed a significantly less restrictive restraint on the defendant by preventing him from entering the home unaccompanied and that the officers left the defendant's home and belongings intact until a warrant was issued. McArthur, 121 S.Ct. at 950-51. The court also found that the two-hour restraint

the police imposed on the defendant was for a limited period of time. McArthur, 121 S.Ct. at 951.

(e) Detention of persons who leave immediately before execution of the warrant

The analysis in Summers has been extended to apply to the detaining and transporting of occupants who leave the premises immediately before the execution of the search warrant and are detained as soon as practicable after leaving. The key factor in these types of cases is whether the police detained the individual as soon as practicable after seeing him leave the location where the search warrant is to be executed. People v. Hill, 2012 IL App (1st) 102028; United States v Bullock, 632 F.3d 1004, 1020 (7th Cir. 2011). See also United States v. Cavazos, 288 F.3d 706 (5th Cir. 2002) and United States v. Cochran, 939 F.2d 337 (6th Cir. 1991).

C. Anticipatory search warrants

An anticipatory search warrant is a search warrant that is issued when there is probable cause to believe that at some future time, but not presently, certain evidence of a crime will be located at the specified place. People v. Nwosu, 284 Ill.App.3d 538, 672 N.E.2d 366, 219 Ill.Dec. 858 (1st Dist. 1996). The most common situations involving anticipatory search warrants are postal interdiction cases where the post office or private parcel carriers such as UPS notify the police that they have intercepted a package containing drugs. The police then seek to have a search warrant issued that will be executed only if the package is delivered.

The execution of the search warrant is contingent upon the occurrence of a specific event at some certain future time when evidence of a crime will be located at a specific place. The judge issuing the anticipatory search warrant should make the warrant contingent on the specified events that are listed in the complaint and warrant.

In drafting the search warrant, language should be included to specifically state that the warrant will only be executed if the contingency occurs. For example the warrant and the complaint should state words to the effect that: "This search warrant will only be executed if the above described UPS parcel bearing tracking number ABC123456789 are accepted into the third floor apartment at 123 Main Street, Chicago, Cook County, Illinois."

The Illinois Supreme Court has held that anticipatory search warrants do not violate either the fourth amendment to the United States Constitution or the search and seizure clause of the Illinois Constitution. People v. Carlson, 185 Ill.2d 546, 708 N.E.2d 372, 376, 236 Ill.Dec. 786 (1999).

D. Lost or destroyed warrants

From time to time a situation may be encountered where a search warrant in a criminal case has been inadvertently lost or destroyed. In this situation the prosecution, or the defense, may seek to restore the warrant pursuant to the Court Records Restoration Act, 705 ILCS 85/1 *et seq.* People v. Wells, 182 Ill.2d 471, 696 N.E.2d 303, 311, 231 Ill.Dec. 311 (1998). Pursuant to that act, in order to restore a lost or destroyed search warrant, the party seeking restoration must: (1) file a written petition supported by affidavit showing the loss or destruction of the search warrant; (2) show that certified copies of the search warrant cannot be obtained; (3) show the subject of the lost or destroyed search warrant; (4) show that the loss or destruction occurred without fault of negligence of the party seeking restoration and (5) show that the loss or destruction of the search warrant, unless supplied, will or may result in damage to the party filing the petition. Id. The court is then to conduct a hearing on the petition and be satisfied that the statements in the application are true. Id.

As the Wells court noted, all this process does is determine whether a lost or destroyed search warrant will be restored and has no bearing on whether a defendant would prevail on a motion to suppress evidence as that entails a separate hearing. Wells, 696 N.E.2d at 311. The Wells court specifically refused to establish a rule that would mandate the prosecution to produce a warrant or a reliable copy of the warrant in order for a search pursuant to a warrant be justified. Id.

As an alternative to restoration pursuant to this statute, copies of the document may be authenticated pursuant to Illinois Rules of Evidence 901(b)(1), (b)(3), and (b)(4). See People v. Pitts, 2016 Il App (1st) 132205.

E. Good faith exception

The Illinois Legislature has created a good faith exception to the exclusionary rule. 725 ILCS 5/114-12(b)(2)(i) provides that good faith means that whenever a peace officer obtains evidence pursuant to a search warrant or arrest warrant obtained from a neutral and detached judge which is free from obvious defects other than non-deliberate errors in preparation and contains no material misrepresentations by any agent of the state and the officer reasonably believed the warrant to be valid.

This section essentially codified the United States Supreme Court decision in People v. Leon, 465 U.S. 897, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984). The court held that evidence seized in violation of the fourth amendment of the United States Constitution should not be suppressed where officers obtained the evidence while acting in reasonable reliance upon a search warrant issued by a detached and neutral magistrate. The rationale behind this decision is that the purpose of the exclusionary rule is to deter police misconduct and not to punish the errors of magistrates and judges. Leon, 104 S.Ct. at 3417. The Illinois Supreme Court adopted the Leon holding in People v. Stewart, 104 Ill.2d 463, 477, 473 N.E.2d 1227, 85 Ill.Dec. 422 (1984).

In short, the good faith exception to the exclusionary rule prevents the suppression of evidence obtained by an officer acting in good faith and in reliance on a

search warrant ultimately found to be unsupported by probable cause where the warrant was obtained from a neutral and detached judge, free from obvious defects other than non-deliberate errors in preparation and contains no material misrepresentations. People v. Beck, 306 Ill.App.3d 172, 713 N.E.2d 596, 602, 239 Ill. 65 (1st Dist. 1999).

The good faith exception does not apply in the following four situations: (1) where the judge who issued the warrant was misled by information in the affidavit that the affiant knew was false or would have known was false except for the affiant's reckless disregard of the truth; (2) where the issuing judge wholly abandoned the judicial role; (3) where the affiant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the warrant was so facially deficient that the executing officers cannot reasonably presume it to be valid. People v. Beck, 306 Ill.App.3d 172, 713 N.E.2d 596, 602, 239 Ill. 65 (1st Dist. 1999); People v. Hieber, 258 Ill.App.3d 144, 629 N.E.2d 235, 238, 195 Ill.Dec. 927 (2nd Dist. 1994); People v. Bryant, 383 Ill.App.3d 327, 889 N.E.2d 710, 321 Ill.Dec. 445 (4th Dist. 2008).

The good faith exception applies only when the officer believed at the time of the execution of the warrant that the warrant was proper and supported by probable cause to search the location was called for and the insufficiency of the warrant was discovered after it was executed. People v. Urbina, 393 Ill.App.3d 1074, 1081, 916 N.E.2d 1, 333 Ill.Dec. 882 (2nd Dist. 2009).

A police officer's decision to obtain a search warrant " is *prima facie* evidence that he was acting in good faith." United States v. Peck, 317 F.3d 754, 757 (7th Cir. 2003). In order to rebut the *prima facie* evidence a defendant "must show that the magistrate simply rubber-stamped the warrant application, the officers were dishonest or reckless in preparing the affidavit, or the warrant was so lacking in probable cause that no officer could have relied on it. *Id*.

A recent trend in these types of situations is a defendant attempting to introduce evidence at a motion to quash to the effect that an officer could have done more to investigate the information that is presented in a warrant or do something different than what the officer did in the case. This was an issue in People v. Bryant, 383 Ill.App.3d 327, 889 N.E.2d 710, 321 Ill.Dec. 445 (4th Dist. 2008). In Bryant, the trial court, over the state's objection, allowed the defendant to "present evidence from other current or retired police officers regarding their views on what should have been done in [the] case before obtaining a search warrant." Bryant, 383 Ill.App.3d at 350. The Bryant court held that the state's objection to the evidence should have been sustained because that evidence is "totally immaterial at a Leon hearing." *Id*. In so holding the Bryant court further held that "we agree with the views recently expressed by the Seventh Circuit Court of Appeals in United States v. Lowe, 516 F.3d 580, 584-85 (7th Cir. 2008) that '[t]he exclusionary rule serves to deter officers from obtaining warrants based on false information, not to deter them from obtaining warrants based on accurate information that is reported to the issuing state judge in a somewhat slipshod manner.'" Bryant, 383 Ill.App.3d at 350. The argument, or fact, that an officer was negligent or careless and could have done more

before seeking a warrant "has nothing to do with whether the good-faith exceptions apply." Bryant, 383 Ill.App.3d at 351.

The court in Bryant specifically admonished against a trial court second guessing about what officers could have done in a specific case:

> "Like Monday-morning quarterbacks, attorneys after the fact can always examine what the State presented to the issuing judge in support of the State's request for a search warrant and point out additional steps that the police could have taken or additional information that could have been called to the judge's attention. However, such arguments demonstrate a fundamental misunderstanding of the search-warrant process, which frequently is up against time constraints and primarily involves police officers, not "legal technicians." See *Gates,* 462 U.S. at 231, 76 L. Ed.2d at 544, 103 S.Ct. at 2328.
>
> After the fact, such legal technicians can always sift through all aspects of the case to point out where more could have been done. However, as the Supreme Court noted in *Ventresca* and *Leon,* among other cases, the constitutional scheme the framers envisioned to secure the fourth amendment's protection is that agents of the State would garner whatever evidence they possess and believe sufficient to justify the issuance of a search warrant and present it under oath to a neutral magistrate. If, in fact, the evidence is not sufficient in the magistrate's judgment to demonstrate probable cause for the issuance of a search warrant, the magistrate has a constitutional duty to reject the State's request. Indeed, a magistrate's oath to uphold the constitution requires the magistrate to do just that. Thus, the presentation to--and rejection by--the neutral magistrate is the brake upon the state's power that the Constitution envisions.
>
> On the other hand, if the State truthfully presents its evidence under oath in support of a search warrant to a neutral magistrate and the magistrate determines that sufficient probable cause is shown to issue the warrant, then the police officer-affiant has done all that the constitution requires of that officer."

Bryant, 383 Ill.App.3d at 351.

It is important to keep in mind that the good faith exception applies to cases that violate a defendant's fourth amendment rights and does not apply to cases where there is a violation of 725 ILCS 5/108-3, the statute that governs the issuing of search warrants in Illinois. The Leon case dealt with a search warrant where the search warrant was facially valid but was technically defective. The Illinois Appellate Court in People v. Taylor, 198 Ill.App.3d 667, 555 N.E.2d 1218, 144 Ill.Dec. 699 (3rd Dist. 1990) declined to create a good faith exception to the requirements of 725 ILCS 5/108-3. In Taylor, a judge approved the issuance of a search warrant over the phone in the middle of the night. The judge told the officers that he would sign the warrant in later that morning when the judge was in court. The officers executed the warrant after the judge orally stated that he would sign it but before he actually signed the warrant. As a result, the warrant, when executed, lacked the date, time and judge' signature. Even though both the prosecution and the defense stipulated that the officers acted in the good faith belief that the warrant was valid, this did not cure the obvious defects in the warrant so as to bring the warrant within the exclusionary exception of 725 ILCS 5/114-12. Taylor, 555 N.E.2d at 1221. The court further stated that the obvious omissions of the date, time and judge's signature prevented the warrant from being facially valid so as to come within the good faith exception. Id.

In the past courts had held that it was implicit in the good faith exception that the warrant actually existed. In People v. Anderson, 304 Ill.App.3d 454, 711 N.E.2d 24, 31-32, 238 Ill.Dec. 211 (2nd Dist. 1999) the court held that the good faith exception did not apply to a police encounter that was entirely the result of the officers' mistaken belief that there was a warrant for the defendant's arrest and, thus, when the defendant was detained and searched pursuant to an invalid warrant the evidence obtained during the search had to be suppressed. In Anderson, the officers arrested, searched and recovered narcotics from the defendant pursuant to an arrest warrant for the defendant. Unbeknownst to and unfortunately for the officers, however, was the fact that the warrant for the defendant's arrest had been previously vacated. Illinois courts consistently refused to apply the good faith exception in cases where no warrant is present. The rational was that for the good faith exception to exist, the officers must be relying on a facially valid arrest warrant that later proved to technically invalid. People v. Maurecek, 208 Ill.App.3d 87, 566 N.E.2d 841, 845, 152 Ill.Dec. 964 (2nd Dist. 1991).

The landscape in this area changed with the United States Supreme Court's opinion in United States v. Herring, 555 US 135, 172 L.Ed.2d 496, 129 S.Ct. 695 (2009). In Herring, the Supreme Court held that, the good faith exception to the exclusionary rule may apply where a police officer arrests a defendant based on information that there is an active arrest warrant, but the warrant is later determined to be invalid or have been recalled.

In Herring, a police officer saw the defendant and checked with two counties to determine whether there were any arrest warrants for the defendant. Upon hearing from one of the counties that there was an arrest warrant for the defendant, the officer placed the defendant under arrest. The officer recovered a pistol and methamphetamine after a search incident to arrest of the defendant. Shortly after the arrest of and recovery of

evidence from the defendant, the county that had issued the arrest warrant contacted the officer and told him that there was a mistake in their computer records and the arrest warrant had been recalled five months earlier. Herring, 129 S.Ct. at 698. The defendant filed a motion to suppress evidence. At the hearing, the evidence showed that mistakes like the one that had taken place had not occurred in the past and the officer testified that he never had reason to question the information about the county's warrant. Herring, 129 S.Ct. 704.

The court held that based on the facts of the case, the exclusionary rule did not apply. The court stated "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless or grossly negligent conduct or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level." Herring, 129 S.Ct. 702. In determining deterrence and culpability, the inquiry is "objective and not an inquiry into the subjective awareness of the arresting officers". Herring, 129 S.Ct. 703.

Simply stated the inquiry is:

> (1) Was the police conduct objectively reasonable and not the product of deliberate, reckless or grossly negligent conduct or the product of recurring or systemic negligence?
>
> (2) Would applying the exclusionary rule meaningfully deter the conduct in question?
>
> (3) Does the deterrent benefit of excluding the evidence outweigh the social costs-does the deterrent effect of exclusion outweigh the social cost of exclusion?

The court also warned that "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should misconduct cause a Fourth Amendment violation." Herring, 129 S.Ct. at 703.

At least two Illinois cases have discussed this area of the law. The first was People v. Morgan, 388 Ill.App.3d 252, 901 N.E.2d 1049, 327 Ill.Dec. 16 (4th Dist. 2009). In Morgan the officers obtained a list of outstanding LaSalle County warrants which contained the defendant's name, date of birth and address. In the past, when the officers obtained such a list they did so on the day the list was printed and the list was printed in the officer's presence. The list in the Morgan case was up to three days old and had not been printed in the officers' presence. Within five minutes of receiving the warrant list, the officers were at the defendant's residence. Prior to going to the defendant's residence the officers did not verify the validity of the warrant. Once at the residence officers entered and arrested the defendant and recovered drugs. After the defendant's arrest the officers called to check the validity of the warrant and inform the county that the warrant

was executed. The officers then learned that the warrant was invalid. Morgan, 388 Ill.App.3d at 255.

The court first held that fact that there was a fourth amendment violation does not automatically trigger the application of the exclusionary rule. "[W]hether the fourth amendment has been violated and whether exclusion is the appropriate sanction are separate issues." Morgan, 388 Ill.App.3d at 264. In determining whether the good faith exception applied the court looked to the test set out in Herring. The court held that the first consideration, what they termed police misconduct, clearly applied. The court held that the officers' reliance on a list that they know to be out of date and failing to attempt to verify the validity of the warrant was misconduct that was "at the very least, gross negligence, if not reckless or willful misconduct." Morgan, 388 Ill.App.3d at 265.

The court then looked at the second consideration, whether applying the exclusionary rule would meaningfully deter the misconduct. The court held that the officers' reliance on an outdated warrant list was conduct that could be deterred. Morgan, 389 Ill.App.3d at 265. Finally the court considered whether the cost of excluding the evidence is outweighed by the strong deterrent effect of the exclusion of the evidence. The court held that a reasonable officer would not have relied on an out of date list and that relying on the old list without making any effort to check the validity of the warrant was the type of reckless conduct that warranted exclusion of the evidence. Morgan, 388 Ill.App.3d 266-67. The court specifically stated that "[o]fficers cannot be willfully blind to the facts and then claim a good-faith reliance precludes suppression of the evidence. Morgan, 388 Ill.App.3d at 267.

The second case in this area is People v. Arnold, 394 Ill.App.3d 63, 914 N.E.2d 1143, 333 Ill.Dec. 331 (2nd Dist. 2009). In Arnold, the officer, who knew the defendant, saw the defendant driving. The defendant eventually ended up going into a store. The officer believed that there was an arrest warrant out for the defendant because the officer had done a warrant check a week earlier and the check revealed an outstanding arrest warrant for the defendant. After he observed the defendant, the officer radioed for verification of the warrant. While waiting for confirmation, the officer went into the store that the defendant had entered and handcuffed the defendant. After handcuffing the defendant, the officer received confirmation that the warrant was valid. A search incident to the arrest led to the defendant being charged with cocaine possession. Arnold, 394 Ill.App.3d 65-67.

At the suppression hearing, the evidence showed that the warrant was not valid at the time of the defendant's arrest. In applying the test set out in Herring the court held that the officer's conduct in handcuffing the defendant prior to receiving confirmation of the warrant's validity was unreasonable. Arnold, 394 Ill.App.3d at 77. The court then looked at whether exclusion of the evidence could deter the conduct. The court determined that the officer's decision to handcuff the defendant without confirming that there was an active arrest warrant was beyond negligence and was reckless. Accordingly, suppression of the evidence would deter that conduct. Lastly the court stated that "the need to deter the police from handcuffing a citizen without confirming whether there is a

valid warrant for his arrest" outweighed the costs of impeding the prosecution of the defendant. Arnold, 394 Ill.App.3d at 77.

In litigating cases involving the good faith exception prosecutors may encounter an argument from defense attorneys to the effect that the Illinois Supreme Court has repudiated or at least called into question the good faith exception. They will invariably cite to People v. Krueger, 175 Ill.2d 60, 675 N.E.2d 604, 221 Ill.Dec. 409 (1996) to advance this argument. The Krueger court held that the good faith exception does not apply, under the Illinois State Constitution, to situations where an officer conducts a warrantless search pursuant to a statute that is later held unconstitutional. This decision has no bearing on the good faith exception as it applies to searches carried out under facially valid search warrants that are later found to be technically invalid. In Krueger, the Illinois Supreme Court specifically stated, "our decision today does not impact the Leon good faith exception." See also People v. Walensky, 286 Ill.App.3d 82, 675 N.E.2d 952, 221 Ill.Dec. 528 (1st Dist. 1996) where the defendant made this type of claim.

F. Challenges to the veracity of the complaint for search warrant (Franks Motions)

1. General considerations

The affidavit supporting a search warrant is presumed valid but the fourth amendment requires that a hearing be held at the defendant's request if: (1) the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit; and (2) the purportedly false statement is necessary to the finding of probable cause. Franks v. Delaware, 438 U.S. 154, 56 L.Ed.2d 667, 98 S.Ct. 2674, 2676 (1978); People v. Taylor, 269 Ill.App.3d 772, 646 N.E.2d 1280, 207 Ill.Dec. 193 (1st Dist. 1995).

In litigating these cases please keep in mind that Franks, on its face, only applies to **governmental informants**. Franks v. Delaware, 438 U.S. at 170-71 (emphasis added). Where an informant appears to testify before the magistrate to testify regarding the allegations contained in the complaint for search warrant, "the case falls outside the scope of Franks." People v. Gorosteata, 371 Ill.App.3d 665, 666, 863 N.E.2d 709, 309 Ill.Dec. 77 (1st Dist. 2007). See also People v. Phillips, 265 Ill.App.3d 438, 637 N.E.2d 715, 721, 202 Ill.Dec. 182 (4th Dist. 1994), People v. Moser, 356 Ill.App.3d 900, 827 N.E.2d 1111, 1121, 293 Ill.Dec. 230 (2nd Dist. 2005), State v. Moore, 54 Wash.App 211, 773 P.2d 96 (1989), State v. Jensen, 259 Kan. 781, 790, 915 P.2d 109, 116 (1996) holding that even where the magistrate asked no questions of the informant and failed to probe the informant's reliability the defendant was not entitled to a Franks hearing.

In litigating this issue, it is imperative to be aware that courts have reached the opposite conclusion of all of these cases and held that the defendant was entitled to a Franks hearing. The court in People v. Caro, 381 Ill.App.3d 1056, 890 N.E.2d 526, 321 Ill.Dec. 804 (1st Dist. 2008) refused to follow Gorosteata and allowed the defendant to

challenge a warrant signed by a non-governmental informant. Likewise, People V. Chambers, 2014 IL App (1st) 120147 rejected Gorosteata and followed Caro in allowing a Franks hearing

The United States Supreme Court in Franks set out the procedure for challenging the affidavit for search warrant. The Franks court stated that: "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and a statement of supporting reasons should accompany them. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any non-governmental informant." Franks, 98 S.Ct. at 2684.

Prior to being able to attempt to challenge the veracity of a complaint for search warrant, the defendant must show that he has standing to do so. People v. Bond, 205 Ill.App.3d 515, 563 N.E.2d 1107, 1109, 151 Ill.Dec. 1 (1st Dist. 1990); People v. Casas, 234 Ill.App.3d 847, 601 N.E.2d 798, 176 Ill.Dec. 100 (1st Dist. 1992). That is, the defendant must assert a legitimate expectation of privacy in the area searched before the defendant can assert a violation of the fourth amendment. Rakus v. Illinois, 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978). The concept of standing is discussed in Section II.

In Illinois, substantial preliminary showing requires more than a defendant's mere denials but less than proof by a preponderance of the evidence. People v. Lucente, 116 Ill.2d 133, 506 N.E.2d 1269, 1276-77, 107 Ill.Dec. 214 (1987). The Lucente court held that the preliminary burden must be sufficiently rigorous to preclude automatic hearings in every case but not so onerous as to be unattainable. Lucente, 506 N.E.2d at 1277. The purpose of this substantial preliminary showing requirement is to discourage abuse of the hearing process and to enable spurious claims to be disposed of at an early stage in the proceedings. Lucente, 506 N.E.2d at 1276.

It is important to keep in mind that Franks intended to create only a limited right to this type of challenge. Lucente, 506 N.E.2d at 1277. In determining whether a defendant has made a substantial preliminary showing, the trial judge must keep in mind the presumption of the validity of the search warrant and the limited nature of the exception to that presumption of validity created by the Franks decision. Id.

Challenges to the deliberate falsity or reckless disregard of the truth of the **affiant**, and not of any non-governmental informant, are what the Franks decision allows. Franks, 98 S.Ct. at 2684 (emphasis added). The defendant's challenge, therefore, must be to the representations of the affiant and not to those of the informant. People v. Vauzanges, 158 Ill.2d 509, 634 N.E.2d 1085, 199 Ill.Dec. 731 (1994).

If a defendant fails to meet the initial burden of establishing a substantial preliminary showing the motion should be dismissed. People v. Martine, 106 Ill.2d 429, 475 N.E.2d 262, 87 Ill.Dec. 905 (1985).

Given the subjective nature of these cases, a trial court's ruling in determining whether a defendant has made a substantial preliminary showing will not be disturbed by an appellate court absent an abuse of the trial court's discretion. Lucente, 506 N.E.2d at 1277; People v. Antoine, 335 Ill.App.3d 562, 781 N.E.2d 444, 269 Ill.Dec. 647 (1st Dist. 2002).

If a defendant makes a substantial preliminary showing, a hearing on the motion does not automatically follow. If there is a substantial preliminary showing of alleged falsity or reckless disregard for the truth and there still remain sufficient grounds in the affidavit to support a finding of probable cause to issue the warrant, then no hearing is required. People v. Eyler, 133 Ill.2d 173, 549 N.E.2d 268, 282, 139 Ill.Dec. 756 (1989).

The Franks rationale also applies when information, necessary to determine probable cause has been intentionally or recklessly omitted from the affidavit for search warrant. People v. Sutherland, 223 Ill.2d 187, 218, 860 N.E.2d 178, 307 Ill.Dec. 524 (2006). The defendant "must show that the information omitted was material to the determination of probable cause and that it was omitted for the purpose of misleading the magistrate." People v. Stewart, 105 Ill.2d 22, 44, 473 N.E.2d 840, 85 Ill.Dec. 241 (1984). Material information is information that had it been included in the affidavit, it would have defeated probable cause. Sutherland, 223 Ill.2d at 219.

2. Cases where there were was no substantial preliminary showing

1. People v. Maiden, 210 Ill.App.3d 390, 569 N.E.2d 120, 155 Ill.Dec. 120 (1st Dist. 1991).

2. People v. Agyei, 232 Ill.App.3d 546, 597 N.E.2d 696, 173 Ill.Dec. 722 (1st Dist. 1992).

3. People v. Castro, 190 Ill.App.3d 227, 546 N.E.2d 662, 137 Ill.Dec. 717 (1st Dist. 1989).

4. People v. Holmes, 175 Ill.App.3d 495, 529 N.E.2d 1043, 124 Ill.Dec. 926 (1st Dist. 1988).

5. People v. Pavone, 241 Ill.App.3d 1001, 609 N.E.2d 906, 182 Ill.Dec. 372 (1st Dist. 1993).

6. People v. Torres, 200 Ill.App.3d 253, 558 N.E.2d 645, 146 Ill.Dec. 682 (1st Dist. 1990).

7. People v. Phillips, 265 Ill.App.3d 438, 637 N.E.2d 715, 202 Ill.Dec. 176 (1st Dist. 1994).

8. People v. Martine, 106 Ill.2d 429, 478 N.E.2d 262, 87 Ill.Dec. 905 (1985).

9. People v. Coss, 246 Ill.App.3d 1041, 617 N.E.2d 138, 186 Ill.Dec. 899 (1st Dist. 1993).

10. People v. McCoy, 295 Ill.App.3d 988, 692 N.E.2d 1244, 230 Ill.Dec. 78 (1st Dist. 1998).

11. People v. Antoine, 335 Ill.App.3d 562, 781 N.E.2d 444, 269 Ill.Dec. 647 (1st Dist. 2002).

12. People v. Freeman, 241 Ill.App.3d 682, 609 N.E.2d 713, 182 Ill.Dec. 179 (1st Dist. 1992).

13. People v. Sutherland, 223 Ill.2d 187, 218, 860 N.E.2d 178, 307 Ill.Dec. 524 (2006).

As mentioned earlier, cases in this area are extremely subjective and fact specific. Please read the cases and see how the factors play out and how the facts in those cases fit with the situations in the cases that you are litigating.

3. Cases where there were was a substantial preliminary showing

1. People v. Gomez, 236 Ill.App.3d 283, 603 N.E.2d 702, 177 Ill.Dec. 632 (1st Dist. 1992).

2. People v. Pearson, 271 Ill.App.3d 640, 648 N.E.2d 1024, 208 Ill.Dec. 102 (1st Dist. 1995).

3. People v. Adams, 259 Ill.App.3d 995, 631 N.E.2d 1176, 197 Ill.Dec. 717 (1st Dist. 1993).

G. Motions to Produce Informants

1. General considerations

Illinois Supreme Court Rule 412(j)(ii) states that disclosure of an informant's identity will not be required where his identity is a prosecution secret and a failure to disclose the informant's identity will not infringe the defendant's constitutional rights. A defendant's request for disclosure is not automatic and the defendant must demonstrate the necessity of disclosure. People v. Thornton, 125 Ill.App.3d 316, 465 N.E.2d 1049, 1051, 80 Ill.Dec. 703 (2nd Dist. 1984).

The purpose of this informer's privilege is to protect the public's interest in effective law enforcement. Rovario v. United States, 353 U.S. 53, 1 L.Ed.2d 639, 77 S.Ct. 623, 627 (1957). The privilege recognizes the obligations of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. Id. The proper application of the informer's privilege involves balancing the public interest in protecting the flow of information against the defendant's need for disclosure in order to prepare the defendant's defense. Rovario, 77 S.Ct. at 628-629. The balancing depends on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Id.

In Illinois, courts consider several factors in determining whether disclosure of the informer's identity is required. Those factors include: (1) whether the request for disclosure relates to the fundamental question of guilt or innocence; (2) whether the informant played an active role in the criminal act by participating in and/or witnessing the offense; (3) whether the informant assisted in setting up the commission of the crime as opposed to being merely a tipster; and (4) whether it has been shown that the informant's life or safety would likely be jeopardized by disclosure of his identity. People v. Taylor, 269 Ill.App.3d 772, 646 N.E.2d 1280, 1285, 207 Ill.Dec. 193 (1st Dist. 1995). Where an informant was neither a participant nor witness to the offense, courts have held that the informant is not a crucial witness or source of information for the defense and the informant's identity need not be disclosed. People v. Thornton, 125 Ill.App.3d 316, 465 N.E.2d 1049, 1052, 80 Ill.Dec. 703 (2nd Dist 1984) citing People v. Gonzalez, 87 Ill.App.3d 610, 410 N.E.2d 146, 43 Ill.Dec. 146 (1st Dist. 1980) and People v. Gresham, 96 Ill.App.3d 581, 421 N.E.2d 1053, 52 Ill.Dec. 190 (4th Dist. 1981).

2. Cases where defendant's burden not met

1. People v. Stoica, 163 Ill.App.3d 660, 516 N.E.2d 909, 114 Ill.Dec. 754 (1st Dist. 1987).

2. People v. Thornton, 125 Ill.App.3d 316, 465 N.E.2d 1049, 80 Ill.Dec. 703 (2nd Dist. 1984).

3. People v. Witherspoon, 216 Ill.App.3d 323, 576 N.E.2d 1030, 160 Ill.Dec. 76 (1st Dist. 1991).

4. United States v. Jefferson, 252 F.3d 937 (7th Cir. 2001).

5. People v. Devaux, 204 Ill.App.3d 392, 561 N.E.2d 1259, 149 Ill.Dec. 563 (1st Dist. 1990).

6. United States v. Bender, 5 F.3d 267 (7th Cir. 1993).

As mentioned earlier, cases in this area are extremely subjective and fact specific. Please read the cases and see how the factors play out and how the facts in those cases fit with the situations in the cases that you are litigating.

3. Cases where defendant's burden was met

1. People v. Raess, 146 Ill.App.3d 384, 496 N.E.2d 1186, 100 Ill.Dec. 121 (1st Dist. 1986).

2. People v. Chaney, 63 Ill.2d 216, 347 N.E.2d 138 (1976).

3. People v. Lewis, 57 Ill.2d 232, 311 N.E.2d 685 (1974).

4. People v. Woods, 139 Ill.2d 369, 565 N.E.2d 643, 152 Ill.Dec. 110 (1990).

V. Police-Citizen Interactions

It is well settled, black letter law that there are three tiers of police-citizen encounters. The first tier consists of arrests, which must be supported by probable cause. People v. Smith, 214 Ill.2d 338, 352, 827 N.E.2d 444, 292 Ill.Dec. 915 (2005). The second tier are brief, temporary investigative detentions, which must be supported by a reasonable, articulable suspicion of criminal activity. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 201 L.Ed.2d 1868 (1968). The final tier consists of consensual encounters, which involve no coercion or detention and therefore do not implicate any fourth amendment interests. People v. Gherna, 203 Ill.2d 165, 177, 784 N.E.2d 799, 271 Ill.Dec. 245 (2003). Each of these tiers is discussed in greater detail below.

It is important to note and recognize that the community caretaking function of the police is not one of the three tiers. Over the years, courts have mistakenly substituted community caretaking function as the third tier of police-citizen encounters in place of consensual encounters. Using the term community caretaking to describe the third tier is incorrect. People v. Luedemann, 222 Ill.2d 530, 544-45, 847 N.E.2d 187, 306 Ill.Dec. 94 (2006). The police's community caretaking function is discussed below.

VI. Legitimate Expectation of Privacy (The Concept Formerly Known as Standing)

A. General Considerations

An individual's capacity to invoke his fourth amendment protections depends on whether the party seeking the protection has a legitimate expectation of privacy in the invaded place. Minnesota v. Olson, 495 U.S. 91, 95, 110 S.Ct. 1684, 109 L.Ed.2d 55 (1990). An expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable. Olson, 495 U.S. at 95-96. The defendant bears the burden of establishing that he held a reasonable expectation of privacy in the place searched or the item seized. People v. Johnson, 114 Ill.2d 170, 499 N.E.2d 1355, 1364, 102 Ill.Dec. 342

(1986); People v. Delgado, 231 Ill.App.3d 117, 596 N.E.2d 149, 151, 172 Ill.Dec. 870 (1st Dist. 1992). A defendant generally has no legitimate expectation of privacy in evidence seized from a third party because the seizure invaded no right of the defendant. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). In short, a defendant cannot challenge the legality of another person's arrest as a basis for his own motion to suppress evidence. People v. James, 118 Ill.2d 214, 226, 514 N.E.2d 998, 113 Ill.Dec. 86 (1987).

The issue of a defendant's lack of a legitimate expectation of privacy must be raised at the hearing on the motion to suppress evidence or it is waived on appeal. People v. Holloway, 86 Ill.2d 78, 426 N.E.2d 871, 877, 55 Ill.Dec. 546 (1981). If, however, the state prevails on a motion to suppress on other grounds, then the issue is not waived on appeal. People v. Keller, 93 Ill.2d 432, 444 N.E.2d 118, 121, 67 Ill.Dec. 79 (1982). On appeal, whether an individual has a legitimate expectation of privacy is a legal question and the appellate court will apply a *de novo* standard of review. People v. Bower, 291 Ill.App.3d 1077, 685 N.E.2d 393, 395, 226 Ill.Dec. 290 (3rd Dist. 1997).

More and more defense attorneys try to argue that the fourth amendment applies to certain **places**, and, thus, the defendant should be able to contest a search of the particular area. This view is incorrect. The fourth amendment protects **people**, not **places**. Katz v. United States, 389 U.S. 347, 351, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967)(emphasis added). The Illinois Supreme Court recently stated that "whether the fourth amendment has been abridged cannot be assessed simply by looking at whether and to what extent a police officer has breached the boundaries of a particular structure. For fourth amendment purposes, a structure's boundaries have no significance standing alone. They are relevant insofar as they pertain to the reasonable privacy expectations of a particular person." People v. Torres, 214 Ill.2d 234, 824 N.E.2d 624, 632, 291 Ill.Dec. 768 (2005).

The relevant inquiry in this area is whether the disputed search and seizure has infringed an interest of the defendant, which the fourth amendment was designed to protect. The defendant must show that he, personally, has an expectation of privacy in the place searched and that this expectation is reasonable. People v. Rosenberg, 213 Ill.2d 69, 77, 820 N.E.2d 440, 289 Ill.Dec. 664 (2004). In determining whether an individual is able to challenge the constitutionality of a search and seizure a court is to consider: (1) ownership of the property seized; (2) whether the defendant was legitimately present in the area searched; (3) the defendant's possessory interest in the property seized; (4) prior use of the area searched or property seized; (5) the ability to control or exclude others' use of the property; and (6) a subjective expectation of privacy in the property. People v. Johnson, 114 Ill.2d 170, 499 N.E.2d 1355, 1364, 102 Ill.Dec. 342 (1986). Whether the defendant has a reasonable expectation of privacy in the area searched must be decided on the basis of the totality of the circumstances of the particular case. Johnson, *supra*. The element of ownership, while important, is not dispositive of the issue of standing. People v. Alexander, 272 Ill.App.3d 698, 650 N.E.2d 1038, 1043, 209 Ill.Dec. 65 (1st Dist. 1995). The remaining factors are of equal significance. Johnson, *supra.* The defendant challenging a search has the burden of establishing a

legitimate expectation of privacy in the searched property. Johnson, 114 Ill.2d at 191-192.

With regard to the second factor from Johnson, whether the defendant was legitimately present in the area searched, it should be noted that in two recent Illinois Supreme Court opinions, the court did not specifically include this factor in its listing of the relevant factors which establish a legitimate expectation of privacy. People v. Sutherland, 233 Ill.2d 187, 230, 860 N.E.2d 178, 307 Ill.Dec. 524 (2006), People v. Johnson, 237 Ill.2d 81, 90, 927 N.E.2d 1179, 340 Ill.Dec. 168 (2010).

B. Judicial estoppel and possessory interest

A legitimate expectation of privacy is more than whether the defendant had a possessory interest in the item seized. Oftentimes prosecutors will argue this factor as the sole reason the defendant lacks standing or will argue the lack of a possessory interest as one factor in trying to defeat a defendant's claim of standing. When arguing this issue, keep in mind the big picture of what you are trying to accomplish. In some situations, arguing a defendant's lack of possessory interest in the article that the police seized will mean that you cannot prevail at trial. The doctrine of judicial estoppel provides that when a party assumes a certain position in a legal proceeding, that party is estopped from assuming a contrary position in a subsequent legal proceeding. State of Illinois Department of Transportation v. Coe, 112 Ill.App.3d 506, 445 N.E.2d 506, 68 Ill.Dec. 58 (4th Dist. 1983); People v. Wisbrock, 223 Ill.App.3d 173, 584 N.E.2d 513, 165 Ill.Dec. 334 (3rd Dist. 1991).

In PCS, UUW or any other possession cases we are trying to prove that the defendant possessed the contraband that is the basis of the charge. By taking the position in a motion to suppress evidence that the defendant had no possessory interest in the dope or gun we cannot turn around, at trial, and argue that, not only did the defendant have a possessory interest in the item, but also the defendant possessed the item.

C. Specific areas

1. Prison cell

A defendant has no recognized expectation of privacy in his prison cell. Hudson v. Palmer, 468 U.S. 517, 526, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); People v. Clark, 125 Ill.App.3d 608, 466 N.E.2d 361, 363-364, 80 Ill.Dec. 909 (5th Dist. 1989).

2. Co-defendants and Co-conspirators

When a defendant is arrested with co-defendants or is charged as part of a conspiracy the defendant will often try to suppress evidence that was recovered from the co-defendants or co-conspirators. A defendant has no standing to do so. A defendant has standing only if his personal fourth amendment rights are violated. The fact that co-defendants or co-conspirators are affected when evidence is introduced against them at

trial does not grant them standing. United States v. Padilla, 508 U.S. 577, 123 L.Ed2d 635, 113 S.Ct. 1936, 1938 (1993). See also People v. James, 118 Ill.2d 214, 514 N.E.2d 998, 1003, 113 Ill.Dec. 86 (1987); People v. McNeil, 53 Ill.2d 187, 290 N.E.2d 602, 604 (1972); People v. Black, 52 Ill.2d 544, 288 N.E.2d 376, 382 (1972).

A person not the victim of an illegal arrest has no standing to seek suppression of the fruits of another person's illegal arrest. People v. Bell, 191 Ill.App.3d 877, 548 N.E.2d 397, 401, 139 Ill.Dec. 12 (1st Dist. 1989). A person who is aggrieved by an unreasonable search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not suffered any infringement of his fourth amendment rights. Alderman v. United States, 394 U.S. 165, 171, 89 S.Ct. 961, 22 L.Ed.2d 176 (1964); People v. Taylor, 245 Ill.App.3d 602, 614 N.E.2d 1272, 1276-77, 185 Ill.Dec. 587 (3rd Dist. 1993).

3. Automobiles

(a) Passengers

When dealing with situations where a passenger in a car alleges that his fourth amendment rights have been violated it is important to keep in mind what the defendant is challenging. Generally a defendant has standing to challenge the initial stop of the car in which he is a passenger, but does not always have standing to contest any search of the car arising out of the initial stop.

A defendant, as an occupant of a vehicle stopped by the police, can challenge the stop of the automobile because it entails an infringement on the passenger's personal freedom. People v. Kunath, 99 Ill.App.3d 201, 425 N.E.2d 486, 489, 54 Ill.Dec. 621 (2nd Dist. 1981). The United States Supreme Court recently unanimously reiterated this principle in Brendlin v. California, 551 U.S. 249, 168 L.Ed.2d 132, 127 S.Ct. 2400 (2007). The court noted that virtually every federal and state appellate court that has considered this issue has held that a passenger in a car may challenge the police's initial stop of a car. If the court finds that the initial stop was improper, the trial court will suppress any evidence subsequently seized as a direct result of the improper stop as fruit of the poisonous tree. People v. Myles, 62 Ill.App.3d 931, 934, 380 N.E.2d 944, 20 Ill.Dec. 735 (1978).

When the defendant, as passenger, contests the validity of the search of the car, he must show, like any other situation, that he has standing. There are circumstances where a passenger may have a legitimate expectation of privacy in certain areas of a vehicle. Contrary to what is often believed, the United States Supreme Court in Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) never issued a blanket denial of standing as to passengers in motor vehicles. Rakas, 439 U.S. 128, 149 at note 17. When a passenger challenges the search of an automobile he must show standing and the court is to look to the traditional factors in determining the issue. See People v. Juarbe, 318 Ill.App.3d 1040, 742 N.E.2d 607, 252 Ill.Dec. 739 (1st Dist. 2001).

When faced with this situation, there are two areas that can help you defeat a passenger's claim of standing. The first is to look to what particular area of the car that the police searched. A passenger's expectation of privacy can vary with the area that is searched. For example, a passenger has less of an expectation of privacy in the wheel well of a car as opposed to the passenger compartment. See Rakas, *supra.* and People v. Taylor, 245 Ill.App.3d 602, 614 N.E.2d 1272, 1278, 185 Ill.Dec. 587 (3rd Dist. 1993).

The second helpful area arises when the vehicle's driver consents to the search. Find out what the defendant did or said when the driver agreed to have the car searched. Did the defendant voice an objection? A failure to do so can be used to defeat a claim of standing. See People v. Juarbe, 318 Ill.App.3d 1040, 743 N.E.2d 607, 252 Ill.Dec. 739 (1st Dist. 2001). By failing to object, a defendant demonstrates that he has little, if any, possessory interest in the area searched. If he did so, he would have said so. It also shows that he has no ability to control or exclude others' use of the property. Finally it shows that the defendant had no subjective expectation of privacy. Again, if the defendant expected privacy in the area, he would have said something. When you couple these three factors with the fact that, as a passenger, the defendant does not own the car searched, you have four of the six factors in your favor.

Cases that have held that a defendant, as a passenger, has standing include:

1. People v. Taylor, 245 Ill.App.2d 602, 614 N.E.2d 1272, 185 Ill.Dec. 587 (3rd Dist. 1993).

2. People v. Kunath, 99 Ill.App.3d 201, 425 N.E.2d 486, 54 Ill.Dec. 621 (2nd Dist. 1981).

3. People v. Crest, 188 Ill.App.3d 768, 544 N.E.2d 825, 136 Ill.Dec. 139 (2nd Dist. 1989).

4. People v. Bunch, 327 Ill.App.3d 979, 764 N.E.2d 1189, 262 Ill.Dec. 72 (1st Dist. 2002).

5. People v. Ferris, 2014 IL App (4th) 130657.

Cases that have held that a defendant, as a passenger, lacked standing include:

1. People v. Juarbe, 318 Ill.App.3d 1040, 743 N.E.2d 607, 252 Ill.Dec. 739 (1st Dist. 2001).

2. People v. Manikowski, 186 Ill.App.3d 1007, 542 N.E.2d 1148, 134 Ill.Dec. 641 (5th Dist. 1989).

3. People v. Mezo, 170 Ill.App.3d 679, 525 N.E.2d 134, 121 Ill.Dec. 328 (5th Dist. 1988).

For a complete list of cases please see Ed Ronkowski's book. Please read the cases and see how the factors play out and how the facts in those cases fit with the situations in the cases that you are litigating.

(b) Rental cars

A person, in sole possession of a rental car, rented by another, without the owner's permission has no standing to contest a search of the car. People v. Bower, 291 Ill.App.3d 1077, 685 N.E.2d 393, 396, 226 Ill.Dec. 290 (3rd Dist. 1997). Oftentimes a person will rent a car and then give it to the defendant who then uses it to commit a crime. The defendant cannot challenge the search of the car if the owner of the rented car did not give the defendant authority to drive the car. Most rental agreements contain an area where the person renting the car is to list the name of any other individual who is authorized to drive the car. If the defendant's name is not there, a court is much less likely to accept a defendant's claim that he was authorized to drive the car. Keep in mind though, as discussed earlier, the defendant still could challenge the initial stop of the car.

(c) Stolen cars

It should go without saying that neither the driver of nor passenger in, a stolen vehicle has the standing to object to a search of a stolen vehicle. People v. Allen, 268 Ill.App.3d 279, 645 N.E.2d 263, 267, 206 Ill.Dec. 258 (1st Dist. 1995); People v. Henenberg, 55 Ill.2d 5, 302 N.E.2d 27, 31 (1973).

4. When the defendant says that the stuff isn't his or that he did not have it.

In the past, defendants charged with crimes of possession had automatic standing to seek suppression of the evidence against him. The rationale for this rule was that if the defendant admitted ownership of or a possessory interest in the evidence, then that admission could be used against them at trial. The United States Supreme Court abolished automatic standing in United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980). In Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) the Supreme Court abolished the rule that a defendant's admissions at a motion to suppress evidence were admissible at trial. Since Salvucci, a defendant must allege a possessory interest in the items seized or an invasion of a legitimate expectation of privacy in the area searched. Salvucci, 448 U.S. at 93. Keep in mind that ownership, while important, is not dispositive of the issue of standing. Salvucci, 448 U.S. at 91; People v. Alexander, 272 Ill.App.3d 698, 650 N.E.2d 1038, 1043, 209 Ill.Dec. 65 (1st Dist. 1995).

This issue comes up in drop cases or any other case where the defendant claims that the evidence recovered does not belong to him. The key area where you should focus is when did the defendant disclaim interest in the property. Courts should look to whether the defendant denied to the police an ownership or possessory interest in the property or whether the defendant denies such an interest at a suppression hearing. A mere disclaimer of a property interest made to the police prior to a search generally

should not result in a loss of standing. Such a disclaimer made at a suppression hearing, however, does result in a loss of standing. People v. Dowery, 174 Ill.App.3d 239, 528 N.E.2d 214, 217, 123 Ill.Dec. 669, 672 (1st Dist. 1988). When a defendant fails to ever claim an ownership or possessory interest in the property, the defendant loses standing to dispute the search and suppress the evidence. People v. Allen, 268 Ill.App.3d 279, 645 N.E.2d 263, 268, 206 Ill.Dec. 258, 263 (1st Dist. 1994). Other cases that hold that a defendant must claim a possessory interest in the property are:

1. People v. Casas, 234 Ill.App.3d 847, 601 N.E.2d 798, 176 Ill.Dec. 100 (1st Dist. 1992).

2. People v. Rice, 286 Ill.App.3d 394, 675 N.E.2d 944, 221 Ill.Dec. 520 (1st Dist. 1997).

3. People v. Wilcher, 145 Ill.App.3d 309, 495 N.E.2d 1001, 99 Ill.Dec. 266 (1st Dist. 1986).

4. People v. Morrison, 178 Ill.App.3d 76, 532 N.E.2d 1077, 127 Ill.Dec. 248 (4th Dist. 1988).

It is important to remember that in this area the defendant must show a possessory interest in the property or a legitimate expectation of privacy in the location searched. The court in People v. Davis, 187 Ill.App.3d 265, 543 N.E.2d 154, 134 Ill.Dec. 871 (1st Dist. 1989) held that a defendant had a legitimate expectation of privacy in the clothing that he was wearing and had standing to seek suppression of evidence that the police recovered from the defendant's pocket even though the defendant denied a possessory interest in that evidence. The Davis court held that ownership was one factor in determining standing and that while he disclaimed ownership in the property, the defendant never disclaimed his expectation of privacy in his person and the clothing that he wore on his body, and had standing to challenge the search. Davis, 543 N.E.2d at 156.

5. Guests/Defendants on another person's property

Another common situation is when the defendant is arrested on the property of another individual and the defendant wishes to suppress evidence that is recovered from the other person's property. These cases are generally fact specific and hinge upon the defendant's relationship to the area searched.

It is well settled law that overnight guests in a hotel or motel room have a legitimate expectation of privacy in the premises to give them standing. People v. Eichelberger, 91 Ill.2d 359, 438 N.E.2d 140, 63 Ill.Dec. 402 (1982). An overnight guest in a private home has a legitimate expectation of privacy in the home and may claim fourth amendment protections. Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684, 1688, 109 L.Ed.2d 85 (1990).

On the other hand, defendants who are guests or merely present in someone else's home or on another's property that is searched may not have standing. People v. Ervin, 269 Ill.App.3d 141, 645 N.E.2d 355, 359, 206 Ill.Dec. 350, 354 (1st Dist. 1994). The Illinois Supreme Court, in holding that a party guest did not have standing to contest a search of the apartment where the party was being, recently stated that "Illinois courts have repeatedly held that persons who are guests or merely present in someone else's home or on another's property when it is searched do not have the right to contest the legality of that search and seizure." People v. Torres, 214 Ill.2d 234, 824 N.E.2d 624, 631, 291 Ill.Dec. 768 (2005).

Simply being the sole occupant of a residence at the time of the search does not give a defendant standing to contest a search of the residence. People v. Delgado, 231 Ill.App.3d 117, 119, 596 N.E.2d 149, 172 Ill.Dec. 870 (1st Dist. 1992). Similarly, being present in the home of a friend, alone, is insufficient to confer standing to the defendant. People v. Bass, 220 Ill.App.3d 230, 243, 580 N.E.2d 1274, 1283, 162 Ill.Dec. 855 (1st Dist. 1991). A non-resident defendant had no standing to challenge the search of an apartment because he was only watching the apartment and had no privacy interest in the apartment. People v. Brown, 277 Ill.App.3d 989, 995, 661 N.E.2d 533, 214 Ill.Dec. 679 (1st Dist. 1996). A maintenance man was held to lack standing because he had no legitimate expectation of privacy in the house located on the property where he was cleaning up the grounds. People v. Harre, 263 Ill.App.3d 447, 454, 636 N.E.2d 23, 28, 200 Ill.Dec. 832 (5th Dist. 1994).

It is crucial to keep in mind, however, that the fact that there are questions about the defendant's permanent residence should not control whether there is standing. People v. Parker, 312 Ill.App.3d 607, 614, 728 N.E.2d 588, 593, 245 Ill.Dec. 506 (1st Dist. 2000). In some cases, a legitimate expectation of privacy may be found to exist for those individuals who are neither permanent residents of a home nor over-night guests. Parker, 728 N.E.2d at 594.

In Illinois, the storage of personal effects and other indicia of residence have been found to be sufficient to confer standing on non-overnight guests. People v. Ervin, 269 Ill.App.3d 141, 645 N.E.2d 355, 359, 206 Ill.Dec. 350, 354 (1st Dist. 1994). In Ervin, the defendant was held to lack a legitimate expectation of privacy in his ex-wife's home notwithstanding the defendant's weekly presence in her home with her permission to provide her with food and health care. The court held that the defendant lacked standing because he kept no clothing on the premises and had not stayed overnight for several years. Ervin, 645 N.E.2d at 360.

On the other hand, the fact that the defendant kept personal effects in a bedroom at his mother's home, coupled with evidence that the defendant had been using the bedroom prior to the search gave him a legitimate expectation of privacy in the property seized from the mother's home. People v. Parker, 312 Ill.App.3d 607, 614, 728 N.E.2d 588, 593, 245 Ill.Dec. 506 (1st Dist. 2000). A defendant had a legitimate expectation of privacy in a garage, owned by the defendant's sister, for which he had no key, because the defendant exercised ownership rights over some of the items contained in the garage

and the defendant operated a business from the property where the garage was located. People v. Alexander, 272 Ill.App.3d 698, 650 N.E.2d 1038, 1043, 209 Ill.Dec. 65, 70 (1st Dist. 1995).

All of these cases are fact specific. Please read the cases and see how the facts in those cases fit with the situations that you are litigating and how they fit into the determination of standing as set out in the Johnson decision.

VII. Investigatory/Terry stops

A. General considerations

There is no constitutional or statutory requirement that a police officer must have probable cause before the officer may stop an individual or an automobile. The United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 20 L.Ed. 889, 88 S.Ct. 1868 (1968) held that when a police officer observes unusual conduct, the officer may stop and detain a person without probable cause in order to investigate criminal activity. The officer, in stopping the individual, may question the person briefly. The officer may ask the individual a moderate number of questions to determine the person's identity and to try to obtain information confirming or dispelling the officer's suspicions, but the individual is not obligated to respond to the officer's inquiries. Berkmer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317 (1984).

Notwithstanding the Berkmer decision, the United States Supreme Court has recently held that there is no Fourth or Fifth Amendment violation in arresting and prosecuting an individual for refusing to tell a police officer his name. Hibel v. Sixth Judicial Court of Nevada, Humboldt County, 524 U.S. 177, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004). In Hibel, the defendant was arrested, prosecuted and convicted for a violation of Nevada's "stop and identify" statute. That statute requires an individual detained by the police, under suspicious circumstances, to identify himself. The court held that Terry principles allow a state to require a suspect to disclose his name during a Terry stop. As the initial stop of the defendant met the Terry requirements of being justified at its inception and reasonably related in scope to the circumstances which justified the initial stop, the court held that the statute did not violate the Fourth Amendment because the statute properly balances the intrusion on the individual's interests against the promotion of legitimate government interests. The request for identity is related to the purpose and rationale of Terry stops and the threat of criminal sanction ensures that the request does not lose all meaning. The court also held that the statute does not violate the Fifth Amendment because there is no danger of incrimination in disclosing a name or identity.

725 ILCS 5/107-14 codifies the Terry decision. That statute, states in part, that during a stop the officer "may demand the name and address of the person and an explanation of his actions." There is no criminal sanction, as in the Nevada statute, for an individual's failure to provide the requested information.

In order to justify a Terry stop, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion into the person's liberty. The Illinois Supreme Court has held that: "Viewed as a whole, the situation confronting the police officer must be so far removed from the ordinary that any competent officer would be expected to act quickly. The facts supporting the officer's suspicions need not meet probable cause requirements, but they must justify more than a mere hunch. The facts should not be viewed with analytical hindsight, but instead should be considered from the perspective of a reasonable officer at the time that the situation confronted him or her." People v. Thomas, 198 Ill.2d 103, 110, 759 N.E.2d 899, 259 Ill.Dec. 838 (2001). The Illinois Code of Criminal Procedure has codified the Terry decision at 725 ILCS 5/107-14.

The Terry court further held that when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, the officer may conduct a pat down search to determine whether the person is carrying a weapon. 88 S.Ct. at 1881. In other words, the right to frisk does not automatically follow the right to stop. People v. Ware, 264 Ill.App.3d 650, 636 N.E.2d 1007, 1010, 201 Ill.Dec. 575 (1st Dist. 1994). The sole justification for the search aspect of a Terry stop is the protection of the police officer and others in the vicinity and not to gather evidence. If the protective search goes beyond what is necessary to determine whether the suspect is armed, it is no longer valid under Terry and a court will suppress the fruits of that search. People v. Sorenson, 196 Ill.2d 425, 752 N.E.2d 1078, 1084, 256 Ill.Dec. 836 (2001). The Illinois Code of Criminal Procedure has codified this search provision at 725 ILCS 5/108-1.01.

In litigating these issues, it cannot be stressed enough that when an officer is conducting a search or a seizure that is an exception to the warrant requirement, the officer does not have to be correct but must always be reasonable. Illinois v. Rodriguez, 497 U.S. 177 (1990). This is because "the ultimate touchstone of the Fourth Amendment is reasonableness." Riley v. California, 573 U.S. ___, 134 S.Ct. 2473, 2482, 189 L.Ed.2d 430 (2014). Even in cases where there is probable cause to search an individual, courts consistently hold that the search conducted must still be reasonable. See People Zayed, 2016 IL App (3d) 140870 and People v. Carter, 2011 IL App (3d) 090238.

1. Approaching individuals

It is important to keep in mind that just because a police officer approaches an individual and questions that person does not automatically mean that there are any fourth amendment implications. The United States Supreme Court has stated that "even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual (citations omitted); ask to examine the individual's identification (citations omitted); and request consent to search his or her luggage (citations omitted)-- as long as the police do not convey a message that compliance with their requests is required." Florida v. Bostick, 501 U.S. 429, 434-35, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991).

In People v. Harris, 228 Ill.2d 222, 886 N.E.2d 947, 319 Ill.Dec. 823 (2008), the Illinois Supreme Court provided a summary of the holding in Bostick. "The general principles of Bostick can be summarized as follows: For purposes of the fourth amendment, an individual is "seized" when an officer " 'by means of physical force or show of authority, has in some way restrained the liberty of a citizen.' " Bostick, 501 U.S. at 434, 115 L. Ed. 2d at 398, 111 S. Ct. at 2386 (1991), quoting Terry, 392 U.S. at 19 n.16, 20 L. Ed. 2d at 905 n.16, 88 S. Ct. at 1879 n.16. "So long as a reasonable person would feel free 'to disregard the police and go about his business,' [citation], the encounter is consensual and no reasonable suspicion is required." Bostick, 501 U.S. at 434, 115 L. Ed. 2d at 398, 111 S. Ct. at 2386, quoting California v. Hodari D., 499 U.S. 621, 628, 113 L. Ed. 2d 690, 698, 111 S. Ct. 1547, 1552 (1991). If, however, when " 'all the circumstances surrounding the incident' " (Immigration & Naturalization Service v. Delgado, 466 U.S. 210, 215, 80 L. Ed. 2d 247, 255, 104 S. Ct. 1758, 1762 (1984), quoting United States v. Mendenhall, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509, 100 S. Ct. 1870, 1877 (1980)) are taken into account, the conduct of the police would lead a reasonable innocent person under identical circumstances to believe that he or she was not "free to decline the officers' requests or otherwise terminate the encounter" (Bostick, 501 U.S. at 436, 115 L. Ed. 2d at 400, 111 S. Ct. at 2387), that person is seized. Accordingly, the analysis hinges on an objective evaluation of the police conduct and not upon the subjective perception of the individual approached. Hodari D., 499 U.S. at 628, 113 L. Ed. 2d at 698, 111 S. Ct. at 1551." Harris, 228 Ill.2d at 246-47.

The Illinois Supreme Court has unequivocally reiterated this general principle. In People v. Luedemann, 222 Ill.2d 530, 552-53, 857 N.E.2d 187, 306 Ill.Dec. 94 (2006) the court restated the general rule that "the police may approach and question a person seated in a parked vehicle without that encounter being labeled a seizure. As Professor LaFave has noted, 'if an officer merely walks up to a person standing or sitting in a public place (or, indeed, who is seated in a vehicle located in a public place) and puts a question to him, this alone does not constitute a seizure.' 4 W. LaFave, Search and Seizure Sec. 9.4 (a), at 419-21 (4th ed. 2004). The 'seated in a vehicle' clause of the above passage is supported by a lengthy list of citations to the many state and federal decisions that have recognized this rule. See 4 W. LaFave, Search & Seizure Sec. 9.4(a) at 419-20, 420 n. 49 (collecting cases). In Murray, this court held that the mere approaching and questioning of a person seated in a parked vehicle does not constitute a seizure and listed many decisions from other jurisdictions that had reached the same conclusion. Murray, 137 Ill.2d at 391-93. Thus, any analysis of such a situation must begin with the recognition that the police may approach a person seated in a parked vehicle and ask questions of that person without that encounter being labeled a seizure. The encounter becomes a seizure only if the officer, through physical force or a show of authority, restrains the liberty of the vehicle's occupant. See Bostick, 501 U.S. at 434, 115 L.Ed.2d at 398, 111 S.Ct. at 2386." The Murray case that the court referred to is People v. Murray, 137 Ill.2d 382, 560 N.E.2d 309, 148 Ill.Dec. 7 (1990).

An officer can go beyond simply attempting to question an individual. An encounter does not turn into a seizure "when the officer utilizes some generally accepted means of gaining the attention of the vehicle occupant or encouraging him to eliminate

any barrier to conversation. The officer may tap on the window and perhaps even open the door if the occupant is asleep. A request that the suspect open the door or roll down the window would seem equally permissible, but the same would not be true of an order that he do so. Likewise, the encounter becomes a seizure if the officer orders the suspect to 'freeze' or to get out of the car." Luedemann, 222 Ill.2d at 557 quoting 4 W. LaFave, Search & Seizure Sec 9.4(a), at 433 (4th ed. 2004).

The test to determine whether the attempt at questioning an individual has turned into a seizure is objective. "The analysis requires an objective evaluation of the police conduct and does not hinge upon the subjective perception of the person involved." Luedemann, 221 Ill.2d at 551. Determining whether the defendant felt free to leave is analyzed form an objective standard by the court and is not to be construed literally. Luedmann, 221 Ill2d at 555. The analysis does not turn on whether the person "practically and realistically" felt free to refuse the officer's request. *Id*. The test "presupposes a reasonable **innocent** person." (Emphasis in original.) Leudemann, 222 Ill.2d at 551.

The factors that Mendenhall, Murray, and Luedemann hold that may indicate whether an individual is seized are:

1. The threatening presence of several officers;
2. The display of a weapon by an officer;
3. Some physical touching of the person of the individual;
4. The use of language or tone of voice indicating that compliance with the officer's request might be compelled.

The Luedemann court specifically rejected three factors, parking the police car in a manner that ordinary citizens may not, shining a flashlight into the car and the officer approaching the defendant's vehicle from the rear driver's side as opposed to walking straight up to the window as indicative of a seizure of an individual. Luedemann, 222 Ill.2d at 558-66.

Even if none of the factors are present, the encounter may still be found to be a seizure. The factors "are not exhaustive and … a seizure can be found on the basis of other coercive police behavior that is similar to the Mendenhall factors." Luedemann, 222 Ill.2d at 557. Factors that have been found to show that a seizure has occurred are "boxing the car in, approaching it on all sides by many officers, pointing a gun at the suspect and ordering him to place his hands on the steering wheel, or use of flashing lights as a show of authority." Luedemann, 222 Ill.2d at 557 quoting 4 W. LaFave, Search & seizure Sec. 9.4(a), at 435 (4th ed. 2004).

The court in People v. Lopez, 2013 IL App (1st) 111819, held that a person was not seized when the person was sitting in a stationary vehicle on a public street, and two officers approach the vehicle on foot, with one officer walking toward the driver's side and one toward the passenger's side, and ask to view the person's driver's license where there was no evidence that the officers drew their weapons, used a commanding tone of

voice or used their vehicle or bodies to block the vehicle from leaving. An excellent example of a consensual encounter leading to reasonable grounds for a Terry stop is People v. Fields, 2014 IL App (1st) 130209.

The fact that an officer activated his emergency lights does not automatically constitute a seizure. People v. Colquitt, 2013 IL App (1st) 121138. The Illinois Supreme Court has not addressed the issue of whether an officer's use of his emergency lights, alone or in combination with other law enforcement techniques always constitutes a seizure. People v. McDonough, 239 Ill.2d 260, 271 (2010).

An officer may approach the front door of an individual's residence to conduct an investigation as long as the officer enters an area impliedly open to the public. People v. Redman, 386 Ill.App.3d 409, 418 (2008). Police have the right to approach a home and knock because doing so does not go beyond that which any private citizen is able to do. Florida v. Jardines, 569 U.S. ___, ___, 133 S.Ct. 1409, 1416 (2013). In addition, "[a]n officer may go beyond the front door to investigate by approaching the back door of a residence-either when no one answers a knock on the front door or where a legitimate reason is shown for approaching the back door." Redman, 386 Ill.App.3d at 418.

Officers may also approach the back door of a residence where circumstances indicate that the officers may find the homeowners there. People v. Cannon, 2015 IL App (3d) 130672, para. 24, citing Alvarez v. Montgomery County, 147 F.3d 354, 356 (4th Cir. 1998). See also People v. Woodrome, 2013 IL App (4th) 130142.

2. Free to leave

In litigating this issue, it seems that many believe that a defendant uttering the magic words: "I did not feel free to leave!" resolves the question of whether the police have seized an individual. This is not and has never been the determining factor in this area. The rationale for this is straightforward. Given the inherent authority of a law enforcement officer and the innate feeling of most law abiding persons to cooperate with authority, "if the ultimate issue is perceived as being whether the suspect 'would feel free to walk away,' then virtually all police citizen encounters must in fact be deemed to involve a Fourth Amendment seizure." 4 W. LaFave, Search & Seizure Sec. 9.4(a), at 423-24 (4th ed. 2004).

It is long settled, black letter law that there is no constitutional violation when a police officer approaches a person in public to ask questions if that person is willing to listen. People v. Gherna, 203 Ill.2d 165, 178, 784 N.E.2d 799, 271 Ill.Dec. 245 (2003). Simply put, the police have the right to approach individuals, as to whom they have no reasonable suspicion and ask potentially incriminating questions. See Florida v. Bostick, 501 U.S. 429, 439, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991).

The fact that such an encounter may go beyond merely asking questions does not, without more, turn the encounter into a seizure. "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual

(citations omitted); ask to examine the individual's identification (citations omitted); and request consent to search his or her luggage (citations omitted)-- as long as the police do not convey a message that compliance with their requests is required." Bostick, 501 U.S. at 434-35.

The Illinois Supreme Court has unequivocally reiterated this general principle. In People v. Luedemann, 222 Ill.2d 530, 552-53, 857 N.E.2d 187, 306 Ill.Dec. 94 (2006) the Illinois Supreme Court restated the general rule that "the police may approach and question a person seated in a parked vehicle without that encounter being labeled a seizure. As Professor LaFave has noted, 'if an officer merely walks up to a person standing or sitting in a public place (or, indeed, who is seated in a vehicle located in a public place) and puts a question to him, this alone does not constitute a seizure.' 4 W. LaFave, Search and Seizure Sec. 9.4 (a), at 419-21 (4th ed. 2004). The 'seated in a vehicle' clause of the above passage is supported by a lengthy list of citations to the many state and federal decisions that have recognized this rule. See 4 W. LaFave, Search and Seizure Sec. 9.4(a) at 419-20, 420 n. 49 (collecting cases). In Murray, this court held that the mere approaching and questioning of a person seated in a parked vehicle does not constitute a seizure and listed many decisions from other jurisdictions that had reached the same conclusion. Murray, 137 Ill.2d at 391-93." The Murray case that the court referred to is People v. Murray, 137 Ill.2d 382, 560 N.E.2d 309, 148 Ill.Dec. 7 (1990).

Indeed, there are many situations where free to leave is not even the correct test to be applied in a certain situation. The Bostick court held that "free to leave" is the appropriate framework for analysis in cases where a person is walking down a street. Bostick, 501 U.S. at 435. In encounters where some factor other than police action has restrained an individual's freedom of movement, the proper test is "whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter." Bostick, 501 U.S. at 436. Courts have applied this analysis to persons seated on a bus, Bostick, and to individuals seated in a parked car, People v. Gherna, 203 Ill.2d 165, 784 N.E.2d 799, 271 Ill.Dec. 245 (2003) and People v. Luedemann, 222 Ill.2d 530, 857 N.E.2d 187, 306 Ill.Dec. 94 (2006).

The test to be applied in these situations "must begin with the recognition that the police may approach a person seated in a parked vehicle and ask questions of that person without that encounter being labeled a seizure. The encounter becomes a seizure only if the officer, through physical force or a show of authority, restrains the liberty of the vehicle's occupant. See Bostick, 501 U.S. at 434, 115 L.Ed.2d at 398, 111 S.Ct. at 2386." Luedemann, 222 Ill.2d at 552-53. In determining whether a seizure occurred, a court is to look to the four Mendenhall factors. "If those factors are absent, that means that only one or two officers approached the defendant, they displayed no weapons, they did not touch the defendant, and they did not use any language or tone of voice indicating that compliance with their requests was compelled. Obviously, a seizure is much less likely to be found when officers approach a person in such an inoffensive manor." Luedemann, 222 Ill.2d at 554.

Even if none of the factors are present, the encounter may still be found to be a seizure. The factors "are not exhaustive and … a seizure can be found on the basis of other coercive police behavior that is similar to the Mendenhall factors." Luedemann, 222 Ill.2d at 557. Factors that have been found to show that a seizure has occurred are "boxing the car in, approaching it on all sides by many officers, pointing a gun at the suspect and ordering him to place his hands on the steering wheel, or use of flashing lights as a show of authority." Luedemann, 222 Ill.2d at 557 quoting 4 W. LaFave, Search & seizure Sec. 9.4(a), at 435 (4th ed. 2004).

An officer can go beyond simply attempting to question an individual. An encounter does not turn into a seizure "when the officer utilizes some generally accepted means of gaining the attention of the vehicle occupant or encouraging him to eliminate any barrier to conversation. The officer may tap on the window and perhaps even open the door if the occupant is asleep. A request that the suspect open the door or roll down the window would seem equally permissible, but the same would not be true of an order that he do so. Likewise, the encounter becomes a seizure if the officer orders he suspect to 'freeze' or to get out of the car." Luedemann, 222 Ill.2d at 557 quoting 4 W. LaFave, Search & Seizure Sec 9.4(a), at 433 (4th ed. 2004).

What often happens in these types of cases is that defense attorneys will argue and judges will rule that even though none of the factors are present, realistically and practically speaking, the individual was seized. Courts are not to engage in this type of analysis. A court is not to conduct a "practical, realistic" inquiry in determining whether a seizure occurred. Luedemann, 222 Ill.2d at 554. What this seems to mean is that a court is only to determine whether the Mendenhall factors, or those similar in nature, exist. Much to the benefit of the prosecution, this is one area where a court is not to engage in a practical, common sense analysis and, instead, conduct a formulaic approach.

a. Officer's authority as pressure to cooperate

An argument that is commonly advanced in these types of situations is that the defendant felt pressured into cooperating because of the police officer's authority. There is no legal support for this contention. "[A] confrontation with a police officer is not a seizure on the basis that the officer's authority produces an inherent pressure to cooperate. Rather, as the leading commentator on the fourth amendment has suggested, an encounter between a police officer and a civilian 'is a seizure only if the officer adds to those inherent pressures by engaging in in conduct significantly beyond that accepted in social intercourse.'" People v. Castigilia, 394 Ill.App.3d 355, 358 (2009) quoting 4 Wayne R. LaFave, Search and Seizure Sec. 9.4 (a), at 425 (4th ed. 2004)).

3. Standards for the stop

As stated earlier, in order to justify a Terry stop, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion into the person's liberty. A reasonable stop must be based upon objective, articulable facts coupled with rational inferences rather than an

officer's subjective nonspecific hunch. People v. Bleitner, 189 Ill.App.3d 971, 546 N.E.2d 241, 246, 137 Ill.Dec. 487 (1st Dist. 1989).

A court is to determine the reasonableness of an officer's conduct by considering the facts, as a reasonable officer in the performance of his duties would have evaluated them and not by evaluating the officer's actions in terms of analytical hindsight. People v. Smithers, 83 Ill.2d 430, 415 N.E.2d 327, 332, 47 Ill.Dec. 322 (1980). This test does not turn on the subjective perception of the stopped individual. People v. White, 221 Ill.2d 1, 21-22 (2006).

In addition, the fact that there may be plausible innocent explanations for a defendant's conduct does not mean it was unreasonable for an officer to conduct a Terry stop. People v. Neuberger, 2011 IL App (2d) 100379, paragraph 8.

A court is to be mindful that the decision to make an investigatory stop is a practical one based on the totality of the circumstances. People v. Sorenson, 196 Ill.2d 425, 752 N.E.2d 1078, 256 Ill.Dec. 836 (2001). This standard is an objective one. People v. Christensen, 198 Ill.App.3d 168, 555 N.E.2d 746, 748, 144 Ill.Dec. 387 (4th Dist. 1990). Simply put, the objective facts known to the officer and not the officer's subjective rationale control the court's inquiry.

Cases in these areas are always fact specific. Whether a Terry stop is reasonable depends on the particular facts of each case with each case standing or falling on its own set of concrete facts. People v. Galvin, 127 Ill.2d 153, 535 N.E.2d 837, 846, 129 Ill.Dec. 72 (1989). See also People v. McGowan, 69 Ill.2d 73, 370 N.E.2d 537, 12 Ill.Dec. 733 (1977).

In analyzing Terry stop cases, courts are to conduct a dual inquiry. That inquiry is whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances that justified the stop in the first place. Terry, 392 U.S. at 19-20. "[A] seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests provided by the Constitution." Illinois v. Caballes, 534 U.S. 405, 407, 160 L.Ed.2d 842, 125 S.Ct. 834 (2005).

4. Objective standard

No matter which version, free to leave or free to decline, is used, the analysis does not turn on the subjective perception of the individual who had contact with the police. People v. White, 221 Ill.2d 1, 21-22, 849 N.E.2d 406, 302 Ill.Dec. 614 (2006). Courts are to make an objective assessment of the police conduct. *Id*. Courts are to consider whether the facts available to the officer at the moment of the seizure justify the police officer's actions. People v. Mayberry, 2015 IL App (2d) 150341, paragraph 14. Additionally, it is important to keep in mind that all of this analysis presupposes that the reasonable person is a reasonable innocent person. Bostick, 501 U.S. at 438.

In assessing the facts known at the time of the stop, information known to all officers acting in concert is imputed to the officer conducting the stop. People v. Ewing, 377 Ill.App.3d 585, 593, 880 N.E.2d 583, 316 Ill.Dec. 851 (4th Dist. 2007). When an officer conducting the stop acts on information or instructions received from another officer, the focus is on whether the officer communicating the information or instructions had reasonable suspicion. Ewing, 377 Ill.App.3d at 593. Likewise, where an officer initiates a stop based on a dispatch, the officer who directed the dispatch must have sufficient facts to establish reasonable suspicion for the stop. Ewing, 377 Ill.App.3d at 594.

It is crucial to remember that courts "are not limited to what the stopping officer says or to evidence of his subjective rationale; rather, we look to the record as a whole to determine what facts were known to the officer and then consider whether a reasonable officer in those circumstances would have been suspicious." United States v. Brown, 232 F.3d 589, 594 (7th Cir. 2000) (internal quotation marks and citations omitted).

This approach was followed in United States v. Tinnie, 629 F.3d 749 (7th Cir. 2011). In that case, the officer stopped the defendant for a traffic violation and asked him to step out of the car. The officer then frisked the defendant and discovered a pistol and ammunition. The officer, Kaiser, testified that he had decided to frisk the defendant before he directed the defendant to get out of the car. Based on the fact that the analysis is objective the court stated that "it is irrelevant that Kaiser decided to frisk Tinnie before directing him to exit the car. Similarly it is also irrelevant that Kaiser testified that he frisks anyone he asks to step out of a vehicle during a traffic stop. The question is rather whether given all of the facts known to Kaiser, a reasonable officer would have believed the frisk was justified." Tinnie, 629 U.S. 3d at 753. The objective facts and not the officer's subjective rationale are to control the inquiry. See also United States v. Bentley, 795 F.3d 630 (7th Cir. 2015). In that case the officer testified that he believed, erroneously, that the fact that a driver had a suspended driver's license did not, without more, give him justification to stop a car that the defendant was driving. The defendant attempted to use the officer's subjective belief in an attempt to suppress evidence recovered from the defendant. The court disagreed stating "[b]ecause the test is an objective one, we ignore [the officer's] mistake." Bentley, 795 F.3d at 635. In keeping with an overall objective standard, an officer's undisclosed "knowledge, suspicion, intent, focus, subjective view, or thought of any kind can neither influence the defendant nor affect the coercive atmosphere of the interview in any way." People v. Goyer, 265 Ill.App.3d 160, 167 (1994).

As mentioned previously, when an officer is conducting a search or a seizure that is an exception to the warrant requirement, the officer does not have to be correct but must always be reasonable. Illinois v. Rodriguez, 497 U.S. 177 (1990). This is because "the ultimate touchstone of the Fourth Amendment is reasonableness." Riley v. California, 573 U.S. ___, 134 S.Ct. 2473, 2482, 189 L.Ed.2d 430 (2014). "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" Heien v. North Carolina, 574 U.S. ___, 135 S.Ct. 530, 536,

190 L.Ed.2d 475 (2014) quoting Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

5. Specific situations

(a) Officer's subjective feelings

While the standard for determining the validity of a Terry stop is an objective one, an officer's testimony as to his subjective feelings is one factor that a court may consider in looking at the totality of the circumstances. In re F.R., 209 Ill.App.3d 274, 568 N.E.2d 133, 137, 154 Ill.Dec. 133 (1st Dist. 1991). In keeping with an overall objective standard, an officer's undisclosed "knowledge, suspicion, intent, focus, subjective view, or thought of any kind can neither influence the defendant nor affect the coercive atmosphere of the interview in any way." People v. Goyer, 265 Ill.App.3d 160, 167 (1994).

One case has held that an officer's subjective intent was irrelevant to its analysis. In United States v. Tinnie, 629 F.3d 749 (7th Cir. 2011) the officer stopped the defendant for a traffic violation and asked him to step out of the car. The officer then frisked the defendant and discovered a pistol and ammunition. The officer, Kaiser, testified that he had decided to frisk the defendant before he directed the defendant to get out of the car. Based on the fact that the analysis is objective the court stated that "it is irrelevant that Kaiser decided to frisk Tinnie before directing him to exit the car. Similarly it is also irrelevant that Kaiser testified that he frisks anyone he asks to step out of a vehicle during a traffic stop. The question is rather whether given all of the facts known to Kaiser, a reasonable officer would have believed the frisk was justified." Tinnie, 629 U.S. 3d at 753. The objective facts and not the officer's subjective rationale are to control the inquiry.

(b) Furtive Movements

An individual's furtive movement alone, by and large, seldom results in a valid basis for a Terry stop. An officer's observation of a defendant's furtive movement to his mouth while in a high drug area, without more, does not justify Terry stop. People v. Marchel, 348 Ill.App.3d 78, 810 N.E.2d 85, 284 Ill.Dec. 432 (1st Dist. 2004).

Similarly in People v. Sims, 2014 IL App (1st) 121306, the court held invalid a Terry stop of the defendant. In Sims, the officer recognized the defendant and knew he had a previous unlawful use of a weapon arrest. The officer saw the defendant place something into his crotch and walk away. The officer stopped and searched the defendant on the basis that the defendant's actions indicated that he could be armed. The search recovered twenty-five bags of cocaine. The Simms court held that the officer's observations did not give rise to reasonable articulable suspicion and held that the stop was invalid.

Two other cases, People v. F.J., 315 Ill.App.3d (2000)(putting an unknown object in pocket) and People v. Fox, 203 Ill.App.3d (1990)(tugging on an article of clothing),

also held that the defendant's furtive movements did not provide valid grounds for a Terry stop.

(c) Past criminal activity/High crime area

Past criminal activity in an area may be a relevant factor supporting an investigatory stop, but it, alone, cannot justify the stop. People v. Hunt, 188 Ill.App.3d 359, 544 N.E.2d 118, 120, 135 Ill.Dec. 761 (3rd Dist. 1989). An individual's presence in an area of expected criminal activity alone dose not rise to the level of reasonable, particularized suspicion. Brown v. Texas, 443 U.S. 47, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979); People v. Elliot, 314 Ill.App.3d 187, 732 N.E.2d 30, 35, 247 Ill.Dec. 314 (2nd Dist. 2000).

There is a split of authority as to whether an officer's general conclusion that an area is a high crime area is enough to establish the area as such. A general conclusion that an area is a high crime area, without facts to support that conclusion, "is insufficient to establish that consideration for purposes of justifying a Terry stop." People v. Harris, 2011 IL App (1st) 103382, paragraph 14. The Harris court noted that there were no Illinois cases that discussed the sufficiency of proof needed to establish an area as a high crime area. The court quoted from United States v. Wright, 485 F.3d 45, 53-54 (1st Cir. 2007) to list some factors that they believed to be relevant. The Harris court noted as possible relevant factors: "the nexus between the type of crime most prevalent or common in the area and the type of crime suspected in the instant case", the "limited geographic boundaries of the 'area' or 'neighborhood' being evaluated" and the "temporal proximity between evidence of heightened criminal activity and the date of the stop or search at issue". Harris, 2011 IL App (1st) 103382 at paragraph 14 quoting United States v. Wright, 485 F.32d 45, 53-54 (1st Cir. 2007).

Notwithstanding the Harris opinion, one court has reached the opposite conclusion. The court in People v. Jackson, 2012 IL App (1st) 103300 p. 30 held that an officer's uncontradicted and undisputed testimony that an area is a high crime area, if accepted by the trial court, is sufficient to establish that the incident occurred in a high crime area. The Jackson court attempted to reconcile the Harris holding on procedural grounds.

Perhaps the best rationale that supports the Jackson court's view of the question is its statement that "[t]o rule otherwise…would be to put requirements on a police officer's testimony that we do not put on any other witness' testimony. If any other witness testified to a fact, and his or her testimony went uncontradicted and undisputed in the courtroom, and the trial court listened to the testimony and found it credible, we would most likely hold that the trial court's finding was not against the manifest weight of the evidence. It would be difficult for us to rule otherwise, if there was no countervailing evidence against it. The question then becomes why should we single out the testimony of police officers for greater scrutiny than we do for other witnesses? The answer, of course, is that we should not. Jackson, 2012 IL App (1st) 103300, p. 36.

Perhaps the best way to avoid this issue is to have the officer testify about his past experience in the area. See In re F.R., 209 Ill.App.3d 274 (1991), People v. Ocampo, 377 Ill.App.3d 150 (2007) and People v. Surles, 2011 IL App (1st) 100068.

(d) Proximity to the scene of a specific crime

An individual's proximity to the scene of a specific, recently reported crime, on the other hand, provides substantially more suspicion than a person's mere presence in an area of high criminal activity. People v. Hubbard, 341 Ill.App.3d 911, 793 N.E.2d 703, 275 Ill.Dec. 932 (5th Dist. 2003).

In Hubbard, the police were completing a traffic stop at 2:25 a.m. when they saw the defendant drive a car into the parking lot of a store. The officers then heard a radio transmission telling them of a shooting that had just occurred at a certain location. The transmission contained no information regarding a physical description of the offender. The officers decided to stop the defendant as the defendant had come from the direction of the shooting, there was little other traffic on the road and the defendant was the only person who had driven in the direction from the shooting during the ten minutes that the officers were conducting the unrelated traffic stop.

Once the police stopped the defendant, they told him that they had stopped him because a shooting had occurred and that they were going to take the defendant to the scene and would release him if he were not involved. The officers ran the plates of the defendant's car and learned that the car was registered to the victim of the shooting. Upon speaking to the victim the police further learned that victim's assailant matched the defendant's description and had driven away in the victim's car. The police then arrested the defendant.

The Hubbard court held that the initial stop of the defendant was a valid Terry stop because the defendant was less than two miles from the scene of a crime that had just been reported, the defendant was the only driver on the main road leaving the area of the shooting, the crime occurred in a rural area making it reasonable to infer that a car would be used to flee the scene and it was reasonable for the officers to infer that the perpetrator of the shooting would be traveling in the direction that the defendant was traveling. Hubbard, 792 N.E.2d at 710-11.

The court further held that, as the purpose of a Terry stop is to allow the officers to investigate their suspicions and given the serious nature of the crime involved, it was reasonable for the officers to detain, in order to investigate the shooting, the only individual that they had seen coming from the direction of the shooting. *Id*.

In determining whether there are reasonable grounds to stop an individual soon after an offense is committed a court is to look at several factors. These factors are: "' (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found; (3) the number of persons in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by

the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.'" People v. Brown, 88 Ill.App.3d 514, 410 N.E.2d 505, 509, 43 Ill.Dec. 505 (4th Dist. 1980), quoting 3 W. LaFave, Search and Seizure Section 9.3, at 84 (1978).

Other cases where an investigatory stop was based primarily on the defendant's proximity to a crime scene are:

1. People v. Bujdud, 177 Ill.App.3d 396, 532 N.E.2d 370, 126 Ill.Dec. 685 (1st Dist. 1988).

2. People v. Sanford, 34 Ill.App.3d 990, 341 N.E.2d 453 (2nd Dist. 1976).

3. People v. Gunderson, 66 Ill.App.3d 516, 383 N.E.2d 1296, 23 Ill.Dec. 269 (1st Dist. 1978).

4. People v. Lee, 48 Ill.2d 272, 269 N.E.2d 272 (1971).

5. People v. Basiak, 50 Ill.App.3d 155, 365 N.E.2d 570, 8 Ill.Dec. 332 (1st Dist. 1977).

6. People v. Mendez, 371 Ill.App.3d 773, 863 N.E.2d 837, 309 Ill.Dec. 205 (2nd Dist. 2007).

A defendant getting out of one car and into another in an area of high narcotics activity does not give rise to reasonable articulable suspicion to conduct a Terry stop. People v. Leggions, 382 Ill.App.3d 1129, 890 N.E.2d 700, 321 Ill.Dec. 978 (4th Dist. 2008).

(e) Traffic violations

Probable cause is not needed to conduct a traffic stop. An officer's reasonable articulable suspicion that a defendant has violated a traffic law is enough to conduct a Terry stop. People v. Hackett, 2102 IL 111781, p. 28. The Hackett decision was followed in People v. Flint, 2012 IL App (3d) 110615.

Generally, a traffic violation provides the basis for a Terry stop. People v. Bujdud, 177 Ill.App.3d 396, 532 N.E.2d 370, 126 Ill.Dec. 685 (1st Dist. 1988). Indeed, it is well-established law that a traffic violation, however minor, creates probable cause for the police to stop a vehicle. United States v. Barahona, 990 F.2d 412, 416 (8th Cir. 1993); People v. Gonzalez, 204 Ill.2d 220, 789 N.E.2d 260, 265, 273 Ill.Dec. 360 (2003). Many courts analyze traffic stops using a Terry based analysis even though the initial stop was based on probable cause or reasonable suspicion. People v. Cosby, 231 Ill.2d 262, 274 (2008). While courts often use Terry analysis there is nothing that holds "that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth

Amendment on the scope of a Terry stop. Berkemer v. McCarty, 468 U.S. 420, 439 n.29, 82 L.Ed.2d 317, 104 S.Ct. 3138 (1984).

Once a motor vehicle has been lawfully stopped for a traffic violation, the police officers may order the driver to get out of the car without violating the fourth amendment. Pennsylvania v. Mimms, 434 U.S. 106, 54 L.Ed.2d 331, 98 S.Ct. 330 (1977); Ohio v. Robinette, 519 U.S. 33, 136 L.Ed.2d 347, 117 S.Ct. 417, (1996).

In general, once officers decide not to issue any citations after a traffic stop, the Terry stop is completed and any subsequent detention or search of the defendant is invalid. People v. Brownlee, 186 Ill.2d 501, 713 N.E.2d 556, 239 Ill.Dec. 25 (1999).

There is no requirement that a police officer must first observe a traffic violation before the officer conducts a computer check of a license plate. People v. Brand, 71 Ill.App.3d 698, 390 N.E.2d 65, 67, 28 Ill.Dec. 83 (1st Dist. 1979); People v. Blankenship, 353 Ill.App.3d 322, 819 N.E.2d 49, 52, 289 Ill.Dec. 137 (3rd Dist. 2004).

Passengers are seized for Fourth Amendment purposes when the vehicle in which they are traveling is subjected to a traffic stop. Brendlin v. California, 551 U.S. 249, 168 L.Ed.2d 132, 138-39, 127 S.Ct. 2400 (2007); People v. Bunch, 207 Ill.2d 7, 13, 796 N.E.2d 1024, 277 Ill.Dec. 658 (2003).

Accordingly, challenges to the questioning or search of passengers, including asking them for consent to search, is governed by the dual prong analysis of Terry. The first prong, whether the initial stop of the car in which the defendant is a passenger was justified at its inception, will, generally, be met in most traffic stop cases where the officer observed the driver commit a traffic violation. It is the second prong, whether any questioning of the passenger, asking the passenger for consent to search, or searches of the passenger or vehicle was related in scope to the circumstances that justified the stop in the first instance, that generates most of the focus.

As mentioned earlier, a seizure, lawful at its inception can become unlawful " 'if it is prolonged beyond the time reasonably required' to complete the purpose of the stop." People v. Harris, 228 Ill.2d 222, 239, 886 N.E.2d 947, 319 Ill.Dec. 823 (2008) citing Illinois v. Caballes, 534 U.S. 405, 407, 160 L.Ed.2d 842, 125 S.Ct. 834 (2005). The Caballes decision "links the reasonableness of a traffic stop's duration to the reasonableness of the stop." People v. Cummings, 2014 IL 115769, para. 18.

As long as police officers execute a traffic stop in a reasonable manner, "police conduct does not 'change the character' of the stop unless the conduct itself infringes upon the seized individual's 'constitutionally protected interest in privacy.'" Harris, 228 Ill.2d at 239 citing Caballes, 534 U.S. at 408. If the police conduct violates either principle, unreasonably prolongs duration or independently triggers the fourth amendment, then the police must possess a separate fourth amendment justification for their action. People v. Baldwin, 388 Ill.App.3d 1028, 1033, 904 N.E.2d 1193, 328 Ill.Dec. 683 (3rd Dist. 2009).

As a result of Harris and Caballes, the Illinois Supreme Court overruled its decision in People v. Gonzalez, 204 Ill.2d 220, 789 N.E.2d 260, 273 Ill.Dec. 360 (2003) "to the extent that it holds that the reasonableness of a traffic stop must be judged not only by its duration but by the additional criterion of whether the actions of the officer alter the fundamental nature of the stop." Harris, 228 Ill2d at 244.

In determining whether the police have unreasonably prolonged an investigative detention a court is to use "a contextual, totality of the circumstances analysis that includes consideration of the brevity of the stop and whether the police acted diligently during the stop." People v. Baldwin, 388 Ill.App.3d 1028, 1034, 904 N.E.2d 1193, 328 Ill.Dec. 683 (3rd Dist. 2009).

In these situations, it is important to keep in mind that just because a police officer approaches an individual and questions that person does not automatically mean that there are any fourth amendment implications. The United States Supreme Court has stated that "even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual (citations omitted); ask to examine the individual's identification (citations omitted); and request consent to search his or her luggage (citations omitted)-- as long as the police do not convey a message that compliance with their requests is required." Florida v. Bostick, 501 U.S. 429, 434-35, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991). See also Muehler v. Mena, 544 U.S. 93, 125 S.Ct. 1465, 161 L.Ed.2d 1465 (2005).

In Harris, the Illinois Supreme Court held that "a warrant check on the occupants of a lawfully stopped vehicle does not violate fourth amendment rights, so long as the duration of the stop is not unnecessary prolonged for the purpose of conducting the check and the stop is otherwise executed in a reasonable manner. Harris, 228 Ill.2d at 237. See also People v. Crosby, 231 Ill.2d 262, 898 N.E.2d, 325 Ill.App.3d 556 (2008).

Using the same analysis the court in People v. Salinas, 383 Ill.App.3d 481, 500, 891 N.E.2d 884, 322 Ill.Dec. 593 (1st Dist. 2008) held that a police officer's questioning of a defendant, who was lawfully stopped for a traffic violation, without reasonable suspicion to speak with the defendant about a narcotics surveillance operation did not violate the defendant's Fourth Amendment rights as the officer lawfully stopped the defendant for a traffic violation and the officer did not unreasonably prolong the duration of the stop.

Like all other Terry situations, the specific facts of each individual case will go a long way in determining whether any questioning or searches of passengers are valid.

(f) Anonymous or Informant tip

While reasonable grounds for an investigatory stop may be based on an informant's tip, some indicia of reliability must be present to justify the stop. People v. Diaz, 247 Ill.App.3d 625, 617 N.E.2d 848, 851, 187 Ill.Dec. 391 (2nd Dist. 1993). Such

evidence of reliability should include independent corroboration by the police officer of the information provided or evidence that the information provided was specific enough to show that the informant had access to reliable information. People v. Messamore, 245 Ill.App.3d 627, 615 N.E.2d 762, 764, 185 Ill.Dec. 892 (3rd Dist. 1993).

Courts are to consider the veracity and reliability of the informant as well as the informant's basis of knowledge. People v. Sparks, 315 Ill.App.3d 786, 792 734 N.E.2d 216, 248 Ill.Dec. 508 (4th Dist. 2000). Whether an investigatory stop may be based on an informant's tip depends on the totality of the circumstances and not on any rigid test. People v. Nitz, 371 Ill.App.3d 747, 751, 863 N.E.2d 817, 309 Ill.Dec. 185 (2nd Dist. 2007).

Generally, information form a concerned citizen is deemed more credible than a tip form an informant who provides information for payment or personal gain. Nitz, 371 Ill.App.3d at 752. When information comes from an identifiable informant "it remains the case that a minimum of corroboration or other verification of the informant is required." Village of Mundelein v. Thompson, 341 Ill.App.3d 842, 850, 793 N.E.2d 996, 276 Ill.Dec. 237 (2nd Dist. 2003).

One recent opinion, People v. Miller, 2014 IL App (2nd) 120873 set out just how minimal the corroboration or other verification need be in these circumtances. "[W]hen an informant is reliable and provides the police with specific details concerning the defendant's engaging in criminal activity, the police will be justified in acting on that tip even when they corroborate only innocent details, like the make, model, color, and license plate number of the car in which the defendant is riding." Miller, 2014 Il App (2nd) 120873 at paragraph 30. The court reasoned that "[i]f this were not the case, meaning that the police would always have to witness the criminal activity, information received from informants would become immaterial." Id.

The United States Supreme Court, in Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), unanimously held that a tip must be reliable in its assertion of illegality and not just in its tendency to identify a determinate person. In J.L., the police searched the defendant after an anonymous caller reported to the police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. J.L., 120 S.Ct. at 1377. The officers arrived at the scene and saw three black males, and one of them, the defendant, was wearing a plaid shirt. Id. The officers saw no firearm and the defendant made no threatening or suspicious movements. Id. Other than the anonymous tip, the officers had no reason to suspect the defendant of any illegal conduct. Id. One of the officers approached the defendant, ordered him to put his hands up and then frisked the defendant. Id. The officers recovered a pistol from the defendant's pocket. Id.

The United States Supreme Court held that the officer's actions violated the defendant's fourth amendment rights because the tip was not sufficiently reliable even though the description of the defendant was accurate. The court held that a tip must be reliable not only its tendency to identify a determinate person but also must be reliable in

its assertion of illegality. J.L., 120 S.Ct. at 1379. This distinction makes reliability have two components: reliability with respect to identification and reliability with respect to the likelihood of criminal activity, which is central to anonymous tip cases. Id, citing 4 W. LaFave, Search & Seizure, Section 9.4(h), p. 213 (3d ed. 1996).

The J.L. court refused to rule out searches taking place without this showing of reliability in all situations. The court stated that: "We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth amendment privacy is diminished, such as airports [citation omitted] and schools [citation omitted] cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere." J.L., 120 S.Ct. at 1380.

A case that followed J.L. and held that there was insufficient indicia of reliability of an informant's tip is People v. Carlson, 313 Ill.App.3d 447, 729 N.E.2d 858, 246 Ill.Dec. 207 (1st Dist. 2000). In Carlson, the police received a 911 call regarding a possible suicidal individual. The anonymous caller told the police that the individual's name was Edward and that he was at a pay phone at a specific location. Carlson, 729 N.E.2d at 859. The caller further stated that the individual might have a gun. Id. The officer went to the address and saw a male speaking on a pay phone. Id. The officer, with his weapon out, identified himself as a police officer, approached the defendant and asked him if his name was Edward. Id. The defendant replied yes. Id. The officer then asked the defendant to lie on the ground. Id. The officer then asked the defendant whether he had a weapon and the defendant responded that he had one in his car. Id. Other officers then took the defendant's keys and recovered a pistol from his car. Id.

The Carlson court held that there was insufficient evidence of sufficient indicia of reliability to justify the Terry stop as the record included no evidence that the police knew the identity of the caller or whether the police could determine the caller's phone number or address. Carlson, 729 N.E.2d at 860. The court further noted that as the prosecution "presented neither the tape nor the dispatcher nor any other admissible evidence to prove that an accountable person called the police" there was insufficient evidence to show that the tip was reliable. Id.

A case that held that there was sufficient indicia of reliability regarding an informant's tip is In re A.V., 336 Ill.App.3d 140, 783 N.E.2d 111, 270 Ill.Dec. 536 (1st Dist. 2002). In A.V. a teenager approached a police officer that was on patrol in a park. A.V., 336 Ill.App.3d at 141. The teenager told the officer that a husky, sixteen year old Hispanic youth wearing black jeans, blue shirt, and white gym shoes was showing a gun to other kids in the park. Id. The teenager then pointed in the direction that the person with the gun had gone. Id. As the officer was headed in that direction, he came upon five or six other youths who pointed toward the defendant and told the officer that the defendant was showing off a gun. Id. About one minute later the officer saw the defendant and recognized him as matching the description given to him and being in the

location described in the tips. Id. The officers performed a protective pat down search of the defendant and recovered a pistol. Id.

The A.V. court held that there was sufficient indicium of reliability regarding the tip. A.V. 336 Ill.App.3d at 144. The informants were not anonymous in the same sense as the informants in J.L. and Carlson because they were identifiable as they approached the police and spoke to them in person. Id. The information was not untraceable as the informants were physically present in the area and the officer could have easily returned and found the informants if the information was false. Id. The information's reliability was also shown by its timeliness as the police located and stopped the defendant within one minute of receiving the information. Id. Lastly, the court noted that five or six additional witnesses corroborated the initial tip that was given to the police officer. Id.

The court in People v. Miller, 355 Ill.App.3d 898, 824 N.E.2d 1080, 291 Ill.Dec. 830 (1st Dist. 2005) followed the A.V. rationale. The Miller court held that the tip that led to the defendant's arrest on a gun charge was reliable because the informant demonstrated his basis of knowledge of the criminal activity by telling the officer that he observed a man with a gun and because the informant gave the information to the police officer in person. Miller, 824 N.E.2d at1084.

Additionally, "showing that an informant is able to predict a defendant's future behavior lends credence to the tip." People v. Nitz, 371 Ill.App.3d 747, 752, 863 N.E.2d 817, 309 Ill.Dec. 185 (2nd Dist. 2007). This is because "when significant aspects of the caller's predictions [are] verified, there [is] reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop." Alabama v. White, 496 U.S. 325, 329, 110 L.Ed.2d 301, 110 S.Ct. 2412 (1990). See also, People v. Chavez, 327 Ill.App.3d 18, 762 N.E.2d 553, 260 Ill.Dec. 616 (1st Dist. 2002).

On the other side of the coin, the court in People v. Salinas, 383 Ill.App.3d 481, 493, 891 N.E.2d 884, 322 Ill.Dec. 593 (1st Dist. 2008) held that an informant's tip did not provide police officers with reasonable suspicion for a Terry stop because the tip was not specific, lacked a prediction of future behavior and failed to establish the informant's basis of knowledge.

i. Telephone tips

An anonymous tip, called into the police station, may be enough for a Terry stop if the information has "some indicia of reliability, and the information upon which the police act must establish the requisite quantum of suspicion." People v. Ledesma, 206 Ill.2d 571, 583, 795 N.E.2d 253, 276 Ill.Dec. 900 (2003) overruled on other grounds by People v. Pitman, 211 Ill.2d 502, 813 N.E.2d 93, 286 Ill.Dec. 36 (2004). The telephone tip must be reliable and allow an officer to reasonably infer that the subject of the tip is involved in criminal activity. People v. Shafer, 372 Ill.App.3d 1044, 1049, 868 N.E.2d 359, 311 Ill.Dec. 359 (4th Dist. 2007).

The factors included in making this determination include:

(1) The quantity and detail of the information so that the officer may be certain that the person stopped is the one the caller identified;

(2) The time interval between the tip and the person locating the person;

(3) Whether the tip is based on contemporaneous eyewitness observations;

(4) Whether the tip has sufficient detail to permit the reasonable inference that the tipster actually witnessed what was described.

Shafer, 372 Ill.App.3d at 1050. See also People v. Ewing, 377 Ill.App.3d 585, 880 N.E.2d 587, 316 Ill.Dec. 851 (4th Dist. 2007).

It is important to keep in mind that in cases "[w]here a non-anonymous caller reports a reckless, erratic or drunk driver, the police must be permitted to stop the reported vehicle without having to question the caller about the specific details that led him to call so long as the non-anonymous tip has sufficient indicia of reliability." Ewing, 377 Ill.App.3d at 957.

An anonymous call made to police emergency dispatch or 9-1-1 have a greater indicia of reliability because the caller's identity may become known because 9-1-1 systems give the police enough information about the caller so that the caller is not truly anonymous and the caller subjects himself to criminal charges if the report is false or misleading. Shafer, 372 Ill.App.3d at 1050-51.

For an excellent example of how all of these factors should be assessed and analyzed, please see People v. Hansen, 2012 IL App (4th) 110603.

ii. Tip from Identified Individual

Generally, information form a concerned citizen is deemed more credible than a tip form an informant who provides information for payment or personal gain. Nitz, 371 Ill.App.3d at 752. When information comes from an identifiable informant "it remains the case that a minimum of corroboration or other verification of the informant is required." Village of Mundelein v. Thompson, 341 Ill.App.3d 842, 850, 793 N.E.2d 996, 276 Ill.Dec. 237 (2nd Dist. 2003).

One recent opinion, People v. Miller, 2014 IL App (2nd) 120873 set out just how minimal the corroboration or other verification need be. "[W]hen an informant is reliable and provides the police with specific details concerning the defendant's engaging in criminal activity, the police will be justified in acting on that tip even when they corroborate only innocent details, like the make, model, color, and license plate number of the car in which the defendant is riding." Miller, 2014 Il App (2nd) 120873 at paragraph 30. The court reasoned that "[i]f this were not the case, meaning that the

police would always have to witness the criminal activity, information received from informants would become immaterial." Id.

(g) Pretextual stops

A common argument made at a motion to suppress evidence is that the initial stop of the defendant was pretextual. That is, the initial stop of the defendant for a minor traffic violation was a pretext or a ruse for the officer to stop the car to find whether the defendant was under the influence or to search the car or the defendant for contraband. Both Illinois and Federal courts have consistently refused to accept this argument. If police officers are objectively doing what they are legally authorized to do, their actions are not to be questioned on the basis of any subjective intent in which they acted. People v. Smith, 269 Ill.App.3d 962, 647 N.E.2d 310, 316, 207 Ill.Dec. 348 (4th Dist 1995).

Furthermore, an objectively reasonable stop is not invalid because the officer acted out of an improper or dual motivation. Determining whether a fourth amendment violation has occurred requires an objective assessment of the officer's actions in light of the facts and circumstances confronting the officers at the time and not on the officer's actual state of mind at the time of the stop. People v. Sorrells, 209 Ill.App.3d 1064, 568 N.E.2d 497, 500, 154 Ill.Dec. 497 (4th Dist. 1991).

A trial court is to focus at all times on whether the officer had articulable, reasonable grounds to stop the defendant and disregard the defendant's arguments about what the officer's real intent may have been. People v. Smith, *supra*. Likewise, in Whren v. United States, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), the United States Supreme Court unanimously held that an officer's state of mind, except for the facts known to him, or his subjective intent in making a traffic stop play no part in determining the constitutional reasonableness of the stop. See also People v. Juarbe, 318 Ill.App.3d 1040, 743 N.E.2d 607, 252 Ill.Dec. 739 (1st Dist. 2001).

Simply stated, "[e]fficient and evenhanded application of the law demands that we look to whether the arrest is objectively justified rather than to the motive of the arresting officer." Ashcroft v. Al-Kidd, ___ U.S. ___, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011). "Indeed, we have never held, outside limited contexts such as an 'inventory search or administrative inspection…, that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment.'" Fernandez v. California, 134 S.Ct. 1126, 1134 188 L.Ed.2d 25, 2014 U.S. Lexis 1636 (2014) quoting Kentucky v. King, 131 S.Ct 1849, 1859, 179 L.Ed. 2d 865, 2011 U.S. Lexis 3541 (2011).

(h) Roadblocks

A roadblock is unconstitutional where its sole purpose is to uncover evidence of ordinary criminal wrongdoing. Absent special circumstances, the fourth amendment prohibits the police from making stops without individualized suspicion at a checkpoint set up for general crime control purposes. City of Indianapolis v. Edmond, 531 U.S. 32,

47, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). This case holds that there is only a limited exception to the rule that a seizure must be accompanied by individualized suspicion, where the roadblocks are designed to further a compelling purpose such as promoting highway safety by targeting drunk drivers. In Illinois, neither probable cause nor individualized suspicion is required to establish a roadblock designed to deter and detect DUI violators. People v. Bartley, 109 Ill.2d 273, 486 N.E.2d 880, 889, 93 Ill.Dec. 347 (1985). The United States Supreme Court, in Michigan Department of Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), also allowed the use of roadblocks.

The Illinois Supreme Court, in Bartley, held that courts should look to the reasonableness of the roadblock in assessing its constitutionality. Bartley, 486 N.E.2d at 886. Courts are to balance the public interest versus the objective and subjective intrusiveness of the stop. The Bartley court held that the public interest involved was compelling because drivers under the influence pose a substantial threat to the welfare of Illinois citizens.

The court then looked at the objective intrusion of the stop. In Bartley, the objective intrusion was not substantial because the stop lasted fifteen to twenty seconds, motorists were able to remain in their vehicles, and they were only asked to produce driving credentials. The court further held that the fact that the police shined flashlights into the stopped cars did not alter the nature of the intrusion. It was reasonable for the police to examine the interior of the vehicles to verify whether the vehicle contained weapons, which could be used to harm the officers. Id.

The Bartley court next looked at the subjective intrusion of the roadblock. Subjective intrusion concerns the fear, surprise, and annoyance of motorists at being stopped. The critical factor is whether the police officers conducting the roadblock are acting with unbridled discretion. The fundamental evil to avoid is what the Bartley court called the roving patrol. Where the discretion of the officers is circumscribed and the police establish the roadblock in a safe manner, drivers have no reason to fear either that their safety is endangered or that they are being singled out for discriminatory treatment.

The Illinois Supreme Court did not adopt an ironclad formula in assessing the subjective intrusiveness of a roadblock. The court did, however, point out several factors that reduce arbitrary enforcement and the use of discretion:

The decision to establish the roadblock and the selection of the site are made by supervisory personnel. In Bartley, an Illinois State Police Captain and Lieutenant made these decisions. Id. at 887.

The police stop vehicles in a pre-established, systematic manner to avoid any concern by the motorist that they are being singled out. In Bartley, the police stopped every westbound vehicle. Id.

There are pre-existing guidelines for the operation of the roadblock. In Bartley, the Illinois State Police had a manual on the proper way to approach a vehicle, request a

driver's license, check for other violations and sidetracking those individuals found to have violations. Id.

There is a sufficient show of the official nature of the operation and it is obvious that the roadblock, in fact, poses no safety risk. In Bartley, there were several state troopers in uniform and several vehicles with flashing lights. There was no safety risk because the roadblock was conducted on a five lane, well lighted, moderately traveled highway. Id.

There is advance publicity of the police's intention to establish DUI roadblocks, without designating specific locations at which they will be conducted. In Bartley, the police did not publicize the fact that the purpose of the roadblock was to detect and to deter motorists under the influence of alcohol. The court held that the lack of advance publicity did not invalidate the roadblock because all of the other factors reduced the subjective intrusion of the stop. Id.

The Bartley court specifically held that these guidelines are not to apply to address the validity of an emergency roadblock such as one used to trap a dangerous criminal before he can flee the jurisdiction. Id. at 885.

i. "Informational" roadblocks

As stated earlier, a roadblock is unconstitutional where its sole purpose is to uncover evidence of ordinary criminal wrongdoing or to advance the interest of general crime control. City of Indianapolis v. Edmond, 531 U.S. 32, 47 121 S.Ct. 447 148 L.Ed.2d 333 (2000). There is only a limited exception to the rule that a seizure must be accompanied by some measure of individualized suspicion, where the roadblocks are designed to further a compelling purpose such as promoting highway safety by targeting drunk drivers. In Edmond, the police stopped every car at a checkpoint and then had a drug dog sniff the car to determine the presence of illegal drugs. The Illinois Supreme Court extended the Edmond rationale to hold unconstitutional so called informational roadblocks. People v. Lidster, 202 Ill.2d 1, 779 N.E.2d 855, 269 Ill.Dec. 1 (2002). The United States Supreme Court had the last word and rejected the Illinois Supreme Court's interpretation of Edmond and held that the roadblock in Lidster was constitutional. Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885, 157 L.Ed.2d 843 (2004).

In Lidster the police set up what they termed an informational roadblock regarding a fatal hit and run crash. The roadblock was setup about one week after the incident at about the same time of night and at about the same location of the crash in order to learn more information about the incident. The police briefly stopped every car and asked the occupants whether they had seen anything happen approximately one week earlier and handed each driver a flyer about the fatal crash. The defendant, Lidster, was driving one of the cars stopped at the roadblock. While stopping his car, the defendant almost hit one of the police officers at the checkpoint. Lidster smelled of alcohol, failed sobriety tests and was ultimately arrested and convicted of DUI.

The Illinois Supreme Court, as stated above, held that the roadblock was unconstitutional but the United States Supreme Court rejected the Illinois Supreme Court's application of Edmond. The United State's Supreme Court held that the Lidster stop was different from the Edmond stop because in Edmond the police stopped vehicles to look for evidence of drug crimes committed by the occupants of those vehicles. Lidster, 157 L.Ed.2d at 850. The United States Supreme Court held that the Lidster stops primary purpose was not to determine whether a vehicle's occupants were committing a crime, but to ask the vehicle's occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others and the police expected the information elicited to help them apprehend, not the occupants of the stopped vehicle, but other individuals. Id. As such, the United States Supreme Court applied a reasonableness standard to determine the constitutionality of the stop. Lidster, 157 L.Ed.2d at 890.

In applying the standard, the court looked to the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. Id. Applying these standards, the court held that the relevant public concern was grave as the police were investigating a crime that resulted in human death and the object of the stop was to help find the perpetrator of a specific known crime, not of general unknown crimes. Lidster, 157 L.E.2d at 191. The court also held that the stop advanced the grave public concern to a significant degree and, most importantly, intruded only minimally with liberty of the sort the fourth amendment protects as each stop required only a very brief wait in line with actual police contact lasting only a few seconds. Id. As such, the United States Supreme Court held the checkpoint constitutional. Id.

ii. Additional situations

A driver making a legal u-turn just prior to a roadblock does not, in and of itself, does not lead to reasonable and articulable suspicion for a Terry stop. People v. Timmsen, 2014 IL App (3d) 120481.

For an example of a roadblock that was held to be unconstitutional please see People v. Adams, 293 Ill.App.3d 180, 687 N.E.2d 536, 227 Ill.Dec. 286 (2nd Dist. 1997). In Adams the roadblock was unconstitutional because there was no compelling public safety purpose in stopping vehicles without a municipal vehicle sticker, the decision to set up the roadblock was made extemporaneously by officers in the field, there was no evidence that the public was informed of the roadblock, and there were no pre-existing guidelines regarding any aspect of the roadblock.

For examples of roadblocks held to be constitutional please see People v. Bartley, *supra*, and People v. Little, 162 Ill.App.3d 6, 515 N.E.2d 846, 113 Ill.Dec. 861 (1st Dist. 1987).

(i) Movement of the defendant during the stop

Movement of a suspect in the general vicinity of a Terry stop is permissible without converting a temporary seizure into an arrest. People v. Rodriquez, 153 Ill.App.3d 652, 505 N.E.2d 1314, 1318, 106 Ill.Dec. 523 (2nd Dist. 1987). Similarly, moving a suspect to a different location for purposes of a showup when the officer is conducting a field investigation immediately after the commission of a crime and when the victim, a short distance away, could confirm or deny the identity of the suspect is not necessarily beyond the scope of a Terry stop. People v. Ross, 317 Ill.App.3d 26, 739 N.E.2d 50, 55, 250 Ill.Dec. 589 (1st Dist. 2000).

After an otherwise valid stop of a vehicle, an officer may order the driver or passengers out of the vehicle. Maryland v. Wilson, 519 U.S. 408, 415, 137 L.Ed.2d 41, 117 S.Ct. 882 (1997). On the other hand, an officer who has made an otherwise lawful stop of a vehicle may, without more, order the passengers to stay in the vehicle. People v. Boyd, 298 Ill.App.3d 1118, 700 N.E.2d 444, 449, 233 Ill.Dec. 139 (4th Dist. 1998).

725 ILCS 5/107-14 also allows any questioning to be done "in the vicinity of where the person was stopped."

(j) Use of force/handcuffing defendant during the stop

Just because a suspect is restrained does not, without more, mean that a Terry stop has been transformed into an arrest. People v. Bujdud, 177 Ill.App.3d 396, 532 N.E.2d 370, 374, 126 Ill.Dec. 685 (1st Dist. 1988). The mere restraint of an individual does not turn an investigatory stop into an arrest. It is the length of the detention and the scope of the investigation that distinguish an arrest from a stop. People v. Chavez, 327 Ill.App.3d 18, 762 N.E.2d 553, 566, 260 Ill.Dec. 894 (1st Dist. 2001).

The fact that officers, with guns drawn, stop a defendant does not necessarily mean that the defendant is under arrest at that instant. People v. Ross, 317 Ill.App.3d 26, 739 N.E.2d 50, 56, 250 Ill.Dec. 589 (1st Dist. 2000); People v. Moore, 294 Ill.App.3d 410, 415, 689 N.E.2d 1181, 228 Ill.Dec. 760 (2nd Dist. 1998); People v. Martin, 121 Ill.App.3d 196, 459 N.E.2d 279, 287, 76 Ill.Dec. 642 (2nd Dist. 1984). But see People v. Bozarth, 2015 IL App (5th) 130147 where the court held that the defendant was seized where an officer approached the defendant's car with weapon drawn and though the officer felt that the defendant was free to leave, the officer testified that if the defendant drove away he would have activated his lights and followed her.

Similarly, handcuffing a defendant during a Terry stop does not turn the stop into an arrest. People v. Colyar, 2012 IL 111835, p. 46, Ross, *supra*; People v. Waddell, 190 Ill.App.3d 914, 546 N.E.2d 1068, 1075, 138 Ill.Dec. 13 (4th Dist. 1989); U.S. v. Smith, 3 F.3d 1088, 1094 (7th Cir. 1993). Whether handcuffing the defendant during a Terry stop was proper depends on the circumstances of the each case and depend on all of the circumstances facing the officer. Colyar, 2012 IL 11835, p. 46-47. In Colyar, the court held that handcuffing the defendant was reasonable because the officers were outnumbered, it was dusk at the time of the stop and it was reasonable to suspect that one

or more of the three persons that the officers detained possessed a gun or could access one if they were not restrained. Colyar, 2012 IL 11835, p. 47.

If an individual is validly detained, such as during a Terry stop, and the individual flees or attempts to flee from the stop, then the police have probable cause to arrest the individual for obstructing a peace officer, 720 ILCS 5/31-1(a). People v. Johnson, 408 Ill.app.3d 107, 119-120 (1st Dist. 2010). Handcuffing an individual who attempts to flee a valid Terry stop is proper as part of a lawful arrest. Johnson, 408 Ill.App.3d at 120.

The fact that the defendant was placed in a squad car does not transform an otherwise valid investigatory stop into an arrest. People v. Ross, *supra*.

Simply put, when an officer has a reasonable suspicion during an investigatory stop that the stopped individual may be armed and dangerous, the officer is permitted to take necessary measures to determine whether the person is armed and to neutralize any threat of physical harm. Colyar, 2012 IL 11835, p. 45.

(k) Duration of the stop

To determine whether an investigatory stop is too long to be justified as an investigatory stop, a court is to determine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly. United States v. Sharpe, 470 U.S. 675, 84 L.Ed.2d 605, 105 S.Ct. 1568, 1575 (1985). There should be no indication that the police unnecessarily prolonged the detention. People v. Dyer, 141 Ill.App.3d 326, 490 N.E.2d 237, 242, 95 Ill.Dec. 764 (5th Dist. 1986). The stop must last no longer than is necessary to effectuate the purpose of the stop. People v. Delaware, 314 Ill.App.3d 363, 731 N.E.2d 904, 910, 247 Ill.Dec. 131 (1st Dist. 2000).

In determining whether the police have unreasonably prolonged an investigative detention a court is to use "a contextual, totality of the circumstances analysis that includes consideration of the brevity of the stop and whether the police acted diligently during the stop." People v. Baldwin, 388 Ill.App.3d 1028, 1034, 904 N.E.2d 1193, 328 Ill.Dec. 683 (3rd Dist. 2009).

The Illinois Supreme Court has paid much attention to the duration of the stop. In People v. Brownlee, 186 Ill.2d 501, 713 N.E.2d 556, 239 Ill.Dec. 25 (1999) the police conducted a traffic stop of a vehicle that contained four individuals. The officers obtained identification of each of the occupants and checked for outstanding warrants. When the check turned negative the officers decided not to issue any traffic citations. The officers reapproached the car and gave the driver's identification back to him and stated that they would not issue any citations. The officers remained at the car, standing on both sides of the car for a while and then asked the driver to consent to a search of the vehicle. The driver asked whether he had a choice in the matter and one of the officers replied that he was asking the driver to allow the search. The driver then got out of the car and consented to the search. The officers then ordered all the other passengers, including the defendant out of the car. A search of the car revealed marijuana. All four

individuals were placed under arrest. A search incident to that arrest revealed that the defendant was in possession of cocaine. The Illinois Supreme Court held that even though the original stop of the vehicle was valid, once the officers stated that they would not issue any citations, the traffic stop was over and the continued detention was unlawful, as the officers had no reasonable suspicion of criminal conduct. Brownlee, 186 Ill.2d at 521.

Over the past few years, duration of a Terry stop has been a very active area of the law. Most cases held that the officers' initial stop of the defendant was justified and that their initial conduct was proper. The real controversy became the officers' actions after the initial reason for the stop was completed. Courts held that a Terry stops turned into an unnecessarily prolonged detention in the following cases:

1. People v. Torres, 347 Ill.App.3d 252, 807 N.E.2d 654, 283 Ill.Dec. 49 (1st Dist. 2004): Once the reason for the stop is concluded, the police needed legal justification to remove the defendant from his vehicle, pat him down, demand identification and conduct a warrant check.

2. People v. Miles, 343 Ill.App.3d 1026, 798 N.E.2d 1279, 278 Ill.Dec. 522 (4th Dist. 2003): The officer's questioning of the defendant was unrelated to the purpose of the stop-failure to illuminate the rear registration plate of a car in which the defendant was a passenger-so the police needed reasonable articulable suspicion to justify the questioning of the defendant.

3. People v. Powell, 343 Ill.App.3d 699, 798 N.E.2d 1252, 278 Ill.Dec. 495 (4th Dist. 2003): Police officer's questioning of a passenger in the defendant's car prolonged the traffic stop and was not reasonably related in scope to the initial reason for the stop.

4. People v. Jones, 346 Ill.App.3d 1101, 806 N.E.2d 722, 282 Ill.Dec. 425 (4th Dist. 2004): Questioning of the defendant regarding the possible presence of drugs or weapons in the defendant's car during a traffic stop after officers determined that defendant's driver's license was valid and car was insured impermissibly prolonged the traffic stop.

5. People v. Harris, 207 Ill.2d 515, 802 N.E.2d 219, 280 Ill.Dec. 294 (2003) overruled by People v. Harris, 228 Ill.2d 222, 886 N.E.2d 947, 319 Ill.Dec. 823 (2008): Police officer's retaining identification card of defendant who was passenger in car stopped for traffic violation and conducting a warrant check was beyond the scope of the initial traffic stop.

6. People v. Hall, 351 Ill.App.3d 501, 814 N.E.2d 1011, 286 Ill.Dec. 785, (2nd Dist. 2004): Police officer's asking defendant whether he had any

contraband, after officer stated that defendant was free to go, impermissibly extended traffic stop for driving with a malfunctioning headlight.

7. People v. Litwin, 2015 IL App (3d) 140429: Based on the totality of the circumstances, the officer taking ten minutes to run the defendant's background information unreasonably prolonged the duration of the stop. The court stated that there is not a bright line rule that indicates when the duration of a stop has become unreasonable.

8. People v. Fratzke, 2015 IL App (4th) 140176: Officer interrupting preparing traffic tickets to conduct a dog sniff for no particularized reason unreasonably prolonged the traffic stop.

The basis for most of these holding was the now overruled portion of People v. Gonzalez, 204 Ill2d 220, 789 N.E.2d 260, 273 Ill.Dec. 360 (2008) that held that, in addition to its duration, the reasonableness of a traffic stop is to be judged on whether the actions of the police officer altered the fundamental nature of the stop. Based on Gonzalez, in order for a police officer to ask a person for consent to search or otherwise engage an individual in conversation after a lawful stop the officer had to have, at a minimum, reasonable articulable suspicion to do so. If the officer did not, as the above list makes clear, a court would find that the fundamental nature of the traffic stop had been altered.

The Illinois Supreme Court in People v. Harris, 228 Ill.2d 222, 239, 886 N.E.2d 947, 319 Ill.Dec. 823 (2008) overruled the alteration prong of Gonzalez. Under Harris the duration prong is the sole focus of the scope of inquiry in these situations. Harris, 228 Ill.2d at 244-45. **In litigating this issue, keep in mind that many of the cases listed above relied on the altering of fundamental nature of the stop in holding that the action that the police officers took was in violation of the Fourth Amendment.**

On the other hand, a few recent cases have held that the police did not unreasonably prolong the stop:

1. People v. Collins, 2015 IL App (1st) 131145: The evidence adduced at the motion to suppress hearing showed that the officers did nothing to unreasonably prolong the stop.

2. People v. Reedy, 2015 IL App (3d) 130955: A ten minute traffic stop where a dog sniff was done was not unreasonably prolonged.

3. People v. Cummings, 2016 IL 115769: Ordinary inquiries regarding a traffic stop such as checking a driver's license, determining whether the driver has outstanding warrants against him and checking a vehicle's registration and proof of insurance do not unreasonably prolong the duration of a traffic stop.

1. Questioning an individual, asking an individual for identification, conducting a warrant check or asking for consent to search during or after a traffic stop

The fact that a police officer asks an individual questions or asks whether the person would consent to a search does not automatically turn the encounter into a seizure "even if the questions cause a pedestrian to pause his or her travels to listen to the questions and answer them (if he or she elects)." People v Castigilia, 394 Ill.App.3d 355, 360, 915 N.E.2d 809, 333 Ill.Dec. 738 (2nd Dist. 2009) citing United States v. Broomfield, 417 F.3d 654, 656 (3rd Cir. 2005).

The analysis in this area is similar to the area of the police approaching an individual and engaging that person in conversation that was discussed above. Just because a police officer approaches an individual and questions that person does not automatically mean that there are any fourth amendment implications. The United States Supreme Court has stated that "even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual (citations omitted); ask to examine the individual's identification (citations omitted); and request consent to search his or her luggage (citations omitted)-- as long as the police do not convey a message that compliance with their requests is required." Florida v. Bostick, 501 U.S. 429, 434-35, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991). See also Muehler v. Mena, 544 U.S. 93, 125 S.Ct. 1465, 161 L.Ed.2d 1465 (2005).

In People v. Harris, 228 Ill.2d 222, 886 N.E.2d 947, 319 Ill.Dec. 823 (2008), the Illinois Supreme Court provided a summary of the holding in Bostick. "The general principles of Bostick can be summarized as follows: For purposes of the fourth amendment, an individual is "seized" when an officer " 'by means of physical force or show of authority, has in some way restrained the liberty of a citizen.' " Bostick, 501 U.S. at 434, 115 L. Ed. 2d at 398, 111 S. Ct. at 2386 (1991), quoting Terry, 392 U.S. at 19 n.16, 20 L. Ed. 2d at 905 n.16, 88 S. Ct. at 1879 n.16. "So long as a reasonable person would feel free 'to disregard the police and go about his business,' [citation], the encounter is consensual and no reasonable suspicion is required." Bostick, 501 U.S. at 434, 115 L. Ed. 2d at 398, 111 S. Ct. at 2386, quoting California v. Hodari D., 499 U.S. 621, 628, 113 L. Ed. 2d 690, 698, 111 S. Ct. 1547, 1552 (1991). If, however, when " 'all the circumstances surrounding the incident' " (Immigration & Naturalization Service v. Delgado, 466 U.S. 210, 215, 80 L. Ed. 2d 247, 255, 104 S. Ct. 1758, 1762 (1984), quoting United States v. Mendenhall, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509, 100 S. Ct. 1870, 1877 (1980)) are taken into account, the conduct of the police would lead a reasonable innocent person under identical circumstances to believe that he or she was not "free to decline the officers' requests or otherwise terminate the encounter" (Bostick, 501 U.S. at 436, 115 L. Ed. 2d at 400, 111 S. Ct. at 2387), that person is seized. Accordingly, the analysis hinges on an objective evaluation of the police conduct and not upon the subjective perception of the individual approached. Hodari D., 499 U.S. at 628, 113 L. Ed. 2d at 698, 111 S. Ct. at 1551." Harris, 228 Ill.2d at 246-47.

The Illinois Supreme Court has unequivocally reiterated this general principle. In People v. Luedemann, 222 Ill.2d 530, 552-53, 857 N.E.2d 187, 306 Ill.Dec. 94 (2006) the court restated the general rule that "the police may approach and question a person seated in a parked vehicle without that encounter being labeled a seizure. As Professor LaFave has noted, 'if an officer merely walks up to a person standing or sitting in a public place (or, indeed, who is seated in a vehicle located in a public place) and puts a question to him, this alone does not constitute a seizure.' 4 W. LaFave, Search and Seizure Sec. 9.4 (a), at 419-21 (4th ed. 2004). The 'seated in a vehicle' clause of the above passage is supported by a lengthy list of citations to the many state and federal decisions that have recognized this rule. See 4 W. LaFave, Search & Seizure Sec. 9.4(a) at 419-20, 420 n. 49 (collecting cases). In Murray, this court held that the mere approaching and questioning of a person seated in a parked vehicle does not constitute a seizure and listed many decisions from other jurisdictions that had reached the same conclusion. Murray, 137 Ill.2d at 391-93. Thus, any analysis of such a situation must begin with the recognition that the police may approach a person seated in a parked vehicle and ask questions of that person without that encounter being labeled a seizure. The encounter becomes a seizure only if the officer, through physical force or a show of authority, restrains the liberty of the vehicle's occupant. See Bostick, 501 U.S. at 434, 115 L.Ed.2d at 398, 111 S.Ct. at 2386." The Murray case that the court referred to is People v. Murray, 137 Ill.2d 382, 560 N.E.2d 309, 148 Ill.Dec. 7 (1990).

An officer can go beyond simply attempting to question an individual. An encounter does not turn into a seizure "when the officer utilizes some generally accepted means of gaining the attention of the vehicle occupant or encouraging him to eliminate any barrier to conversation. The officer may tap on the window and perhaps even open the door if the occupant is asleep. A request that the suspect open the door or roll down the window would seem equally permissible, but the same would not be true of an order that he do so. Likewise, the encounter becomes a seizure if the officer orders the suspect to 'freeze' or to get out of the car." Luedemann, 222 Ill.2d at 557 quoting 4 W. LaFave, Search & Seizure Sec 9.4(a), at 433 (4th ed. 2004).

The test to determine whether the attempt at questioning an individual has turned into a seizure is objective. "The analysis requires an objective evaluation of the police conduct and does not hinge upon the subjective perception of the person involved." Luedemann, 221 Ill.2d at 551. The analysis does not turn on whether the person "practically and realistically" felt free to refuse the officer's request. Leudemann, 222 Ill.2d at 555. The test "presupposes a reasonable **innocent** person." (Emphasis in original.) Leudemann, 222 Ill.2d at 551. "The relevant issues in this situation " ' is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'" Luedemann, 222 Ill.2d at 550, quoting Florida v. Bostick, 501 U.S. 429, 436, 115 L.Ed.2d 389, 400, 111 S.Ct. 2382, 2387 (1991). Determining whether the defendant felt free to leave is analyzed from an objective standard by the court and is not construed literally. Luedemann, 222 Ill.2d at 555, (noting that the standard is not whether an individual "practically" or "realistically" felt free to leave)."

In Harris, *supra*, and People v.Cosby, 231 Ill.2d 262, 898 N.E.2d 603, 325 Ill.App.3d 556 (2008) the Illinois Supreme Court applied the rationale in Mendenhall, Bostick, Mena, and Leudemann, to traffic stops. In Harris, the defendant was a passenger in a car stopped for a traffic offense. Harris, 228 Ill.2d at 224. During the course of the stop, the officer asked the defendant for identification and the defendant complied. *Id*. The officer ran a computer search, which determined that the defendant had an outstanding arrest warrant. *Id*. The officer arrested the defendant and a search incident to arrest found the defendant in possession of cocaine. *Id*. The court first held that as an arrest warrant is a matter of public record, the defendant had no reasonable expectation of privacy in the fact that a judge has ordered the defendant's arrest and that a warrant check does not implicate any legitimate privacy interests. Harris, 228 Ill.2d at 237. The Harris court then held that a warrant check on the occupant of a lawfully stopped vehicle does not infringe on the occupant's Fourth Amendment rights as long as the duration of the stop is not unnecessarily prolonged in order to conduct the check and the stop is otherwise carried out reasonably. *Id*. Applying this standard the court held that because the initial stop of the defendant was lawful, that the seizure's duration was reasonable and that the warrant check did not infringe on a constitutionally protected privacy interest, the warrant check did not violate the Fourth Amendment. Harris, 228 Ill.2d at 238.

In Cosby, the issue was whether, in two cases, consents to search obtained after the conclusion of a traffic stop was a second seizure of the defendants. Cosby, 238 Ill.2d at 276. The court applied the Mendenhall, *supra*, and Luedemann, *supra*, factors (the threatening presence of several officers, the display of a weapon by an officer, the touching of the person of the citizen, the use of language or tone of voice indicating that compliance with the officer's request might be compelled) and determined that a seizure of the defendants did not occur. Cosby, 238 Ill.2d at 276-285.

Another case that dealt with asking for consent to search a vehicle during a traffic stop is People v. Ramsey, 362 Ill.App.3d 610, 839 N.E.2d 1093, 298 Ill.Dec. 446 (4th Dist. 2005). Ramsey presented the familiar facts involving a traffic stop for a broken windshield. The officer gave the defendant a written warning and then began asking him questions about the possibility of contraband in the defendant's car. The officer then asked for and received the defendant's consent to search the vehicle. The officer found methamphetamine and arrested the defendant. The trial court granted the defendant's motion to suppress. The appellate court reversed the trial court even though it held that the officer's questioning of the defendant was not related to the purpose of the stop-the cracked windshield. Ramsey, 839 N.E.2d at 1099.

The court applied a consent analysis and specifically held that "[t]he fact that a police officer poses questions to a driver after the purpose of the traffic stop has concluded **does not** automatically amount to a seizure. In a consensual conversation, the officer could pose questions to the driver or request consent to search the vehicle therein. The driver could decline to answer the officer's questions or refuse to give his consent. Unless the totality of the circumstances indicate a reasonable person would not have felt free to leave, no seizure has occurred and the defendant's consent to search the vehicle is not constitutionally prohibited." Ramsey, 839 N.E.2d at 1099 (emphasis added). As

there was no show of force, no brandishing of weapons, no blocking of the defendant's car's path, no threat or command, or no authoritative tone of voice involved, the encounter between the officer and the defendant was consensual. *Id*.

The rationale in Ramsey was followed in People v. Barker, 369 Ill.App.3d 670, 867 N.E.2d 1021, 311 Ill.Dec. 35 (4th Dist. 2007). In Barker, the defendant was a passenger in her own vehicle when it was stopped for a traffic violation. The officer gave the driver a written warning for the traffic violation. The officer observed a twelve pack of beer with some individual containers missing. Even though having the opened cardboard container in the car was legal, the officer asked the driver whether any of the beer containers were in the car. After the driver answered in the negative, the officer asked the driver if he could search the vehicle to be sure. The driver said "yes" while the defendant, the owner of the car said nothing. The officer searched the car and found contraband. The defendant was arrested. The trial court granted the defendant's motion to suppress.

In reversing the trial court, the Barker court held that, even though the traffic stop was complete when the officer asked the driver additional questions, the additional questioning did not exceed the scope of the stop as the officer had reasonable, articulable suspicion to justify his questioning and the driver gave valid consent to search the vehicle. Barker, 369 Ill.App.3d at 674. The court held that "[a]n officer encountering occupants of a vehicle late on a summer Saturday night with a 12-pack of beer minus a bottle or two would have reasonable suspicion to believe that criminal activity, *i.e.*, drinking and driving, was afoot." Barker, 369 Ill.App.3d at 675. The court then held that the officer's further questioning of the driver and asking him for permission to search was also based on reasonable, articulable suspicion because "[a] driver of vehicle who has been drinking and driving is not likely to meekly admit the presence of open containers and offer them up for inspection." Barker, 369 Ill.App.3d at 676.

Lastly the court stated that the case was similar to Ramsey. The Barker court held that as the officer did not demand the driver's compliance, there was no show of force, brandishing of weapons, blocking the car's path nor an authoritative tone of voice used what occurred, while not "a friendly, innocuous encounter" was consensual. Barker, Barker, 369 Ill.App.3d at 676. "[A]bsent some show of authority beyond the verbal request, the law presumes a reasonable person would feel free to decline the request and depart." Barker, 369 Ill.App.3d at 676.

Inherent in a person's consent to search is the person's agreement to wait during the search. People v. Oliver, 236 Ill.2d 448, 925 N.E.2d 1107, 338 Ill.Dec. 901 (2010). In Oliver the defendant claimed that because the police directed him where to wait during a consensual search of his vehicle's interior, he was illegally seized when the police asked him for consent to search the trunk of his vehicle. Noting that "the defendant had to wait somewhere", the Illinois Supreme Court rejected the defendant's argument because not doing so "would transform every consensual vehicle search into an unconstitutional seizure." Oliver, 236 Ill.2d at 458.

(l) Flight

When an officer, without reasonable articulable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. Florida v. Royer, 460 U.S. 491, 497-498, 75 L.Ed.2d 229, 103 S.Ct. 1319 (1983). A driver making a legal u-turn just prior to a roadblock, in and of itself, does not lead to reasonable and articulable suspicion for a Terry stop as there were no factors present to show that the defendant was doing anything other than going about his business. People v. Timmsen, 2014 IL App (3d) 120481.

However, an individual's flight from an approaching police officer is not the action of an individual minding his own business, but is the opposite of such conduct and can raise suspicion to warrant a Terry stop. Illinois v. Wardlow, 528 U.S. 119, 145 L.Ed.2d 570, 120 S.Ct. 673, 676 (2000).

In Wardlow, police officers were patrolling an area known for heavy narcotic sales on the westside of Chicago. Wardlow, 120 S.Ct. at 674. The officers saw the defendant holding a bag in his hand while he was standing near a building. Wardlow, 120 S.Ct. at 674-675. The defendant looked in the officers' direction and then fled through a gangway and an alley. Wardlow, 120 S.Ct. at 675. An officer eventually stopped the defendant and immediately conducted a pat-down search for weapons because, in the officer's experience, it was common for there to be weapons in the near vicinity of narcotics transactions. Id. During the pat down, the officer squeezed the bag that the defendant was carrying and felt a heavy, hard object that was similar to the shape of a gun. Id. The officer opened the bag and found a pistol. Id.

The United States Supreme Court held that it was not simply the defendant's mere presence in an area of heavy narcotics trafficking that aroused the suspicion of the officers, but it was the presence coupled with defendant's unprovoked flight upon noticing the police that gave rise to the officers' suspicion. Wardlow, 120 S.Ct. at 676. The court reasoned that headlong flight, while not indicative of wrongdoing, is the consummate act of evasion and as such suggests wrongdoing. Id. Using common sense judgments and inferences about human behavior, the court held that the officers were justified in suspecting that the defendant was involved in criminal activity and in investigating further. Id. The Wardlow court cautioned that if, after such a stop, the officer does not learn facts that establish probable cause, the individual must be allowed to go on his way. Wardlow, 120 S.Ct. at 677.

If a defendant flees from the police into the defendant's home, absent probable cause to arrest the defendant or exigent circumstances, the police may not enter into the defendant's home and detain the defendant. In re D.W., 341 Ill.App.3d 517, 796 N.E.2d 46, 275 Ill.Dec. 566 (1st Dist. 2003).

(1) Defendant initially stopped and then flees

If an individual is validly detained, such as during a Terry stop, and the individual flees or attempts to flee from the stop, then the police have probable cause to arrest the individual for obstructing a peace officer, 720 ILCS 5/31-1(a). People v. Johnson, 408 Ill.App.3d 107, 119-120 (1st Dist. 2010). Handcuffing an individual who attempts to flee a valid Terry stop is proper as part of a lawful arrest. Johnson, 408 Ill.App.3d at 120.

In some cases like this, it is not necessary to determine whether the initial seizure was lawful. In People v. Keys, 375 Ill.App.3d 459 (2007) the defendant was a passenger in a car that the police stopped. The defendant voluntarily got out of the car and fled when the officer tried to pat him down. While he fled, the defendant dropped packets of heroin to the ground. The defendant filed a motion to suppress claiming that the initial stop of the car was invalid. In affirming the denial of the motion, the appellate court held that because the defendant ended the initial seizure by running away it was unnecessary to determine whether the initial seizure was lawful because the defendant was not seized within the meaning of the fourth amendment at the time he abandoned the drugs. Keys, 375 Ill.App.3d at 464.

The Illinois Supreme Court has held that the defendant's act of fleeing from being illegally seized during a traffic stop ended the illegal seizure and that the flight interrupted the causal connection between the officer's non flagrant misconduct and the discovery of a gun in the vehicle in which the defendant was stopped. People v. Henderson, 2013 IL 114040. "Permitting defendants to flee from the police under the circumstances of this case, and yet claim the protections of the fourth amendment, would foster a lack of cooperation with law enforcement officers, putting the police and public at risk." Henderson, 2013 IL 114040, p. 50.

(m) Officer's objectively reasonable mistake of law

Situations where an officer mistakenly believes an individual is committing a criminal act may provide the basis for reasonable suspicion. An officer's objectively reasonable mistake of law may provide the justification for an investigatory stop. Heien v. North Carolina, 574 U.S. ___, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014); People v. Gaytan, 2015 IL 116223 (2015).

In Gaytan, the defendant was a passenger in a car that had a rear mounted, ball type trailer hitch. Thinking that the trailer hitch obstructed the vehicle's license plate in violation of 625 ILCS 5/3-413(b), the officers stopped the car and recovered cannabis. The defendant was ultimately convicted of offenses arising out of the cannabis. During the pendency of the case the defendant filed a motion to suppress evidence that the trial court denied. He alleged that the trailer hitch did not violate the statute and, thus, the officers had no valid reason to stop the car in which the defendant was a passenger. After a lengthy and detailed review of the of the obstruction statute, the Illinois Supreme Court agreed with the defendant that the car was not in violation of the statute. The court did not agree, however, that the officers lacked reasonable suspicion to stop the car.

The Gaytan court followed Heien v. North Carolina, 574 U.S. ___, 135 S.Ct. 530, 536, 190 L.Ed.2d 475 (2014) which held that there is no fourth amendment violation where a police officer stops a vehicle based on an "objectively reasonable although mistaken belief" that the conduct which gave rise to the stop was illegal. In holding that the officers' mistake of law in interpreting 625 ILCS 5/3-413(b) was objectively reasonable the Gaytan court noted that the statute was ambiguous and that no prior appellate case had addressed the application of the statute to trailer hitches. Gaytan, 2015 IL 116223, paragraph 48.

The Heien and Gaytan cases further underscore the concept that when an officer is conducting a search or a seizure that is an exception to the warrant requirement; the officer does not have to be correct but must always be reasonable. Illinois v. Rodriguez, 497 U.S. 177 (1990). "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" Heien, 135 S.Ct. at 536 quoting Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

6. **Frisk component**

(a) General considerations

The right to frisk the subject of a Terry stop does not automatically flow from a legally justified Terry stop. People v. Galvin, 127 Ill.2d 153, 165, 535 N.E.2d 837, 129 Ill.Dec. 72 (1989). A frisk can only be made after a valid Terry stop. Galvin, 127 Ill.2d at 165. "The fact that a police officer has reason to stop an individual does not necessarily mean that the additional intrusion of a search for weapons will also be warranted." People v. F.J., 315 Ill.App.3d 1053, 1056 (2000). The officer must have a reasonable belief that his or her safety or the safety of others is in danger before the police may conduct a frisk. People v. Christensen, 198 Ill.App.3d 168, 555 N.E.2d 746, 748-749, 144 Ill.Dec. 387 (4th Dist. 1990).

Although the officer need not be absolutely positive that an individual is armed, the belief must be reasonable, taking into account the reasonable inferences the police are entitled to draw from facts in light of their experiences. People v. Rivera, 272 Ill.App.3d 502, 650 N.E.2d 1084, 1087, 209 Ill.Dec. 111 (1st Dist. 1995). Once a reasonable belief of danger arises, an officer may conduct a Terry search of the suspect limited to the minimum necessary to discover objects capable of being used as weapons. Rivera, 650 N.E.2d at 1087. The sole justification for the search allowed by Terry is protection of the police and others in the vicinity and not to gather evidence. People v. Flowers, 179 Ill.2d 257, 688 N.E.2d 626, 629, 227 Ill.Dec. 933 (1997).

With respect to narcotics cases, Terry requires more than a general belief that drug dealers may carry weapons before an officer may conduct a pat down. People v. Marcella, 2013 IL App (2nd) 120585, para. 32; People v. Boswell, 2014 IL App (1st) 122275, para. 23. "[T]he mere fact that an officer believes drug dealers carry weapons or

narcotics arrests involve weapons is insufficient alone to support reasonable suspicion to justify a Terry frisk. People v. Rivera, 272 Ill.App.3d 502, 509 (1995). The Boswell court held that in addition to the interrelationship between drugs and weapons, other factors that courts should look to include whether the defendant engaged in any furtive movement, whether the officers observed any bulges in defendant's clothing or whether the defendant attempted to run or walk away. Boswell, 2014 IL App (1st) 122275 at para. 25. In litigating this issue, it is important that the record contain all of the observations and reasons that lead the officer to conduct the protective pat down.

Objects which look or feel like a weapon may be seized for further investigation. People v. Powell, 244 Ill.App.3d 127, 586 N.E.2d 589, 597, 166 Ill.Dec. 631 (1st Dist. 1991). The search is not limited to the suspect's body but extends to items within his immediate grasp. Powell, 586 N.E.2d at 598. If the frisk goes beyond what is necessary to determine whether the defendant is armed then the search is beyond Terry. People v. Blake, 268 Ill.App.3d 737, 645 N.E.2d 580, 583, 206 Ill.Dec. 575 (2nd Dist. 1995).

The validity of a frisk conducted during a valid investigatory stop is assessed by an objective standard. Flowers, 179 Ill.2d at 264. The question is whether a reasonable prudent person in the circumstances would be warranted in the belief that his safety or that of others was in danger. Flowers, 179 Ill.2d at 264. The officer conducting the frisk must be able to point to specific and articulable facts which taken together with natural inferences, reasonably warrants the intrusion. Flowers, 179 Ill.2d at 264.

Even though there is an objective standard, an officer's subjective belief regarding the safety of the situation is one of the factors that may be considered in determining whether a frisk was valid under Terry. Flowers, 179 Ill.2d at 264. The mere fact that an officer believes that drug dealers carry weapons or that narcotic arrests involve weapons is, alone, insufficient to support a Terry frisk. Rivera, 650 N.E.2d at 1090. Illinois courts have consistently refused to characterize certain types of offenses as offenses where suspects should automatically be frisked. See Galvin, Flowers, and Rivera. The reasonableness of every search is to be judged by the particular facts and circumstances surrounding it. Flowers, 179 Ill.2d at 270.

The Illinois legislature has codified the search component of Terry at 725 ILCS 5/108-1.01.

(b) Passenger areas of vehicles

An officer, in making a Terry stop is allowed to search the passenger compartment of a vehicle, limited to those areas where a weapon may be placed, provided that the officer has a reasonable belief, based on specific and articulable facts which, taken together along with rational inferences therefrom, warrant the belief that the suspect is dangerous and may gain immediate control of a weapon. Michigan v. Long, 463 U.S. 1032, 77 L.Ed.2d 1201, 103 S.Ct. 3469, 3481 (1983).

A police officer's observation of a bullet in plain view in the center console of a vehicle lead to the reasonable inference that a gun may be in the vehicle and gave the officer reasonable grounds to remove the occupants from the vehicle and to search the interior of the vehicle. People v. Colyar, 2012 IL 111835, p. 42-44.

An officer, after making a valid stop and pat down of a suspect may seize an unidentified item that he had seen the suspect, seconds before the stop, stuff into the crack of a seat which was still within reach of the other occupants of the vehicle and arguably within reach of the suspect. People v. Payton, 208 Ill.App.3d 658, 567 N.E.2d 540, 153 Ill.Dec. 582 (1st Dist. 1991). In Payton, the officer testified that he was sure that the suspect did not have a weapon on him and saw that the item that the defendant placed into the seat was a plastic bag. When the officer recovered the bag, he found that it contained cocaine. The court held without merit the defendant's argument that once the officer had the bag in his hand and discovered that it contained folded papers and white powder, he should have returned it because it was not a weapon because the initial seizure was valid. Payton, 567 N.E.2d at 543.

There is no requirement that the officers question and frisk occupants of a vehicle prior to any search of the vehicle. People v. Rodriguez, 154 Ill.App.3d 401, 506 N.E.2d 1064, 107 Ill.Dec. 173 (3rd Dist. 1987).

VIII. Arrest

A. General considerations

An arrest is constitutional if there is probable cause for the arrest or is the result of an arrest warrant based on probable cause. Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); People v. Melock, 149 Ill.2d 423, 599 N.E.2d 941, 174 Ill.Dec. 857 (1992). Probable cause exists where the police have knowledge of facts, which would lead a reasonable person to believe that a crime has occurred and that the defendant has committed it. People v. Myrick, 274 Ill.App.3d 983, 651 N.E.2d 637, 643, 209 Ill.Dec. 459 (1st Dist. 1995).

An arrest based on probable cause, but prohibited by state law, does not violate the Fourth Amendment. Virginia v. Moore, 553 U.S. 164, 128 S.Ct. 1598, 170 L.Ed.2d 559, (2008).

B. When is a person under arrest?

Whether and exactly when a defendant is placed under arrest is a crucial element of a motion to suppress evidence. Generally, notwithstanding the law regarding Terry stops, a defendant will try to argue that he was under arrest as soon as he had contact with the police. A seizure does not occur simply because a law enforcement officer approaches and questions a person if that person is willing to listen. United States v. Drayton, 536 U.S. 194, 200, 153 L.Ed.2d 242, 122 S.Ct. 2105, 2110 (2002).

If a judge finds that an officer did not have probable cause to place the individual under arrest and grants the motion to suppress evidence, the State cannot use any evidence gathered after the arrest at trial. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). This evidence can be anything from physical evidence such as guns or drugs to other types of evidence such as the results of lineups and confessions.

An arrest occurs when, by means of physical force or show of authority, a person's freedom of movement is restrained. People v. Melock, 149 Ill.2d 423, 599 N.E.2d 941, 946, 174 Ill.Dec. 857 (1992). To determine whether an arrest has occurred, the relevant inquiry is whether a reasonable, innocent person would, under the circumstances, have considered himself arrested or free to leave. People v. Williams, 164 Ill.2d 1, 645 N.E.2d 844, 848, 206 Ill.Dec. 592 (1994). A court is to view all the circumstances surrounding the incident in determining whether a reasonable, innocent person would believe a seizure occurred. People v. Myrick, 274 Ill.App.3d 983, 651 N.E.2d 637, 642, 209 Ill.Dec. 459 (1st Dist. 1995). This test is flexible in that it focuses on the totality of the circumstances and not on any one action taken by the police. Id. These principles come from United States v. Mendenhall, 446 U.S. 544, 64 L.Ed.2d 497, 100 S.Ct. 1870 (1980).

Mendenhall listed the following factors that may indicate a seizure:

(1) The threatening presence of several officers;

(2) The display of a weapon by an officer;

(3) The touching of the person of the citizen;

(4) The use of language or tone of voice indicating that compliance with the officer's request might be compelled.

In determining whether a defendant was arrested, Illinois courts are to consider:

(1) The time, place, length, mood and mode of the encounter between the defendant and the police;

(2) The number of police officers present;

(3) Any indicia of formal arrest or restraint;

(4) The officer's intention;

(5) The defendant's subjective belief or understanding;

(6) Whether the defendant was told that he could refuse to go with the police;

(7) Whether the defendant was transported in a police car;

(8) Whether the defendant was told that he was free to leave;

(9) Whether the defendant was told that he was under arrest;

(10) The language used by the officers.

People v. Washington, 363 Ill.App.3d 13, 24, 842 N.E2d 1193, 299 Ill.Dec. 841 (1st Dist. 2006); People v. Anderson, 395 Ill.App.3d 241, 917 N.E.2d 18, 334 Ill.Dec. 421 (1st Dist. 2009); People v. Gomez, 2011 IL App (1st) 092185.

Defendants will often argue that because a police officer advises the defendant of his Miranda warnings when the officer first stopped the defendant during an investigatory stop, the defendant was under arrest at that moment. This is not the case. The Illinois Supreme court has consistently held that simply giving Miranda warnings does not create a custodial situation. People v. Williams, 164 Ill.2d 1, 645 N.E.2d 844, 206 Ill.Dec. 592 (1994). See also People v. Wipfler, 68 Ill.2d 158, 368 N.E.2d 870, 11 Ill.Dec. 262 (1977). This long standing precedent was followed in People v. Gomez, 2011 IL App (1st) 092185, paragraph 60.

A second situation is where a police officer drives an individual to the police station. This can arise when the police have the name of someone they think is a suspect in a crime and ask him if he would go to the police station with the officers. The person agrees and is subsequently identified in a lineup or confesses to the crime. A defendant will claim that he was under arrest as soon as he got into the police car. This, by itself, does not mean that the defendant was under arrest. The fact that the defendant did not drive his own car to the police station does not mean that he was arrested at the scene. People v. Myrick, 274 Ill.App.3d 983, 651 N.E.2d 637, 209 Ill.Dec. 459 (1st Dist. 1995). See also People v. Wipfler, 68 Ill.2d 158, 368 N.E.2d 870, 11 Ill.Dec 262 (1977).

This concept, that merely being driven by the police to a police station does not in and of itself indicate an arrest was further reinforced in People v. Sturgess, 364 Ill.App.3d 107, 845 N.E.2d 741, 300 Ill.Dec. 852 (1st Dist. 2006). In Sturgess, the defendant was convicted of DUI. The defendant was involved in a crash on I-57 and the responding officer, Trooper Tyler, told the defendant to accompany another Trooper, Evans, back to the station. Sturgess, 845 N.E.2d at 744. The defendant asked Tyler whether she could call her son to have him pick her up from the crash scene. Id. Tyler instructed the defendant to ride with Evans, as Tyler wanted to keep the area of the crash clear of additional persons because the area was highly congested with traffic. Id. At the station the defendant failed several field sobriety tests and was arrested for DUI. Id. The defendant filed a motion to suppress evidence claiming that her transportation from the crash scene to the police station was an unlawful arrest, as Tyler had no probable cause to place her in custody.

The appellate court affirmed the trial court's denial of the defendant's motion. The appellate court held that the defendant was not unlawfully seized as only two officers "encountered defendant, that neither of them brandished a weapon in her presence, that neither of them physically touched her and that neither of them used harsh or coercive language or tone of voice to indicate that her presence was compulsory. Defendant was not placed in handcuffs or read her rights until after Tyler administered her sobriety tests. Allowing defendant to wait by the side of the interstate for a ride from her son would only have aggravated the traffic conditions Tyler described and delayed the securing of the scene of the accident." Sturgess, 845 N.E.2d at 748. See also People v. Smith, 214 Ill.2d 338, 827 N.E.2d 444, 292 Ill.Dec. 915 (2005).

The fact that the defendant was placed in a squad car does not transform an otherwise valid investigatory stop into an arrest. People v. Ross, 317 Ill.App.3d 26, 739 N.E.2d 50, 56, 250 Ill.Dec. 589 (1st Dist. 2000).

The fact that officers, with guns drawn, stop a defendant does not necessarily mean that the defendant is under arrest at that instant. People v. Ross, *supra*; People v. Moore, 294 Ill.App.3d 410, 689 N.E.2d 1181, 1185, 228 Ill.Dec. 760 (2nd Dist. 1998); People v. Martin, 121 Ill.App.3d 196, 459 N.E.2d 279, 287, 76 Ill.Dec. 642 (2nd Dist. 1984).

Similarly, handcuffing a defendant during a Terry stop does not turn the stop into an arrest. Ross, *supra*; People v. Waddell, 190 Ill.App.3d 914, 546 N.E.2d 1068, 1075, 138 Ill.Dec. 13 (4th Dist. 1989); People v. Nitz, 371 Ill.App.3d 747, 754, 863 N.E.2d 817, 309 Ill.Dec. 185 (2nd Dist. 2007), U.S. v. Smith, 3 F.3d 1088, 1095 (7th Cir. 1993).

Handcuffing **and** placing an individual in a police car does not convert a Terry stop into a formal arrest. U.S. v. Stewart, 388 F.3d 1079 (7th Cir. 2004).

The mere restraint of an individual does not turn an investigatory stop into an arrest. It is the length of the detention and the scope of the investigation that distinguish an arrest from a stop. People v. Chavez, 327 Ill.App.3d 18, 762 N.E.2d 553, 566, 260 Ill.Dec. 894 (1st Dist. 2001).

When the police take action that looks like an arrest, those actions must be '"reasonable in light of the circumstances that prompted the stop or that developed during its course.'" 4 W. LaFave, Search and Seizure, Section 9.2(d), at 304 (4th ed. 2004), quoting United States v. Acosta-Colon, 157 F.3d 9, 15 (1st Cir. 1998). The important thing to remember in these and all situations regarding whether and when an individual is under arrest is that no one factor controls these issues. The inquiry is to focus on the totality of the circumstances and not on any one action taken by the police. People v. Wicks, 236 Ill.App.3d 97, 603 N.E.2d 594, 598, 177 Ill.Dec. 524 (1st Dist. 1992).

1. Free to leave

In litigating this issue, it seems that many believe that a defendant uttering the magic words: "I did not feel free to leave!" resolves the question of whether the police have seized an individual. This is not and has never been the determining factor in this area. The rationale for this is straightforward. Given the inherent authority of a law enforcement officer and the innate feeling of most law abiding persons to cooperate with authority, "if the ultimate issue is perceived as being whether the suspect 'would feel free to walk away,' then virtually all police citizen encounters must in fact be deemed to involve a Fourth Amendment seizure." 4 W. LaFave, Search & Seizure Sec. 9.4(a), at 423-24 (4th ed. 2004).

It is long settled, black letter law that there is no constitutional violation when a police officer approaches a person in public to ask questions if that person is willing to listen. People v. Gherna, 203 Ill.2d 165, 178, 784 N.E.2d 799, 271 Ill.Dec. 245 (2003). Simply put, the police have the right to approach individuals, as to whom they have no reasonable suspicion and ask potentially incriminating questions. See Florida v. Bostick, 501 U.S. 429, 439, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991).

The fact that such an encounter may go beyond merely asking questions does not, without more, turn the encounter into a seizure. "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual (citations omitted); ask to examine the individual's identification (citations omitted); and request consent to search his or her luggage (citations omitted)-- as long as the police do not convey a message that compliance with their requests is required." Bostick, 501 U.S. at 434-35.

The Illinois Supreme Court has unequivocally reiterated this general principle. In People v. Luedemann, 222 Ill.2d 530, 552-53, 857 N.E.2d 187, 306 Ill.Dec. 94 (2006) the Illinois Supreme Court restated the general rule that "the police may approach and question a person seated in a parked vehicle without that encounter being labeled a seizure. As Professor LaFave has noted, 'if an officer merely walks up to a person standing or sitting in a public place (or, indeed, who is seated in a vehicle located in a public place) and puts a question to him, this alone does not constitute a seizure.' 4 W. LaFave, Search and Seizure Sec. 9.4 (a), at 419-21 (4th ed. 2004). The 'seated in a vehicle' clause of the above passage is supported by a lengthy list of citations to the many state and federal decisions that have recognized this rule. See 4 W. LaFave, Search and Seizure Sec. 9.4(a) at 419-20, 420 n. 49 (collecting cases). In Murray, this court held that the mere approaching and questioning of a person seated in a parked vehicle does not constitute a seizure and listed many decisions from other jurisdictions that had reached the same conclusion. Murray, 137 Ill.2d at 391-93." The Murray case that the court referred to is People v. Murray, 137 Ill.2d 382, 560 N.E.2d 309, 148 Ill.Dec. 7 (1990).

Indeed, there are many situations where free to leave is not even the correct test to be applied in a certain situation. The Bostick court held that "free to leave" is the appropriate framework for analysis in cases where a person is walking down a street. Bostick, 501 U.S. at 435. In encounters where some factor other than police action has restrained an individual's freedom of movement, the proper test is "whether a reasonable

person would feel free to decline the officer's requests or otherwise terminate the encounter." Bostick, 501 U.S. at 436. Courts have applied this analysis to persons seated on a bus, Bostick, and to individuals seated in a parked car, People v. Gherna, 203 Ill.2d 165, 784 N.E.2d 799, 271 Ill.Dec. 245 (2003) and People v. Luedemann, 222 Ill.2d 530, 857 N.E.2d 187, 306 Ill.Dec. 94 (2006).

The test to be applied in these situations "must begin with the recognition that the police may approach a person seated in a parked vehicle and ask questions of that person without that encounter being labeled a seizure. The encounter becomes a seizure only if the officer, through physical force or a show of authority, restrains the liberty of the vehicle's occupant. See Bostick, 501 U.S. at 434, 115 L.Ed.2d at 398, 111 S.Ct. at 2386." Luedemann, 222 Ill.2d at 552-53. In determining whether a seizure occurred, a court is to look to the four Mendenhall factors. "If those factors are absent, that means that only one or two officers approached the defendant, they displayed no weapons, they did not touch the defendant, and they did not use any language or tone of voice indicating that compliance with their requests was compelled. Obviously, a seizure is much less likely to be found when officers approach a person in such an inoffensive manor." Luedemann, 222 Ill.2d at 554.

Even if none of the factors are present, the encounter may still be found to be a seizure. The factors "are not exhaustive and … a seizure can be found on the basis of other coercive police behavior that is similar to the Mendenhall factors." Luedemann, 222 Ill.2d at 557. Factors that have been found to show that a seizure has occurred are "boxing the car in, approaching it on all sides by many officers, pointing a gun at the suspect and ordering him to place his hands on the steering wheel, or use of flashing lights as a show of authority." Luedemann, 222 Ill.2d at 557 quoting 4 W. LaFave, Search & seizure Sec. 9.4(a), at 435 (4th ed. 2004).

An officer can go beyond simply attempting to question an individual. An encounter does not turn into a seizure "when the officer utilizes some generally accepted means of gaining the attention of the vehicle occupant or encouraging him to eliminate any barrier to conversation. The officer may tap on the window and perhaps even open the door if the occupant is asleep. A request that the suspect open the door or roll down the window would seem equally permissible, but the same would not be true of an order that he do so. Likewise, the encounter becomes a seizure if the officer orders the suspect to 'freeze' or to get out of the car." Luedemann, 222 Ill.2d at 557 quoting 4 W. LaFave, Search & Seizure Sec 9.4(a), at 433 (4th ed. 2004).

What often happens in these types of cases is that defense attorneys will argue and judges will rule that even though none of the factors are present, realistically and practically speaking, the individual was seized. Courts are not to engage in this type of analysis. A court is not to conduct a "practical, realistic" inquiry in determining whether a seizure occurred. Luedemann, 222 Ill.2d at 554. What this seems to mean is that a court is only to determine whether the Mendenhall factors, or those similar in nature, exist. Much to our benefit, this is one area where a court is not to engage in a practical, common sense analysis and, instead, conduct a formulaic approach.

a. Objective standard

No matter which version, free to leave or free to decline, is used, the analysis does not turn on the subjective perception of the individual who had contact with the police. People v. White, 221 Ill.2d 1, 21-22, 849 N.E.2d 406, 302 Ill.Dec. 614 (2006). Courts are to make an objective assessment of the police conduct. *Id*. Additionally, it is important to keep in mind that all of this analysis presupposes that the reasonable person is a reasonable innocent person. Bostick, 501 U.S. at 438.

C. Initial voluntary accompaniment turning into illegal detention

A frequent scenario is where an individual voluntarily agrees to go with the police to the station. These cases are always fact and detail specific and "[i]t is difficult to say where an interviewee's presence at the police station that begins voluntarily transforms into a coerced stay". People v. Anderson, 395 Ill.App.3d 241, 250, 917 N.E.2d 18, 334 Ill.Dec. 421 (1st Dist. 2009).

When a defendant voluntarily goes with the police and "there is no formal declaration of arrest, and the defendant is not searched, handcuffed, fingerprinted, or photographed, the defendant is neither seized nor under arrest." People v. Sturgess, 364 Ill.App.3d 107, 113, 845 N.E.2d 741, 300 Ill.Dec. 852 (1st Dist. 2006) citing People v. Myrick, 274 Ill.App.3d 983, 989-990, 651 N.E.2d 637, 209 Ill.dec. 459 (1st Dist. 1995). Keep in mind, however, that "[e]ven if a defendant was not told that he was under arrest, not touched by a police officer, not handcuffed, fingerprinted, searched, or subjected to any other arrest procedures, he may have been illegally detained if he was not told that he could leave and he did not feel free to leave." People v. Reynolds, 257 Ill.App.3d 792, 800, 629 N.E.2d 559, 196 Ill.Dec. 14 (1st Dist. 1994).

A defendant's voluntary cooperation is not turned into an illegal detention simply because the officers drove the defendant to the police station. Myrick, 274 Ill.App.3d at 989. Likewise, the fact that the officers were armed at the time of the defendant's voluntary accompaniment to the police station does not mean the encounter was an illegal detention. People v. Cosby, 231 Ill.2d 262, 287, 893 N.E.2d 603, 325 Ill.Dec. 556 (2008). Additionally, the police performing a limited pat down of the defendant before entering the police car to go to the station "adds little" to a claim of illegal seizure and detention. Anderson, 395 Ill.App.3d 249-250.

A defendant who voluntarily accompanies the police for an interview does not implicitly consent to remain at the station while the police look for probable cause for an arrest. People v. Barlow, 273 Ill.App.3d 943, 950, 654 N.E.2d 223, 210 Ill.Dec. 924 (1st Dist. 1995). The length of time of an interrogation is one factor that a court is to consider, but it alone does not determine whether an individual was illegally detained at the police station. People v. Prince, 288 Ill.App.3d 265, 273, 681 N.E.2d 521, 224 Ill.Dec. 206 (1st Dist. 1997). The police have no legal obligation to tell an interviewee

that he does not have to remain at the station for an interview. See Cosby, 231 Ill.2d at 288.

It is the defendant's burden to show that his continued presence at the police station was the result of an illegal seizure. People v. Graham, 214 Ill.App.3d 798, 806, 573 N.E.2d 1346, 158 Ill.Dec. 161 (1st Dist. 1991). No single indicium of arrest is dispositive of this issue and a court is to consider all of the circumstances surrounding the detention in the case. People v. Washington, 363 Ill.App.3d 13, 24, 842 N.E2d 1193, 299 Ill.Dec. 841 (1st Dist. 2006).

1. Defendant not allowed to roam around the station

A common defense argument is that the defendant was under arrest or detained because he was not allowed to move about the police station unescorted. This argument is meritless. As long as a defendant was not told that he had to remain at the station pursuant to police detention or that he was formally under arrest, "[t]elling the defendant that a police officer would escort him to the restroom appears within reasonable bounds of a voluntary encounter to ensure that the station, necessarily a secure environment where evidence and reports of crimes may be present, remains secure. A request that a voluntary guest at a police station be accompanied while at the police station is not an indication that the individual is no longer a guest, but a person seized, at least in the absence of other indicia of a seizure." People v. Anderson, 395 Ill.App.3d 241, 250, 917 N.E.2d 18, 334 Ill.Dec. 421 (1st Dist. 2009).

D. Probable cause

Probable cause exists where the officer has knowledge of facts and circumstances, which would lead a reasonable person to believe that a crime has occurred and that the defendant committed the crime. People v. Myrick, 274 Ill.App.3d 983, 651 N.E.2d 637, 643, 209 Ill.Dec. 459 (1st Dist. 1995). In deciding whether probable cause to arrest exists, courts are not to be unduly technical but rather deal with probabilities; the determination of probable cause must be based on the factual and practical considerations of everyday life in which reasonable persons, and not legal technicians, act. People v. Creach, 79 Ill.2d 96, 402 N.E.2d 228, 231, 37 Ill.Dec. 338 (1980).

A court should view the facts known to the officer "through the lens of common sense" and are not to weigh them against "an inflexible set of evidentiary requirements." Florida v. Harris, 2013 U.S. Lexis 1121, 19 (2013). "Finely tuned standards such as proof beyond a reasonable doubt or by preponderance of the evidence…have no place in the [probable cause] decision." Illinois v. Gates, 462 U.S. 213, 235, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). A police officer's factual knowledge, based on prior experience is relevant in making this determination. People v. Tisler, 103 Ill.2d 226, 469 N.E.2d 147, 153, 82 Ill.Dec. 613 (1984).

A lesser standard is required to support a finding of probable cause than would be necessary for a conviction. People v. McNair, 102 Ill.App.3d 322, 429 N.E.2d 1233, 57

Ill.Dec. 870 (1st Dist. 1980). Probable cause does not require a showing that it is more likely true than false that the individual is committing or has committed a crime. People v. Wear, 229 Ill.2d 545, 564, 893 N.E.2d 631, 323 Ill.Dec. 359 (2008).

The fact that there may be innocent explanations for some or all of the facts or circumstances known to the officer does not negate probable cause. People v. Geier, 407 Ill.App.3d 553, 557 (2nd Dist. 2011). The police observing a series of seemingly innocuous acts, when taken together may constitute probable cause to believe a crime is being committed. People v. Taylor, 165 Ill.App.3d 64 (1987). Repetition of the purportedly innocuous act is "unnecessary where the police possess more specific information that a crime is being committed." People v. Grant, 2013 IL 112734, p. 17. In Grant, the officer heard the defendant yell out "dro, dro" once. The officer testified that he knew that term to signify marijuana sales. The Grant court held that, based on the officer's law enforcement expertise and observations, there was probable cause to arrest the defendant for the ordinance violation of Soliciting Unlawful Business. Grant, 2013 IL 112734 at p. 15.

An arrest's validity does not depend on whether the arrested person actually committed the crime. Michigan v. De Fillipo, 443 U.S. 31, 37, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979). "Finely tuned standards such as proof beyond a reasonable doubt or by preponderance of the evidence…have no place in the [probable cause] decision." Illinois v. Gates, 462 U.S. 213, 235, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

The subsequent invalidation of an ordinance that was the basis for an arrest will not render unreasonable the initial arrest and any accompanying search. People v. Sobol, 26 Ill.App.3d 303, 325 N.E.2d 118, 119 (3rd Dist. 1975).

An arresting officer's state of mind, except for the facts known to him, is irrelevant to the existence of probable cause. Whren v. United States, 517 U.S. 806, 812-813, 135 L.Ed.2d 89, 116 S.Ct. 1769 (1996). The officer's subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. Devenpeck v. Alford, 543 U.S. 146, 125 S.Ct. 588, 594, 160 L.Ed.2d 537 (2004).

A traffic violation, however minor, creates probable cause for the police to stop a vehicle. United States v. Barahona, 990 F.2d 412, 416 (8th Cir. 1993); People v. Gonzalez, 204 Ill.2d 220, 789 N.E.2d 260, 273 Ill.Dec. 360 (2003) overruled on other grounds by People v, Harris, 228 Ill.2d 222 (2008). Regardless of Barahona and Gonzlaez, probable cause is not needed for a traffic stop. All that is required is a reasonable articulable suspicion that the defendant violated a traffic law. People v. Hackett, 2102 IL 111781, p. 28. The Hackett decision was followed in People v. Flint, 2012 IL App (3d) 110615.

A traffic stop that is based on mistake of law is generally unconstitutional, even if the mistake is reasonable and made in good faith. People v. Cole, 369 Ill.App.3d 960, 967, 874 N.E.2d 81, 314 Ill.Dec. 171 (4th Dist. 2007). The rationale for this is that a police officer's subjective belief that the law has actually been broken when no violation

has occurred is not objectively reasonable. Cole, 369 Ill.App.3d at 968. In these situations where an officer makes a stop based on a mistake of law, the court should look to determine whether there are specific, articulable facts that would give reasonable suspicion of a violation of the law. Cole, *Id*. Despite the officer's mistaken interpretation of law, if the facts known to the officer "raised a reasonable suspicion that the defendant was in fact violating the law as written" there would be no constitutional violation. Cole, *Id*. Simply put, even if the officer is wrong about what the law is, if the facts show that the defendant actually violated the law as it is written there should be no constitutional violation.

An officer's objectively reasonable mistake of fact in a traffic stop, on the other hand, rarely violates the fourth amendment. United States v. Cashman, 216 F.3d 582, 587 (7th Cir. 2000). This is because an officer conducting a search or seizure pursuant to an exception to the warrant requirement does not always have to be correct but must always be reasonable. See Illinois v. Rodriguez, 497 U.S. 177, 186-86, 111 L.Ed.2d 148, 110 S.Ct. 2793 (1990).

A common situation that arises is where a traffic stop of a defendant leads to an arrest for more serious charges. An officer need not charge a minor traffic violation when, after a stop, the officer discovers a more serious offense. People v. Goestenkors, 278 Ill.App.3d 144, 662 N.E.2d 574, 578, 214 Ill.Dec. 1008 (5th Dist. 1996); People v. Repp, 165 Ill.App.3d 90, 518 N.E.2d 750, 116 Ill.Dec. 128 (2nd Dist. 1988). Similarly, probable cause to arrest will not be invalidated by a later determination not to charge a person for the offense for which he was originally stopped. People v. Assenato, 186 Ill.App.3d 331, 542 N.E.2d 457, 460, 134 Ill.Dec. 278 (2nd Dist. 1989).

If an individual is validly detained, such as during a Terry stop, and the individual flees or attempts to flee from the stop, then the police have probable cause to arrest the individual for obstructing a peace officer, 720 ILCS 5/31-1(a). People v. Johnson, 408 Ill.App.3d 107, 119-120 (1st Dist. 2010). Handcuffing an individual who attempts to flee a valid Terry stop is proper as part of a lawful arrest. Johnson, 408 Ill.App.3d at 120.

1. Illegally obtained evidence from one defendant used as probable cause to arrest another defendant.

The Illinois Supreme Court has held that a statement obtained as the fruit of an illegal arrest of another person provided probable cause for the arrest of the defendant as the defendant could not challenge the legality of another person's arrest as a basis for his own motion to suppress evidence. People v. James, 118 Ill.2d 214, 514 N.E.2d 998, 113 Ill.Dec. 86 (1987).

2. Delay between probable cause and arrest.

This is an area that arises with some degree of regularity especially in cases where a traffic violation leads to a stop of the defendant. Often defense attorneys will argue that because a police officer did not immediately stop the defendant upon observation of a

traffic violation, the probable cause for the arrest has somehow diminished or expired. There is no legal support for this common argument. Mere delay does not dissipate probable cause to arrest. People v. Shepherd, 242 IllApp.3d 24, 2-30, 610 N.E.2d 163, 182 Ill.Dec. 739 (4th Dist. 1993). Pursuant to 725 ILCS 5/107-2(1)(c) a police officer "may arrest a person when" there is "reasonable grounds to believe that the person is committing or has committed an offense." The Shepherd court interpreted this to mean that once probable cause to arrest exists an officer has discretion to arrest a person "immediately, later or perhaps never." Shepherd, 242 Ill.App.3d at 29. Simply put, an officer's decision not to stop a defendant immediately has no impact on the constitutionality of the officer stopping the defendant a few minutes later. Shepherd, 242 Ill.App.3d at 30.

E. Probable cause arising out of Terry stop or consensual encounter

A common situation is when a Terry stop or consensual encounter leads to probable cause to arrest. The Illinois Supreme Court in People v. Love, 199 Ill.2d 269, 769 N.E.2d 10, 263 Ill.Dec. 808 (2002) addressed this situation. In that case an officer saw what he believed to be drug transactions where a person approached the defendant, gave her money and then the defendant removed an item from her mouth and gave it to the individual who had given her money. The officer approached the defendant and asked the defendant her name. The officers noticed that the defendant had difficulty answering the officers' questions and ordered her to spit out what she had in her mouth. The defendant complied and the officers recovered cocaine. The court held that based on their observations of the transaction, the officer had reasonable suspicion to detain the defendant. When the officer received the garbled response, the court held that the reasonable suspicion had ripened into probable cause to arrest the defendant. Because the officer had probable cause to arrest the defendant, the order to spit the item was a search incident to arrest. See also, People v. Richardson, 376 Ill.App.3d 612, 876 N.E.2d 303, 315 Ill.Dec. 303 (1st Dist. 2007) where the court held that the defendant's conflicting or evasive responses to police questioning constituted probable cause to arrest the defendant.

If an individual is validly detained, such as during a Terry stop, and the individual flees or attempts to flee, then the police have probable cause to arrest the individual for obstructing a peace officer, 720 ILCS 5/31-1(a). People v. Johnson, 408 Ill.App.3d 107, 119-120 (1st Dist. 2010). Handcuffing an individual who attempts to flee a valid Terry stop is proper as part of a lawful arrest. Johnson, 408 Ill.App.3d at 120.

F. Arrest of defendant in the defendant's home

1. Pursuant to an arrest warrant

An arrest warrant based on probable cause gives law enforcement the authority to enter a dwelling where the suspect lives when there is reason to believe the suspect is

inside his or her dwelling. Payton v New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371, 1388 (1980).

"An officer executing an arrest warrant is authorized to enter a building where the person is 'or is reasonably believed to be' if he is refused admittance after announcing his authority and purpose (People v. Barbee, (1966), 35 Ill.2d 407, 411, 220 N.E.2d 401), and an officer is justified in eliminating all places where the arrestee may be hiding before moving on. (People v. Sprovieri (1969), 43 Ill.2d 223, 227, 252 N.E.2d 531)." People v. Stibal, 56 Ill.App.3d 1048, 1051, 372 N.E.2d 931, 14 Ill.Dec. 652 (1st Dist. 1978). This is still the state of the law in Illinois. Foulks v. Emery, 2006 U.S. Dist. LEXIS 32589 (S.D. Ill. May 23, 2006). There is no distinction between whether the arrest warrant is for a felony or misdemeanor offense. People v. Sain, 122 Ill.App.3d 646, 649, 461 N.E.2d 1043, 78 Ill.Dec. 209 (2nd Dist. 1984).

Keep in mind that the standard for entry into the suspect's home pursuant to an arrest warrant is reasonableness- where the suspect is reasonably believed to be. The standard is not that there is probable cause to believe that the suspect is within his or her dwelling. There is "no persuasive logic in requiring the higher probable cause test in the situation…where a valid arrest warrant issued by a judge for defendant exists and the place to be searched is the defendant's own residence." Sain, 122 Ill.App.3d at 650.

In situations where the police want to enter into and search the residence of a third party for the subject of an arrest warrant the police must obtain a search warrant for that third person's residence. Steagald v. United States, 451 U.S. 204, 205-206, 68 L.Ed.2d 38, 101 S.Ct. 1642 (1981).

2. Warrantless arrests

The fourth amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. Payton v New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371, 1381 (1980). If this is the case, a court will suppress any evidence recovered from inside the suspect's home.

A common defense argument in this area is that because a defendant was arrested without a warrant in his home, then **all** of the evidence against the defendant in the case must be suppressed. This is not the case. A Payton violation only excludes evidence recovered inside the defendant's home and does not automatically require the exclusion of statements made by the suspect outside of the premises where the police have probable cause to arrest the defendant. New York v. Harris, 495 U.S. 14, 109 L.Ed.2d 13, 110 S.Ct. 1640, 1644 (1990). The court refused to apply the exclusionary rule in this situation because the rule in Payton was designed to protect the physical integrity of the home and not give suspects protection for statements made outside of their home where the police have probable cause to arrest the defendant. Harris, 495 U.S. at 19.

In Illinois, the holding in Harris has been extended to include **any** evidence obtained outside of the home. People v. Alexander, 212 Ill.App.3d 1091, 571 N.E.2d 1075, 1084, 157 Ill.Dec. 56 (1st Dist. 1991).

If a defendant files a motion to suppress evidence and alleges that the defendant was arrested in the defendant's home without a warrant and the police do not recover any evidence in the home, the motion is a "so what" motion as long as the police had probable cause to arrest the defendant. If there is probable cause to arrest the defendant, any evidence recovered or developed outside of the home, such as confessions, line-up results, or laboratory results, are not excluded because of a warrantless or nonconsensual arrest in the defendant's home.

a) "Consent once removed" doctrine

This concept may arise in situations where an undercover officer or informant enters into the defendant's home and then other officers enter the home to effectuate an arrest or search. For the doctrine to apply the undercover officer or informant must (1) enter at the express invitation of someone with authority to consent; (2) at that point establish the existence of probable cause to arrest or search; and (3) immediately summons help from other officers. United States v. Akinsanya, 53 F.3d 852, 856 (7th Cir. 1995). In litigating this issue, please keep in mind that neither the United States Supreme Court not the Illinois Supreme Court has expressly adopted this doctrine. People v. Krinitsky, 2012 IL App (1st) 120016, p. 38.

G. In custody on one charge and being investigated in another case

One situation that frequently arises is where the defendant is in custody for one offense and is the subject of investigation in other unrelated offenses. The most common situation in this area is where the defendant is in custody in one case and stands in a lineup regarding other offenses. This was the situation in People v. Gomez, 147 Ill.App.3d 928, 498 N.E.2d 767, 101 Ill.Dec. 443 (1st Dist. 1986). In Gomez, the defendant was arrested in his apartment for a series of robberies. Gomez, 498 N.E.2d at 768. At the time of his arrest on the robberies, there was an outstanding warrant for the defendant's arrest for a traffic offense. Id. The police officer who arrested Gomez was aware of the warrant but did not go to the defendant's apartment to solely arrest the defendant on the warrant. Id. At the police station, the defendant was identified as the perpetrator in one of the robberies for which he was arrested. Id. The trial court found that the police lacked probable cause to arrest the defendant for the robberies and suppressed the line up identification. Id.

The Gomez court reversed the trial court's ruling. The court held that it did not matter whether the police had probable cause to arrest the defendant for the robberies because "when the defendant was identified in a lineup by the victim of that robbery, he was lawfully being held in custody on a warrant charging him with a traffic offense. Under these circumstances, requiring defendant to appear in a line up did not implicate any of his fourth amendment rights." Gomez, 498 N.E.2d at 768. As an added bonus,

the court held that pursuant to People v. Seymour, 84 Ill.2d 24, 416 N.E.2d 1070, 1072, 48 Ill.Dec. 548 (1983), the police had no duty to orally tell the defendant that he had a right to post bond on the traffic warrant. Id.

H. Search incident to arrest

1. General considerations

Searches of a defendant and the area of his immediate control incident to his arrest have long been held to be lawful. Chimel v. California, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1969); People v. Joyner, 50 Ill.2d 302, 278 N.E.2d 756 (1972). See also People v. Tillman, 355 Ill.App.3d 394, 823 N.E.2d 117, 291 Ill.Dec. 107 (1st Dist. 2005) which held that a police officer kicking open a wall above a hole in which a lawfully arrested defendant had put an object and recovering narcotics from the wall was a valid search incident to arrest as the defendant's arrest was valid and the hole in the wall was immediately within the defendant's control. Tillman, 823 N.E.2d at 123.

Likewise, items that a defendant possesses at the time of arrest may be subject to a search incident to arrest. An arrestee's clothing, wallet and other small items of personal property can be subject to a search because they are immediately associated with the arrestee. See People v. Dillon, 102 Ill.2d 522 (1984) and People v. Cregan, 2014 IL 113600 (2014). Whether an item is immediately associated with an arrestee is determined by whether he is in actual physical possession of the object at the time of his arrest. Cregan, 2014 IL 113600, para. 51. This includes items found in the arrestee's pockets as well as wallets or purses. Cregan, 2014 IL 113600, para. 50. If at the time of arrest, an arrestee is in actual physical possession of a bag, it is considered immediately associated with the arrestee and is subject to search. Cregan, 2014 IL 113600, para. 51.

The police are not limited to searching only for weapons, but they also may search for evidence of the defendant's crime in order to preserve it for trial. United States v. Robinson, 414 U.S. 218, 235, 38 L.Ed.2d 427, 94 S.Ct. 467 (1973). Search incident to arrest also applies to any containers found on the defendant's person or in the area of his immediate control. Robinson, 414 U.S. at 223-24; New York v. Belton, 453 U.S. 454, 460-61, 69 69 L.Ed.2d 768, 101 S.Ct. 2860 (1981); United States v. Johnson, 846 F.2d 279, 282 (5th Cir. 1988).

When the police have made a lawful arrest of an occupant of a vehicle, the officer may search the passenger compartment of the vehicle and any containers found within the passenger compartment as a search incident to arrest. New York v. Belton, 453 U.S. 454, 460, 69 L.Ed.2d 768, 101 S.Ct. 2860 (1981).

A search incident to arrest need not be made at the location of the arrest. "[S]earches and seizures that could be made on the spot at the time of the arrest may legally be conducted later when the accused arrives at the place of detention." United States v. Edwards, 415 U.S. 800, 803, 39 L.Ed.2d 771, 94 S.Ct. 1234 (1974). Generally

speaking, as long as the administrative processes incident to the defendant's arrest and custody have not been completed, a search of the items seized from the defendant's person is still incident to the defendant's arrest. United States v. Ruigomez, 702 F.2d 61, 66 (5th Cir. 1983) (citing Edwards, 415 U.S. at 804).

The United States Supreme Court sharply limited searches incident to arrest involving vehicles in Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). In Gant, the court held that police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the vehicle's passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of the arrest. Gant, 129 S.Ct. 1710 at 1723.

The Illinois Supreme Court followed Gant in People v. Bridgewater, 235 Ill.2d 85, 918 N.E.2d 553, 335 Ill.Dec. 208 (2009). In Bridgewater, the police observed the defendant speeding and driving with tinted windows. The officer pursued the defendant who drove into a convenience store parking lot, exited his vehicle and began to walk into the store. The officer ordered the defendant to return to his vehicle but the defendant walked into the store. The officer spoke to the defendant inside the store and told him that he was being stopped for speeding and for driving with tinted windows. The officer asked the defendant several times to exit the store but the defendant refused. The defendant eventually relented and went outside. The officer asked the defendant to produce his driver's license and proof of insurance but the defendant refused. The defendant refused other commands that the officer gave him. The officer ultimately arrested the defendant for obstructing a police officer. The defendant was five feet from his vehicle when he was arrested. The officer asked two assisting officers to conduct a search of the defendant's vehicle. The defendant was handcuffed and in a squad car at the time of the search. The officers recovered a pistol in the defendant's car.

The trial court granted the defendant's motion to suppress. The Illinois Supreme Court upheld the trial court's ruling on the grounds that the search was an invalid search incident to arrest. The court held that the defendant was not unsecured and within reaching distance of the car's passenger compartment at the time of the search. Bridgewater, 235 Ill.2d at 95. Additionally, because the defendant was arrested for obstructing a police officer which was based on the defendant refusing to follow the officer's commands, the police could not have reasonably believed that evidence of that offense could be found in the defendant's car. Bridgewater, 235 Ill.2d at 95.

An example of a case where it was reasonable to believe that a vehicle contained evidence of the offense for which the individual was arrested is Thornton v. United States, 541 U.S. 615, 158 L.Ed.2d 905, 124 S.Ct. 2127 (2004). In Thornton, before the officer could stop the defendant for a traffic offense, the defendant parked his car and began to walk away. The officer stopped the defendant and patted him down and recovered drugs from the defendant. The officer arrested the defendant and placed him in the squad car. The officer then searched the passenger compartment of the defendant's car and found a pistol. The United States Supreme Court upheld the search of the defendant's car as a valid search incident to arrest. Thornton, 541 U.S. at 623. The Gant

court specifically upheld Thornton as it was reasonable to believe that Thornton's car contained evidence of the initial arrest. Gant, 129 S.Ct 1710 at 1719. The Gant court stated that "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence." Gant, 129 S.Ct. 1710 at 1719.

Search incident to arrest also applies in cases where the defendant is arrested on a civil body attachment. When an officer takes a suspect into custody it does not matter whether it is for a criminal offense or on a civil warrant. People v. Miller, 354 Ill.App.3d 476, 820 N.E.2d 1216, 1220, 290 Ill.Dec. 149 (4th Dist. 2004). The key issue is whether the defendant was lawfully taken into custody, not the underlying reason for it. *Id*. See also People v. Allibalogun, 312 Ill.App.3d 515, 727 N.E.2d 633, 245 Ill.Dec. 186 (4th Dist. 2000). See also People v. Harris, 364 Ill.App.3d 1037, 848 N.E.2d 1048, 1051, 302 Ill.Dec. 484 (4th Dist. 2006), upholding search as search incident to arrest where an individual was taken into custody for a probation violation.

The police ordering a lawfully arrested individual to spit an item out of her mouth is a valid search incident to arrest. People v. Love, 199 Ill.2d 269, 769 N.E.2d 10, 263 Ill.Dec. 808 (2002).

When an officer has probable cause to arrest an individual, a search may be conducted immediately before the arrest. Rawlings v. Kentucky, 448 U.S. 98, 111, 65 L.Ed.2d 633, 100 S.Ct. 2556 (2002); People v. Little, 322 Ill.App.3d 607, 612, 750 N.E.2d 745, 255 Ill.Dec. 828 (1st Dist. 2001); People v. Damian, 374 Ill.App.3d 941, 947, 873 N.E.2d 1, 313 Ill.Dec. 706 (5th Dist. 2007).

A warrantless search of an arrestee's cell phone for electronic data is not valid as a search incident to arrest. Riley v. California, 573 U.S. ____ (2014). In general, a search warrant is required for such a search absent another exception to the warrant requirement such as exigent circumstances.

2. Protective sweeps

A protective sweep is a quick and limited search of premises, which is incident to arrest, conducted to protect the safety of police officers or others, and narrowly confined to a cursory visual inspection of those places in which a person may be hiding. Maryland v. Buie, 494 U.S. 325, 108 L.Ed.2d 276, 110 S.Ct. 1093 (1990). The rationale for the protective sweep is that because an arrest is being made in the suspect's home, police officers have an interest in making sure that other persons do not launch an unexpected attack. Buie, 494 U.S. at 333. A sweep is to last only as long as is needed to dispel the reasonable suspicion of danger. Buie, 494 U.S. at 335-36.

Where safety is at issue, the ability to conduct a cursory visual inspection of a suspect's premises should not be unnecessarily constrained. People v. Pierini, 278 Ill.App.3d 974, 664 N.E.2d 140, 144, 215 Ill.Dec. 743 (1st Dist. 1996). Evidence seized

subject to plain view observation, pursuant to such a sweep, does not violate the suspect's constitutional protections. Pierini, 664 N.E.2d at 144.

In February of 2010 an Illinois appellate court specifically held for the first time that an officer must be lawfully on the premises for a protective sweep to be valid. People v. Davis, 398 Ill.App.3d 940, 955-956, 924 N.E.2d 67, 338 Ill.Dec. 207 (2nd Dist. 2010).

3. "Arrestable" offenses

One way a defendant may try to defeat a search incident to arrest is to claim that the offense for which he was stopped is only punishable by a fine and, as such, he was not lawfully arrested. This happens most often when a defendant is stopped for a minor traffic violation. This assertion is not the law. The United States Supreme Court has ruled that a person may be arrested for a traffic violation punishable only by a fine. Atwater v. City of Lago Vista, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001). In Atwater, Atwater was arrested and jailed for a failure to wear a seatbelt. Atwater, 532 U.S. at 323.

The Illinois Supreme Court has found no reason to deviate from this holding. People v. Fitzpatrick, 2013 IL 113449. In addition, the court in People v. Bridgewater, 375 Ill.App.3d 414, 873 N.E.2d 45, 313 Ill.Dec. 750 (3rd Dist. 2007) also followed the holding in Atwater.

I. Out of jurisdiction arrest

Generally an officer's position as a police officer does not give him authority to arrest a defendant outside of the officer's jurisdiction. When outside of his jurisdiction an officer may, as a private citizen, arrest an individual when a crime is being committed but the officer's powers to investigate are no greater than any other private citizen and the officer may not use police powers that are unavailable to private citizens to obtain evidence. 725 ILCS 5/107-3; People v. Lahr, 147 Ill.2d 379, 383, 589 N.E2d 539, 168 Ill.Dec. 139 (1992). An example of using powers beyond that of an ordinary citizen is the use of a radar gun to gather evidence to arrest an individual for speeding. Lahr, 147 Ill.2d at 383, People v. Kirvelaitis, 315 Ill.App.3d 667, 672, 734 N.E.2d 524, 248 Ill.Dec. 596 (2nd Dist. 2000).

An officer's use of his cognitive skills, obtained by police experience or otherwise, to interpret an officer's observation is not an exercise of police authority. People v. Erby, No. 5-06-0217, Slip opinion at p. 4, (5th Dist. 2007). The mere fact that "an officer is better able to interpret what he observed does not move his actions from those of a citizen to those of police power." Erby, Slip opinion at p. 6. In effectuating an out of jurisdiction arrest an officer may use any proper tool at his disposal to restrain a suspect. People v. Kleutgen, 359 Ill.App.3d 275, 279, 833 N.E.2d 416, 295 Ill.Dec. 593 (2nd Dist. 2005).

Pursuant to 725 ILCS 5/107-4(a-3) a police officer may make out of jurisdiction arrests if:

(1) The officer is engaged in the investigation of an offense that occurred in the officer's primary jurisdiction and the arrest or temporary questioning is made pursuant to that investigation; or

(2) the officer, while on duty as a peace officer becomes personally aware of the immediate commission of a felony or misdemeanor violation of the law; or

(3) the officer, while on duty as a peace officer is requested by an appropriate State or local law enforcement official to render aid or assistance to the requesting law enforcement agency that is outside the officer's primary jurisdiction.

In litigating this issue, please keep in mind that the officer must have firsthand awareness or knowledge of the recent commission of a felony which the officer has a reasonable suspicion the defendant participated in order for the officer to make a valid extrajudicial arrest. 725 ILCS 5/107-4(a-3)(2); People v. Contreras, 2011 IL App (2d) 100930.

J. The Good Faith Exception and arrest warrants

A situation that arises from time to time is where an officer arrests a defendant on what the officer believes to be a valid arrest warrant and at, some point after the arrest it is shown that the warrant was invalid, had been quashed and recalled or had been previously executed.

In the past courts had held that it was implicit in the good faith exception that the warrant actually existed. In People v. Anderson, 304 Ill.App.3d 454, 711 N.E.2d 24, 31-32, 238 Ill.Dec. 211 (2nd Dist. 1999) the court held that the good faith exception did not apply to a police encounter that was entirely the result of the officers' mistaken belief that there was a warrant for the defendant's arrest and, thus, when the defendant was detained and searched pursuant to an invalid warrant the evidence obtained during the search had to be suppressed. In Anderson, the officers arrested, searched and recovered narcotics from the defendant pursuant to an arrest warrant for the defendant. Unbeknownst to and unfortunately for the officers, however, was the fact that the warrant for the defendant's arrest had been previously vacated. Illinois courts consistently refused to apply the good faith exception in cases where no warrant is present. The rational was that for the good faith exception to exist, the officers must be relying on a facially valid arrest warrant that later proved to technically invalid. People v. Maurecek, 208 Ill.App.3d 87, 566 N.E.2d 841, 845, 152 Ill.Dec. 964 (2nd Dist. 1991).

The landscape in this area changed with the United States Supreme Court's opinion in United States v. Herring, 555 US ___, 172 L.Ed.2d 496, 129 S.Ct. 695 (2009). In Herring, the Supreme Court held that, the good faith exception to the exclusionary rule

may apply where a police officer arrests a defendant based on information that there is an active arrest warrant, but the warrant is later determined to be invalid or have been recalled.

In Herring, a police officer saw the defendant and checked with two counties to determine whether there were any arrest warrants for the defendant. Upon hearing from one of the counties that there was an arrest warrant for the defendant, the officer placed the defendant under arrest. The officer recovered a pistol and methamphetamine after a search incident to arrest of the defendant. Shortly after the arrest of and recovery of evidence from the defendant, the county that had issued the arrest warrant contacted the officer and told him that there was a mistake in their computer records and the arrest warrant had been recalled five months earlier. Herring, 129 S.Ct. at 698. The defendant filed a motion to suppress evidence. At the hearing, the evidence showed that mistakes like the one that had taken place had not occurred in the past and the officer testified that he never had reason to question the information about the county's warrant. Herring, 129 S.Ct. 704.

The court held that based on the facts of the case, the exclusionary rule did not apply. The court stated "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless or grossly negligent conduct or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level." Herring, 129 S.Ct. 702. In determining deterrence and culpability, the inquiry is "objective and not an inquiry into the subjective awareness of the arresting officers". Herring, 129 S.Ct. 703.

Simply stated the inquiry appears to be:

> (1) Was the police conduct objectively reasonable and not the product of deliberate, reckless or grossly negligent conduct or the product of recurring or systemic negligence?
>
> (2) Would applying the exclusionary rule meaningfully deter the conduct in question?
>
> (3) Does the deterrent benefit of excluding the evidence outweigh the social costs-does the deterrent effect of exclusion outweigh the social cost of exclusion?

The court also warned that "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should misconduct cause a Fourth Amendment violation." Herring, 129 S.Ct. at 703.

At least two Illinois cases have discussed this area of the law. The first was People v. Morgan, 388 Ill.App.3d 252, 901 N.E.2d 1049, 327 Ill.Dec. 16 (4th Dist. 2009). In Morgan the officers obtained a list of outstanding LaSalle County warrants which contained the defendant's name, date of birth and address. In the past, when the officers obtained such a list they did so on the day the list was printed and the list was printed in the officer's presence. The list in the Morgan case was up to three days old and had not been printed in the officers' presence. Within five minutes of receiving the warrant list, the officers were at the defendant's residence. Prior to going to the defendant's residence the officers did not verify the validity of the warrant. Once at the residence officers entered and arrested the defendant and recovered drugs. After the defendant's arrest the officers called to check the validity of the warrant and inform the county that the warrant was executed. The officers then learned that the warrant was invalid. Morgan, 388 Ill.App.3d at 255.

The court first held that fact that there was a fourth amendment violation does not automatically trigger the application of the exclusionary rule. "[W]hether the fourth amendment has been violated and whether exclusion is the appropriate sanction are separate issues." Morgan, 388 Ill.App.3d at 264. In determining whether the good faith exception applied the court looked to the test set out in Herring. The court held that the first consideration, what they termed police misconduct, clearly applied. The court held that the officers' reliance on a list that they know to be out of date and failing to attempt to verify the validity of the warrant was misconduct that was "at the very least, gross negligence, if not reckless or willful misconduct." Morgan, 388 Ill.App.3d at 265.

The court then looked at the second consideration, whether applying the exclusionary rule would meaningfully deter the misconduct. The court held that the officers' reliance on an outdated warrant list was conduct that could be deterred. Morgan, 389 Ill.App.3d at 265. Finally the court considered whether the cost of excluding the evidence is outweighed by the strong deterrent effect of the exclusion of the evidence. The court held that a reasonable officer would not have relied on an out of date list and that relying on the old list without making any effort to check the validity of the warrant was the type of reckless conduct that warranted exclusion of the evidence. Morgan, 388 Ill.App.3d 266-67. The court specifically stated that "[o]fficers cannot be willfully blind to the facts and then claim a good-faith reliance precludes suppression of the evidence. Morgan, 388 Ill.App.3d at 267.

The second case in this area is People v. Arnold, 394 Ill.App.3d 63, 914 N.E.2d 1143, 333 Ill.Dec. 331 (2nd Dist. 2009). In Arnold, the officer, who knew the defendant, saw the defendant driving. The defendant eventually ended up going into a store. The officer believed that there was an arrest warrant out for the defendant because the officer had done a warrant check a week earlier and the check revealed an outstanding arrest warrant for the defendant. After he observed the defendant, the officer radioed for verification of the warrant. While waiting for confirmation, the officer went into the store that the defendant had entered and handcuffed the defendant. After handcuffing the defendant, the officer received confirmation that the warrant was valid. A search incident

to the arrest led to the defendant being charged with cocaine possession. Arnold, 394 Ill.App.3d 65-67.

At the suppression hearing, the evidence showed that the warrant was not valid at the time of the defendant's arrest. In applying the test set out in Herring the court held that the officer's conduct in handcuffing the defendant prior to receiving confirmation of the warrant's validity was unreasonable. Arnold, 394 Ill.App.3d at 77. The court then looked at whether exclusion of the evidence could deter the conduct. The court determined that the officer's decision to handcuff the defendant without confirming that there was an active arrest warrant was beyond negligence and was reckless. Accordingly, suppression of the evidence would deter that conduct. Lastly the court stated that "the need to deter the police from handcuffing a citizen without confirming whether there is a valid warrant for his arrest" outweighed the costs of impeding the prosecution of the defendant. Arnold, 394 Ill.App.3d at 77.

IX. Consent

A warrantless search conducted with a defendant's voluntary consent does not violate the fourth amendment. Schneckloth v. Bustamonte, 412 U.S. 218, 228, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973). As the United States Supreme Court has stated: "Police officers act in full accord with the law when they ask citizens for consent." United States v. Drayton, 536 U.S. 194, 207, 153 L.Ed.2d 242, 122 S.Ct. 2114 (2002).

The determination of whether a defendant's consent was voluntary depends on the totality of the circumstances surrounding the defendant giving consent. People v. Bean, 84 Ill.2d 64, 417 N.E.2d 608, 48 Ill.Dec. 876 (1981). Where an illegal detention has occurred, a subsequent consent to search may be found to be tainted as a result of the illegality. People v. Brownlee, 186 Ill.2d 501, 713 N.E.2d 556, 239 Ill.Dec. 25 (1999). The burden is on the state to show that the given consent was voluntary. People v. Anthony, 198 Ill.2d 194, 761 N.E.2d 1188, 1192, 260 Ill.Dec. 632 (2001).

In attempting to obtain an individual's consent to search, it is *per se* coercive for a police officers to assert that **they could definitively** obtain a search warrant. People v. Price, 195 Ill.App.3d 701, 708, 552 N.E.2d 815, 160 Ill.Dec. 490 (1st Dist. 1990)(emphasis added). There is no coercion, on the other hand, when the police tell a defendant that **they could seek and possibly** obtain a search warrant. People v. Magby, 37 Ill.2d 197, 206 N.E.2d 33 (1967)(emphasis added); People v Kratovil, 351 Ill.App.3d 1023, 815 N.E.2d 78, 286 Ill.Dec. 868 (2nd Dist. 2004)(emphasis added). Statements by the police that they would seek a search warrant if the defendant did not allow a search does not invalidate the defendant's consent to search. People v. Paul, 176 Ill.App.3d 960, 531 N.E.2d 1008, 126 Ill.Dec. 381 (1st Dist. 1988). Additionally, an officer telling a defendant that he would leave an officer at her residence while he sought a warrant does not amount to coercion. Kratovil, 815 N.E.2d at 87. Telling a defendant that drug dogs would be called into search the defendant's apartment if the defendant did not consent to a search did not render the defendant's consent invalid. People v. Gunther, 225 Ill.App.3d 574, 580, 588 N.E.2d 346, 167 Ill.Dec. 705 (2nd Dist. 1992)

The fact that officers had their weapons drawn does not, alone, render consent to search a residence involuntary. People v. Long, 208 Ill.App.3d 627, 567 N.E.2d 514, 522, 153 Ill.Dec. 556 (1st Dist. 1990). There is no constitutional requirement that a lawfully seized defendant be advised that the defendant was free to go before the defendant's consent to search be recognized as voluntary. Ohio v. Robinette, 519 U.S. 33, 136 L.Ed.2d 347, 117 S.Ct. 417 (1996).

An individual may convey consent to search by non-verbal conduct. In re M.N., 268 Ill.App.3d 893, 645 N.E.2d 499, 503, 206 Ill.Dec. 494 (1st. Dist. 1994). There must be more than acquiescence to a claim of lawful authority. Bumper v. North Carolina, 391 U.S. 543, 20 L.Ed.2d 797, 88 S.Ct. 1788, 1792 (1968). Where non-verbal consent is alleged, the defendant's agreement to consent to the search must be unmistakably clear. People v. Anthony, 198 Ill.2d 194, 761 N.E.2d 1188, 1193, 260 Ill.Dec. 632 (2001). In Anthony, the court held that the defendant acquiesced to a search rather than consented when he spread his legs apart and put his hands on his head in response to the officer asking whether he could search the defendant. Id.

The Illinois Supreme Court distinguished its Anthony decision in People v. Smith, 214 Ill.2d 338, 827 N.E.2d 444, 292 Ill.Dec. 915 (2005). In Smith the defendant was a passenger in a car where the driver was arrested for DUI. The defendant, the officer felt, was also under the influence so he was offered a ride from where the car was parked on an interstate highway back to the police station. The police department had a policy of conducting a pat-down search of anyone who entered into a squad car. The officers asked the defendant if they could perform a pat-down search of the defendant before the defendant got into the squad car. The defendant responded by facing the squad car and placing his hands on the trunk. The officers then patted down the defendant and recovered a pistol. The defendant alleged that his consent was involuntary because he acquiesced to the officers' authority. The Illinois Supreme court disagreed. The court held that because the pat-down was not preceded by any accusatory police questioning, there was no indication of any hostility between the defendant and the police, and the officers did not exhibit their authority in an intimidating fashion as the officers merely requested permission to search the defendant before allowing the defendant in the squad car as a matter of standard police procedure, the defendant's consent was voluntary. Smith, 214 Ill.2d at 353-54.

For another case discussing non-verbal consent, please see People v. Raibley, 338 Ill.App.3d 692, 788 N.E.2d 1221, 273 Ill.Dec. 345 (4th Dist. 2003) which held that the defendant's shrug in response to being asked if the police could look at videotapes that turned out to contain child pornography was ambiguous as it could have expressed anything from the defendant's consent to the defendant's acquiescence to authority to aloofness or contempt for the police. The safest course of action in these situations is to have the officer obtain an affirmative statement or written consent from the defendant indicating the defendant's consent to search.

Inherent in a person's consent to search is the person's agreement to wait during the search. People v. Oliver, 236 Ill.2d 448, 925 N.E.2d 1107, 338 Ill.Dec. 901 (2010).

In Oliver the defendant claimed that because the police directed him where to wait during a consensual search of his vehicle's interior, he was illegally seized when the police asked him for consent to search the trunk of his vehicle. Noting that "the defendant had to wait somewhere", the Illinois Supreme Court rejected the defendant's argument because not doing so "would transform every consensual vehicle search into an unconstitutional seizure." Oliver, 236 Ill.2d at 458.

A defendant's refusal to sign a consent to search form, irrespective of the circumstances of the refusal, is not a *per se* express refusal of consent. People v. Burton, 409 Ill.App.3d 321, 334-335 (2nd Dist. 2011). The Burton court looked to why the defendant refused to sign a consent to search form.

In Burton, the defendant's girlfriend, who was the lease holder of the apartment where she and the defendant lived, consented to a search of the apartment and a closet where the defendant kept his coat. The police officers asked the defendant to sign a consent to search form, but he refused to sign the document because he was not named on the apartment lease. The defendant also testified at the suppression hearing that as a result of being convicted of seven felonies in nine years, he knew his rights.

In determining whether the defendant expressly refused to consent to the search, the court held that there was no refusal. The court stated that the defendant's refusal to sign the consent form "was based on his belief that, because he was not named in the lease, it was unnecessary. Defendant did not testify that he told the officers that he would not sign the form because he did not want them to search, nor did he testify that, in fact he did not sign the form because he objected to the search. Rather, defendant explained to the officers that he did not need to sign because he was not named in the lease, and then proceeded to sit in the front room while the search took place. He never indicated that he wanted the search to cease, and he did not take any other action that could reasonably be interpreted as an express refusal of consent." Burton, 409 Ill.App3d at 333. The Burton court specifically declined to find that "a refusal to sign a consent to search form is, irrespective of the surrounding circumstances, a *per se* express refusal of consent." *Id*. at 334-335.

A. Scope of consent

The scope and duration of the police's lawful presence in a defendant's residence is governed by the scope of his consent. People v. Dale, 301 Ill.App.3d 593, 703 N.E.2d 927, 930, 234 Ill.Dec. 827 (4th Dist. 1998). In Dale, the defendant allowed the officers into his motel room after the police asked if they could come in and speak to the defendant. The motel manager wanted the police to remove the defendant from the room. The officers told the defendant that they would stay in the room while the defendant got his things together. The defendant did not protest and began packing his belongings. As he did, cocaine fell from some of his clothing. The Dale court held that the defendant consented only to having the police enter his room to speak with him and did not consent to having the police watch him pack. Id. The Dale court was also troubled by the fact

that the officers "helped" the defendant pack by getting some of his clothes from a closet and then giving them to the defendant.

In short, while conducting a warrantless search based on consent the police "have no more authority than they have apparently been given by the voluntary consent of the defendant." People v. Baltazar, 295 Ill.App.3d 146, 149 (3rd Dist. 1998). A court reviews the scope of an individual's consent by using a test of "objective reasonableness". Florida v. Jimeno, 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991); People v. Ledesma, 206 Ill.2d 571, 593 (2003), overruled on other grounds by People v. Pittman, 211 Ill.2d 502, 513 (2004).

In applying this test, a court is to consider what a "typical reasonable person [would] have understood by the exchange between the officer and the suspect." Jimeno, 500 U.S. at 251; Ledesma, 206 Ill.2d at 593. Simply stated, the scope of consent to search is determined by its expressed object or purpose. Jimeno, 500 U.S. at 251; Ledesma, 206 Ill.2d at 593.

Using these concepts courts have held that the police may search unlocked containers found inside the area being searched if it is reasonable to find the object of the search in such containers. In Jimeno the United States Supreme Court held that the defendant's consent to search his car included the search of a paper bag found in the car because the officer told the defendant that he suspected him of possessing narcotics. Jimeno, 500 U.S. at 251. Along the same lines, the defendant's consent to search his motorcycle included the search of his jacket located in a cargo area when the express object of the search was narcotics. People v. Phillips, 264 Ill.App.3d 213, 222 (5th Dist. 1994).

On the other hand, a defendant's general consent to search a vehicle does not give the police the authority to break into locked containers or do physical damage to the vehicle in conducting the search. Jimeno, 500 U.S. at 251-252. Likewise the court in People v. Vasquez, 388 Ill.App.3d 532, 553 (1st Dist. 2009) held that the removal of a vehicle's bumper went beyond the defendant's consent to search the vehicle.

In an issue new to Illinois, the court in People v. Kats, 2012 IL App (3d) 100683, Paragraph 29 was asked to consider "whether a defendant's consent to search his vehicle and its contents for contraband extends to the spaces behind interior door panels that are not visible to the naked eye from inside the vehicle's passenger cabin." In Kats, after the completion of a traffic stop, the officer asked the defendant if he could search the vehicle and its contents for contraband. Kats, 2012 IL App (3d) 100683 at paragraph 7. During the search of the vehicle the officer observed that the plastic part of one of the doors had been pulled away from the metal framework of the door. Id at paragraph 10. The officer used a screw driver and another tool to pry back the plastic door panel and ultimately recovered marijuana. Id at paragraph 10. The trial court granted the defendant's motion to suppress evidence finding that the defendant's consent to search did not include consent to have the police pry open the closed compartment where the officer could not see the contraband. Id at paragraph 13.

The appellate court disagreed and reversed the trial court. They held that once the defendant agreed to the search of the vehicle and its contents for contraband, it would be reasonable to find contraband behind a removable door panel. Id at paragraph 30. The court further stated that "a reasonable person in the defendant's position would have understood that he had authorized [the officer] to search behind the vehicle's door panels, particularly where (as here) the panels could be easily removed and replaced and the search could be accomplished without causing any structural damage to the car. [The officer] did not alter or damage the vehicle or remove anything that could not easily be replaced (as in *Vasquez).* Rather, he merely used a screwdriver to pry open a door panel-a panel which he testified was already slightly ajar-so that he could peer into the space behind it. Given the minimally invasive manner in which this search was conducted and the unlimited consent given by the defendant, we hold that [the officer's] search did not exceed the scope of consent." Id at paragraph 30.

It is important to keep in mind that the cases in this area of law are extremely fact specific. As shown in the Kats opinion, where the court commented several times that the officer asked the defendant for consent to search his "vehicle and its contents" for "contraband", the scope of consent hinges on what the officers specifically told the defendant when the he consented to the search.

B. Third party consent

The defendant himself need not give consent. Consent may be obtained from a third party who has or is reasonably believed to have joint access or control over the premises. United States v. Matlock, 415 U.S. 164, 170, 39 L.Ed.2d 242, 94 S.Ct. 988 (1974); Illinois v. Rodriguez, 497 U.S. 177, 111 L.Ed.2d 148, 110 S.Ct. 2793 (1990). Additionally, "the consent of one who possesses common authority over premises or effects is valid as against the absent non-consenting person with whom the authority is shared." Matlock, 415 U.S. 164 at 170. When someone who has control over the premises consents to a search, the search will not be invalidated because the defendant claims an expectation of privacy in the area or items searched. People v. Hefflin, 71 Ill.2d 525, 376 N.E.2d 1367, 1374, 17 Ill.Dec. 786 (1978).

The same rationale applies to automobiles. The driver of an automobile has authority to consent to a search of a vehicle because the driver has immediate possession and control of the entire vehicle. People v. James, 163 Ill2d 302, 314-15, 645 N.E.2d 195, 206 Ill.Dec.190 (1994). The driver's consent is valid even if the owner of the vehicle is present and does not object to the search. People v. Sanchez, 292 Ill.App.3d 763, 769, 686 N.E.2d 367, 226 Ill.Dec. 737 (3rd Dist. 1997).

1. Limitations on third party consent

In Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208, (2006) the United States Supreme Court held that one occupant may not give effective consent to search shared premises against a co-tenant who is present and refuses to give permission

to search. In Randolph, the police responded to a domestic dispute at the defendant's home. Randolph, 164 L.Ed.2d 208 at 217. Once the police arrived at the defendant's home they talked to the defendant's wife and she told them that the defendant was a cocaine user and had drugs in the home. *Id*. The police asked the defendant for permission to search the home and he "unequivocally refused." *Id*. The officers then asked the defendant's wife for permission to search and she "readily gave" consent. *Id*. The police recovered cocaine and the defendant was arrested and subsequently indicted. *Id*. In deciding whose authority prevailed, the court held that "a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." *Id*.

Two phrases of the holding are crucial: "physically present co-occupant" and "as to him". The defendant who objects to the search must be physically present at the premises and any recovered evidence must be used against him. Thus, it would appear, a third party against, whom evidence from a search objected to by another party, would not be able to use a lack of third party consent to contest the validity of the search. The court did note that exigent circumstances might justify a warrantless search in these types of situations. Randolph, 164 L.Ed.2d 208 at 223, Footnote 6.

Another point that is crucial is that the term "physically present" means actually present at the colloquy were the third party gives consent. The Randolph court stated "we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenants permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out. Randolph, 547 U.S. at 121.

The Randolph "fine line" was at issue in Fernandez v. California, 134 S.Ct. 1126, 188 L.Ed.2d 25, 2014 U.S. Lexis 1636 (2014). In Fernandez the defendant was a suspect in a recently committed robbery. The police went to defendant's residence and they heard screams coming from inside. The defendant's girlfriend, Rojas, answered the door and she had visible, fresh injuries to her face. The officers wanted to conduct a protective sweep of the residence and they asked the defendant to step out of the apartment so they could do so. The defendant refused and told the police that they had no right to come into the apartment. The officers placed the defendant under arrest for domestic battery and took him to the police station. About an hour later, the police returned to the apartment and asked Rojas for consent to search the residence and she agreed. The officers then recovered evidence linking the defendant to the original robbery.

Adhering to the decision in Randolph, the United States Supreme Court upheld the search of the apartment. The defendant argued that Randolph should not apply because the police removed him from the residence. The court rejected that argument. The fact that the police removed the defendant was of no issue as long as it was objectively reasonable to do so. Randolph did not "suggest that improper motive may invalidate objectively justified removal." Fernandez, 134 S.Ct. at 1134.

The defendant also argued that his original objection made at the threshold should have remained in effect until he had withdrawn it. The court rejected this contention as well stating that Randolph is to be "taken at its word-that it applies only when the objector is standing in the door saying 'stay out' when the officers propose to make a consent search". Fernandez, 134 S.Ct. at 1136.

The importance of this "fine line" is further shown in People v. Parker, 386 Ill.App.3d 40, 898 N.E.2d 1047, 325 Ill.Dec. 768 (1st Dist. 2007). In Parker, the defendant was sleeping when the police came to his apartment and were given consent to search the apartment by the defendant's live in girlfriend, Grisham. Parker, 383 Ill.App.3d at 42. In reversing the trial court, the Parker court held that "[a]lthough defendant was present nearby, he was not present at the threshold colloquy where Grisham gave her voluntary consent. Due to his absence at that point, the defendant could not object when the police entered his home and began their search. Following the reasoning of the Randolph court, the defendant 'lost out' on his opportunity to do so." Parker 386 Ill.App.3d at 45. The Parker court further stated that for the defendant to override his girlfriend's consent "it was necessary for him to be present 'at the door' and expressly object to the search when the police entered his home." Parker, 386 Ill.App.3d at 45.

One case went beyond the defendant's refusal to sign a consent to search and looked at why the defendant refused to sign the consent in determining whether the defendant had objected to a co-tenant's consent to search. In People v. Burton, 409 Ill.App.3d 321 (2nd Dist. 2011) the defendant's girlfriend, who was the lease holder of the apartment where she and the defendant lived, consented to a search of the apartment and a closet where the defendant kept his coat. The police officers asked the defendant to sign a consent to search form, but he refused to sign the document because he was not named on the apartment lease. The defendant also testified at the suppression hearing that as a result of being convicted of seven felonies in nine years, he knew his rights.

In determining whether the defendant expressly refused to consent to the search, the court held that there was no refusal. Burton 409 Ill.App.3d at 333. The court stated that the defendant's refusal to sign the consent form "was based on his belief that, because he was not named in the lease, it was unnecessary. Defendant did not testify that he told the officers that he would not sign the form because he did not want them to search, nor did he testify that, in fact he did not sign the form because he objected to the search. Rather, defendant explained to the officers that he did not need to sign because he was not named in the lease, and then proceeded to sit in the front room while the search took place. He never indicated that he wanted the search to cease, and he did not take any other action that could reasonably be interpreted as an express refusal of consent." *Id*. at 333. The Burton court specifically declined to find that "a refusal to sign a consent to search form is, irrespective of the surrounding circumstances, a *per se* express refusal of consent." *Id*. at 335.

Additionally, the police have no duty to find a potentially objecting co-tenant before they act on the consent that they have already obtained. Randolph, 547 U.S. at 122; Parker, 386 Ill.App.3d at 45.

Randolph was also followed in People v. Mikrut, 371 Ill.App.3d 1148, 864 N.E.2d 958, 309 Ill.Dec. 717 (2nd Dist. 2007).

As stated above, a driver may consent to the search of a vehicle, even if the owner is present, as long as the owner does not object to the search. Sanchez, *supra*; People v. Mendoza, 234 Ill.App.3d 826, 835, 599 N.E.2d 1375, 175 Ill.Dec. 361 (5th Dist. 1992).

2. Common authority

Even though third party consent only applies to those areas where there is joint control or access, United States v. Duran, 957 F.2d 499 (7th Cir. 1992), courts recognize the doctrine of common authority in situations involving family, marital or cohabitant relationships. People v. Pickens, 275 Ill.App.3d 108, 112, 655 N.E.2d 1206, 211 Ill.Dec. 823 (5th Dist. 1995). Where a defendant lives with his parents or a close relative, and the relative consents to a search of the defendant's bedroom, there is a presumption that the relative has sufficient common authority over the bedroom to authorize the search. People v. Bliey, 232 Ill.App.3d 606, 615, 597 N.E.2d 830, 173 Ill.Dec. 856 (1st Dist. 1992). The burden is on the State to establish common authority. People v. Bull, 185 Ill.2d 179, 197, 705 N.E.2d 824, 235 Ill.Dec. 641 (1998).

Common authority is based on "mutual use of the property by persons generally having joint access or control for most purposes" such that each person assumes the risk that the other may allow the police to search any common areas. United States v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).

There are two types of common authority: actual and apparent. Under the theory of apparent common authority, where the police receive consent form a third party whom the police reasonably believe has actual common authority, but who, in fact, does not, there is no fourth amendment violation. People v. Bull, 185 Ill.2d 179, 187-88, 705 N.E.2d 824, 235 Ill.Dec. 641 (1998). The inquiry in this area is an objective one. The question is whether the facts available to the officer cause a reasonable person to believe that the consenting party had authority over the premises or location searched. If so, then the consent the person gave to the police was valid. *Id*. at 188-89.

In these types of cases, courts focus on whether the defendant has established exclusive possession of the searched area. People v. Brown, 162 Ill.App.3d 528, 539, 515 N.E.2d 1285, 114 Ill.Dec. 14 (4th Dist. 1987). Two factors that show the defendant's exclusive possession are whether the defendant locked the room in his absence and whether the defendant gave explicit instructions not to allow anyone into the room. Brown, 162 Ill.App.3d at 539-540.

The determination of whether the individual consenting to a search of closed or locked items is extremely fact specific. An excellent discussion of the issue is in People v. Burton, 409 Ill.App.3d 321 (2nd Dist. 2011). The Burton case held that the defendant's girlfriend and leaseholder of their apartment consent to allow the police to search the defendant's jacket's pocket was valid.

Another case regarding this issue is People v. Lyons, 2013 IL App (2d) 120392. In Lyons, the defendant's wife turned over various floppy disks and DVDs which were later found to contain child pornography to the police. The defendant stored the items in a locked cabinet. Regarding the issue of common authority over the locked cabinet and the disks, the court specifically held that "[u]nder Illinois law, proof that spouses have common authority over a space is, without more, rebuttable proof that each spouse has authority not only over containers within that space that are jointly owned or used by the spouses, **but also over containers owned or in practice used by one spouse alone.** The presumption does not require the State to prove that the spouse who solely owns or uses the container has specifically authorized the other spouse to access it; the presumption arises simply from the fact of common authority over the space itself." Lyons, 2013 IL App (2d) 120392 at p. 33 (emphasis added). This presumption is also "appropriate in the case of certain unmarried cohabitants." Lyons, at p. 32.

A minor child, living at home, is competent to give lawful consent to search and age alone is never an automatic bar to capacity to consent. People v. Bishop, 352 Ill.App.3d 195, 815 N.E.2d 1264, 287 Ill.Dec. 461 (2nd Dist. 2004). See also People v. Holmes, 180 Ill.App.3d 870, 536 N.E.2d 1005, 129 Ill.Dec. 955 (3rd Dist. 1989).

In Bishop, the defendant was charged with numerous counts of Aggravated Criminal Sexual Assault against his fifteen year old daughter. The victim told the police that the defendant had most recently sexually assaulted her in his bedroom the night before the interview with the police. She told the police that the defendant used a condom and that the used condom could be found in a wastebasket in the defendant's bedroom. She further told the police that they could also find Vaseline that the defendant used for lubrication as well as birth control pills that the defendant forced the victim to take in the defendant's bedroom. The defendant filed a Motion to Suppress Evidence that the trial court denied. In affirming the trial court's denial of the motion, the appellate court held that because the victim testified that she was allowed to go in and out of the defendant's bedroom when the door was open, that the door was open when she was alone in the house after school, that the defendant never kept the door locked or closed when he was gone, that the defendant never told the victim that neither she nor anyone was not allowed into the room, the defendant had failed to rebut the presumption of common authority that exists when family members live together. Bishop, 815 N.E.2d at 1272-1273.

C. Defendants on parole or probation

Usually when individuals are placed on mandatory supervised release (parole) or probation, a condition of that parole or probation is that the person submits to searches of his person, residence or property.

1. Probation

Notwithstanding this blanket consent, courts require that any such search be based on reasonable suspicion, especially if the search is of the defendant's home. People v. Lampitok, 207 Ill.2d 231, 798 N.E.2d 91, 105-06, 278 Ill.Dec. 244 (2000). See also United States v. Knights, 534 U.S. 112, 151 L.Ed.2d 497, 122 S.Ct. 587, 592 (2001) and Griffin v. Wisconsin, 483 U.S. 868, 97 L.Ed.21d 709, 107 S.Ct. 3164, 3168 (1987) that held that a search of a probationer's home can be reasonable without strict adherence to the ordinary warrant and probable cause requirement as long as there are reasonable grounds or reasonable suspicion that support the search.

A provision where a defendant waives his fourth amendment rights by freely agreeing to a suspicionless search as a condition of probation pursuant to a fully negotiated guilty plea may be found to be a valid waiver and consent to such a search based on principles of contract law which govern plea negotiations. People v. Absher, 242 Ill.2d 77, 950 N.E.2d 659, 351 Ill.Dec. 163 (2011).

Pursuant to 730 ILCS 110/11 a probation officer has the authority to arrest any probationer found in violation of his probation conditions.

2. MSR

For defendants on MSR, "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." Samson v. California, 574 U.S. 843, 165 L.Ed.2d 250, 120 S.Ct. 2193, 2202 (2006). Accordingly, a limited pat down of an individual on MSR is appropriate even where there is no individualized suspicion of criminal activity. People v. Moss, 217 Ill.2d 511, 842 N.E.2d 699, 299 Ill.Dec. 662 (2005). The Illinois Supreme Court further held that the search condition of MSR "has no limitation on what government agent may perform that search or what purpose they may have." Moss, 842 N.E.2d at 712.

Based on the Samson decision, the Illinois Supreme Court has held that the Fourth Amendment does not bar a suspicionless search of a parolee's residence. People v. Wilson, 228 Ill.2d 35, 52, 885 N.E.2d 1033, 319 Ill.Dec. 353 (2008). In Wilson, the defendant signed and accepted a search condition pertaining to his MSR requiring him to "consent to a search of his person, property or residence under" his control. Wilson, 228 Ill.2d at 52. By doing so, any enhanced protections afforded to an individual's residence did not apply to the defendant because the defendant's "status as a parolee, coupled with the plain language of his search condition, reduced his expectation of privacy in his residence to a level that society would not recognize as legitimate." *Id*.

D. "Consent once removed" doctrine

This concept may arise in situations where an undercover officer or informant enters into the defendant's home and then other officers enter the home to effectuate an arrest or search. For the doctrine to apply the undercover officer or informant must (1) enter at the express invitation of someone with authority to consent; (2) at that point establish the existence of probable cause to arrest or search; and (3) immediately summons help from other officers. United States v. Akinsanya, 53 F.3d 852, 856 (7th Cir. 1995). In litigating this issue, please keep in mind that neither the United States Supreme Court not the Illinois Supreme Court has expressly adopted this doctrine. People v. Krinitsky, 2012 IL App (1st) 120016, p. 38.

X. Exigent circumstances and hot pursuit

Courts have long held that exigent circumstances are an exception to the warrant requirement. Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980). The burden is on the state to demonstrate the existence of exigent circumstances justifying a warrantless search or seizure. People v. McNeal, 175 Ill.2d 335, 677 N.E.2d 841, 846, 222 Ill.Dec. 307 (1997). The Illinois Supreme Court, in People v. Williams, 161 Ill.2d 1, 641 N.E.2d 296, 204 Ill.Dec. 72 (1994) set out the factors that are relevant to determining the existence of exigent circumstances. These factors are whether:

(1) The crime under investigation was recently committed;

(2) There was any deliberate or unjustified delay by the police during which a warrant could have been obtained;

(3) A grave offense was involved, particularly a crime of violence;

(4) There was a reasonable belief that the suspect was armed;

(5) The police officers were acting on a clear showing of probable cause;

(6) There was a likelihood that the suspect would escape if he was not swiftly apprehended;

(7) There was strong reason to believe that the suspect was in the premises;
The police entry was made peaceably, albeit nonconsensually.

Williams, 641 N.E.2d at 306.

These factors are balancing factors rather than rigidly applied cardinal rules. People v. White, 177 Ill.2d 194, 512 N.E.2d 677, 685, 111 Ill.Dec. 288 (1987). While no one factor controls this issue, the commission of an offense in the presence of an officer militates in favor of finding exigent circumstances. People v. Pierini, 278 Ill.App.3d 974, 664 N.E.2d 140, 144, 215 Ill.Dec. 743 (1st Dist. 1996).

Just as the commission of an offense in front of an officer makes it easier for a court to find that exigent circumstances exist, the other side of the coin is equally true. "The passage of time between the commission of the offense and the arrest has a significant bearing on claims of exigency." White, 512 N.E.2d at 685.

This was an issue in People v. Shanklin, 367 Ill.App.3d 569, 855 N.E.2d 184, 305 Ill.Dec. 293 (1st Dist. 2006). In Shanklin, almost three weeks after the murder of the victim, the police interviewed a witness who named the defendant as the shooter in the murder. The police went to the defendant's home. The officers did not have an arrest warrant for the defendant's arrest or a warrant to search the defendant's home. The police arrested the defendant in his home and recovered a pistol. At the hearing on the motion to suppress evidence the trial court found that the warrantless entry into the defendant's home was non-consensual but there were exigent circumstances that validated the arrest and recovery of the pistol. The Shanklin court disagreed. The court specifically held that there were no exigent circumstances to support the defendant's arrest. It noted that there was no explanation in the record from the officer as to why he did not attempt to obtain an arrest or search warrant. Shanklin, 855 N.E.2d at 190. The court additionally stated that there was no evidence that the defendant was a danger to the arresting officers, that the defendant was seen with a weapon in the seventeen days between the murder and the arrest nor was there any evidence that the defendant would escape were he not apprehended quickly. *Id*.

Please keep in mind that the factual scenario in Shanklin, the warrantless arrest of an individual suspected of a violent crime in his home after an investigation, is very common. In litigating motions in this area it is incumbent upon us to make sure that the record contains evidence in the areas that are noted in the opinion.

Hot pursuit of a suspect who flees from a public place into his residence constitutes an exigent circumstance. United States v. Santana, 427 US 38, 96 S.Ct. 2406, 2410, 49 L.Ed.2d 300 (1976). A person "may not defeat an arrest which has been set in motion in a public place … by the expedient of escaping to a private place." Santana, 427 U.S. at 43. Additionally, the arrest must "otherwise proper". Santana, 427 U.S. at 42. There must be probable cause to arrest the suspect in the first instance for hot pursuit to apply in the situation of the police chasing a suspect into the suspect's residence. People v. Wear, 229 Ill.2d 545, 566-67, 893 N.E.2d 631, 323 Ill.Dec. 359 (2008). In addition to probable cause to arrest, the otherwise proper requirement has been held to include that the arrest must have been set in motion in a public place. People v. Davis, 398 Ill.App.3d 940, 952-53, 924 N.E.2d 67, 338 Ill.Dec. 207 (2nd Dist. 2010).

Santana and Wear apply only to arrests. There is no such thing as hot pursuit into a suspect's home in order to conduct a Terry stop. Wear, 229 Ill.2d at 567.

A. What constitutes a grave offense

Courts have considered grave offenses to be first-degree murder, armed robbery and assault. Minnesota v. Carter, 525 U.S. 83, 142 L.Ed.2d 373, 119 S.Ct. 469 (1998); People v. Wimbley, 314 Ill.App.3d 18, 731 N.E.2d 290, 297, 246 Ill.Dec. 762 (1st Dist. 2000).

An issue that frequently arises is whether narcotics trafficking can be considered a grave offense for the purposes of exigent circumstances. Based on the definition of grave offense as set out in the Carter and Wimbley decisions, it would appear that drug dealing would not be considered a grave offense. There are two Illinois cases, however, that do hold that drug dealing is a grave offense. Those cases are People v. Patterson, 267 Ill.App.3d 933, 642 N.E.2d 866, 871, 205 Ill.Dec. 1 (1st Dist. 1994) and In re D.W., 341 Ill.App.3d 517, 796 N.E.2d 46, 275 Ill.Dec. 566 (1st Dist. 2003). In holding drug dealing a grave offense, the D.W. court reasoned, "the sale and distribution of drugs with resultant addiction issues have perhaps done more to damage the fabric of modern society than any other single crime. Further, we believe that, frequently, the crimes of violence referenced in the case law as 'grave crimes' are inextricably linked to drug trafficking." D.W., 796 N.E.2d at 55.

Additionally, courts have refused to adopt a rule stating that the fact that drugs can easily be disposed of creates a *per se* finding of exigent circumstances when drugs are the subject of an investigation. People v. Ouellette, 78 Ill.2d 511, 401 N.E.2d 507, 509, 36 Ill.Dec. 666 (1979); Wimbley, 731 N.E.2d at 291. The police must have particular reasons to believe that the drugs will be destroyed in order for exigent circumstances will arise. D.W., *supra*, Wimbley, *supra*.

XI. Plain View/Touch/Smell

The plain view doctrine allows a police officer to seize an item when (1) the officer is lawfully located in the place where he observed the object, (2) the object is in plain view, and (3) the incriminating nature of the item is immediately apparent. People v. Madison, 264 Ill.App.3d 481, 637 N.E.2d 1074, 1078, 202 Ill.Dec. 338 (1st Dist. 1994).

The plain view doctrine has been applied to anything that an officer becomes aware of by his five senses while in a lawful position. People v. Wright, 41 Ill.2d 170, 242 N.E.2d 180, 184 (1968). When objects have a distinctive and consistent shape that an officer has been trained to detect and that officer has previous experience in detecting such objects, his tactile perception can provide him with the same recognition that his sight would have provided. People v. Mitchell, 165 Ill.2d 211, 650 N.E.2d 1014, 1022, 209 Ill.Dec. 41 (1995). The officer's belief must be objectively reasonable in light of his past experience and training, and capable of verification. Mitchell, 650 N.E.2d at 1022. Probable cause is probable cause, regardless of whether it develops from sight or touch. *Id*. It is the officer's plain touch of the object which elevates his reasonable suspicion that the suspect might be armed to the necessary probable cause to believe that the suspect is concealing a weapon. *Id*.

The plain touch doctrine is not limited to weapons. If a police officer lawfully pats down a suspect and feels an object whose contour or mass makes its identity

immediately apparent, then there has been no invasion of privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations in the plain view context. Minnesota v. Dickerson, 508 U.S. 366, 375, 124 L.Ed.2d 334, 113 S.Ct. 2130 (1993). This was the case in Mitchell where an officer patted down the defendant and felt an object that felt like rock cocaine in a plastic bag. The officer specifically testified that he felt that the object was probably rock cocaine. The Mitchell court held that the requirements for seizure under the plain touch doctrine had been met. Mitchell 650 N.E.2d at 1024.

The officer is not allowed to manipulate the object in order to determine its identity. People v. Blake, 268 Ill.App.3d 737, 645 N.E.2d 580, 583, 206 Ill.Dec. 575 (2nd Dist. 1995). If an officer has to manipulate the object, its incriminating character is not immediately apparent and exceeds the scope of a proper Terry frisk. Dickerson, 124 L.Ed.2d at 347-348.

As mentioned above, the Illinois Supreme Court in the Wright case held that the plain view doctrine applies to anything that an officer becomes aware of through the officer's five senses. Wright, 242 N.E.2d at 184. Distinctive odors have long been held to be persuasive evidence of probable cause and an officer's detection of controlled substances by their smell has been held to be an acceptable method of establishing probable cause. People v. Stout, 106 Ill.2d 77, 87 (1985) and People v. Campbell, 67 Ill.2d 308, 315 (1977).

More recently, People v. Smith, 2012 IL App (2d) 12030, p. 17 following Stout held that the odor of raw cannabis provided probable cause for a vehicle search. This was especially true where the officer had considerable training and experience in identifying and detecting the odor of cannabis. Smith, at p. 14. In addition, Smith did not limit its holding to cases where the odor of cannabis is characterized as strong or in any other fashion. The court flatly held that "[t]here is no modifier preceding 'cannabis.'" Smith, at p. 16. For good measure the opinion provides citations to at least ten opinions from other jurisdictions that are in accord with its holding. See also People v. Weaver, 2013 IL App (3d) 130054 which followed Smith.

XII. Police Impoundments and Inventory searches

Police impoundments of vehicles and subsequent searches of the impounded vehicles are different issues. Law enforcement may impound vehicles in furtherance of "public safety" or "community caretaking functions", which include removing "disabled or damaged vehicles" and "automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic." South Dakota v. Opperman, 428 U.S. 364, 368-69, 96 S.Ct. 3092, 49 L.Ed.2d 1020 (1976).

An inventory search of a lawfully impounded vehicle is a judicially created exception to the fourth amendment's warrant requirement. People v. Hundley, 156 Ill.2d

135, 138, 619 N.E.2d 744, 189 Ill.Dec. 43 (1993). The rationale behind allowing inventory searches are that the searches protect the owner's property, protect the police against claims of lost or stolen property and protect the police from potential danger. People v. Gipson, 203 Ill.2d 298, 304, 786 N.E.2d 540, 272 Ill.Dec. 1 (2003). A valid inventory search furthers these objectives and satisfies the fourth amendment if the police procedures are reasonable and administered in good faith. People v. Clark, 394 Ill.App.3d 344, 348, 914 N.E.2d 734, 333 Ill.Dec. 315 (1st Dist. 2009).

Accordingly, in order for an inventory search of a vehicle to be lawful, the search must meet the following requirements:

(1) The original impoundment of the vehicle is lawful;
(2) The purpose of the search must be to protect the owner's property and to protect the police from claims of lost, stolen or vandalized property and to guard the police from danger;
(3) The search must be conducted in good faith pursuant to reasonable standardized police procedures and not as a pretext for an investigatory search.

Illinois v. Lafayette, 462 U.S. 640, 77 L.Ed.2d 65, 103 S.Ct. 2605 (1983); People v. Hundley, 156 Ill.2d 135, 138, 619 N.E.2d 744, 189 Ill.Dec. 43 (1993); People v. Urisni, 245 Ill.App.3d 480, 614 N.E.2d 869, 872, 185 Ill.Dec. 428 (2nd Dist. 1993).

There is no requirement that the reasonable standardized procedures must be written. People v. Gipson, 203 Ill.2d 298, 306, 786 N.E.2d 540, 272 Ill.Dec. 1 (2003). All that the law requires regarding this factor is that when conducting an inventory search, the police act according to standardized department procedures. Gipson, 203 Ill.2d at 309.

When analyzing and litigating motions involving inventory searches there sometimes is an over-reliance on the fact that the inventory search is done pursuant to reasonable standardized police procedures. This factor alone is not controlling. Standardized police regulations "cannot be used as a predicate to determine the lawfulness or reasonableness of an inventory search of a vehicle." People v. Schultz, 93 Ill.App.3d 1071, 1076, 418 N.E.2d 6, 49 Ill.Dec. 362 (1st Dist. 1981). To allow this factor to be dispositive of the analysis would allow the police "unlimited authority to violate the property rights of individuals guaranteed and protected by the fourth amendment of the United States Constitution." *Id.* An officer impounding a defendant's vehicle does not become lawful soley because the officer is following police procedures. People v. Spencer, 408 Ill.App.3d 1, 10 (1st Dist. 2011).

In cases where the police have seized and towed a defendant's car the threshold issue that a court is to consider is "whether the impoundment of the vehicle is proper." People v. Mason, 403 Ill.App.3d 1048, 1054, 935 N.E.2d 130, 343 Ill.Dec. 490 (3rd Dist. 2010) citing People v. Alewelt, 217 Ill.App.3d 578, 577 N.E.2d 809, 160 Ill.Dec. 484 (1st Dist. 1991). The fact that a defendant's car would be left unattended is not, in and of itself, a sufficient reason to impound a vehicle, unless the vehicle is illegally parked.

People v. Clark, 394 Ill.App.3d 344, 348, 914 N.E.2d 734, 333 Ill.Dec. 315 (1st Dist. 2009). The police have the authority to seize and tow vehicles that impede traffic or "threaten public safety and convenience." Clark, 394 Ill.App.3d at 344. Please keep in mind that when the police tow a vehicle because it was illegally parked or leaving the vehicle would be a danger to public safety and convenience, the officer must testify to how the vehicle was illegally parked or to how the vehicle threatened public safety and convenience. See People v. Spencer, 408 Ill.App.3d 1, 10 (1st Dist. 2011).

In litigating motions in this area it is important that the evidence shows that the officer was acting "in accordance with a standardized decision to tow" the vehicle as well as contains the location of the car. Clark, 394 Ill.App.3d at 344. In doing so, the officer should testify "in detail regarding the procedure used to inventory a vehicle pursuant to an impoundment". Mason, 403 Ill.App.3d at 1055. Additionally, in litigating these motions, we should be entering into evidence at the hearings the entire portion of the police department's regulations or procedures that address towing or impounding vehicles. See People v. Spencer, 408 Ill.App.3d 1, (1st Dist. 2011).

For an excellent example of how detailed the analysis of these types of cases has become, please see People v. Nash, 409 Ill.App.3d 342 (2nd Dist. 2011).

XIII. Inevitable Discovery

The doctrine of inevitable discovery provides that evidence that would be inadmissible at trial because it was obtained in violation of a defendant's constitutional rights may be admitted if the prosecution proves, by a preponderance of the evidence, that the evidence would have been inevitably discovered by lawful means and without reference to any police error or misconduct. Nix v. Williams, 467 U.S. 431, 444, 81 L.Ed.2d 377, 104 S.Ct. 2501 (1984); People v. Burnridge, 178 Ill.2d 429, 687 N.E.2d 813, 227 Ill.Dec. 331 (1997).

In general, courts will find that evidence would have been inevitably discovered if:

(1) The condition of the evidence when actually found by lawful means would have been the same as that when improperly obtained;
(2) The evidence would have been discovered through an independent line of investigation untainted by the illegal conduct;
(3) The independent investigation was already in progress at the time the evidence was unconstitutionally obtained.

People v. Perez, 258 Ill.App.3d 133, 630 N.E.2d 158, 162, 196 Ill.Dec. 461 (2nd Dist. 1994).

It should go without saying that inevitable discovery does not allow a warrantless or illegal entry into a home to search for and recover evidence on the basis that the officers could have obtained a search warrant. "[A]bsent any of the narrowly limited exceptions [citations] to the search warrant requirement, police who believe they have

probable cause to search cannot enter a home without a warrant merely because they plan subsequently to get one. The assertion by police (after an illegal entry and finding evidence of a crime) that discovery was 'inevitable' because they planned to get a search warrant and had sent an officer on such a mission, would as a practical matter be beyond judicial review. Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." United States v. Griffin, 502 F.2d 959 (6th Cir. 1974).

XIV. Attenuation

A court's determination that a defendant's arrest was illegal is not dispositive of the admissibility of the defendant's subsequent confession. The relevant inquiry is whether the confession was obtained by exploitation of the illegality of the arrest. Brown v. Illinois, 422 U.S. 590, 599, 45 L.Ed.2d 416, 95 S.Ct. 2254 (1975). The State has the burden of demonstrating attenuation. People v. Jennings, 296 Ill.App.3d 761, 764, 695 N.E.2d 1303, 231 Ill.Dec. 184 (1st Dist. 1998).

The factors to be considered in determining whether a confession was the product of an illegal arrest are:

(1) The proximity in time between the arrest and confession;
(2) The presence of intervening circumstances;
(3) The purpose and flagrancy of the police misconduct;
(4) Whether Miranda warnings were given to the defendant.

People v. Foskey, 136 Ill.2d 66, 554 N.E.2d 192, 202, 143 Ill.Dec. 247 (1990).

Illegally obtained evidence cannot be used to prove attenuation between an illegal arrest and any subsequent statements of the arrested individual. People v. Clay, 349 Ill. App. 3d 517, 812 N.E.2d 473, 479, 285 Ill. Dec. 653 (1st Dist. 2004); People v. Austin, 293 Ill.App.3d 784, 688 N.E.2d 740, 228 Ill.Dec. 42 (1st Dist. 1997); People v. Beamon, 255 Ill.App.3d 63, 627 N.E.2d 316, 194 Ill.Dec. 200 (1st Dist. 1993).

If the police obtain statements from a defendant by confronting him with evidence legally obtained together with illegally obtained evidence, a court must suppress the statements unless the State proves that the illegally obtained evidence did not influence the content of the defendant's statements or the defendant's decision to make the statements. Clay, 812 N.E2d at 479 citing People v. Bates, 267 Ill.App.3d 503, 642 N.E.2d 774, 204 Ill.Dec. 873 (1st Dist. 1994).

For excellent examples of how the attenuation factors play out see People v. Morris, 209 Ill.2d 137, 807 N.E.2d 377, 282 Ill.Dec. 753 (2004) and People v. Klimawicze, 352 Ill.App.3d 13, 815 N.E.2d 760, 287 Ill.Dec. 116, (1st Dist. 2004).

XV. Abandonment

When an individual abandons property, the right of privacy in the property is terminated and may be seized and searched without probable cause. People v. Sutherland, 223 Ill.2d 187, 230, 860 N.E.2d 178, 307 Ill.Dec. 524 (2006). This is because the fourth amendment of the United States Constitution does not protect abandoned property. People v. Phoenix, 98 Ill.App.3d 557, 421 N.E.2d 1022, 52 Ill.Dec. 159 (4th Dist. 1981). If no arrest has taken place at the time the evidence is dropped or discarded, the evidence is considered abandoned and the legality of the subsequent arrest is irrelevant to the admissibility of the evidence. People v. Grant, 38 Ill.App.3d 62, 347 N.E.2d 244 (1st Dist. 1976).

XVI. Dog sniff cases

Until January of 2005 it had been the law that in order for an officer to conduct a dog sniff test of an individual's vehicle, the officer must have specific and articulable facts, which justify the test of the vehicle. People v. Cox, 202 Ill.2d 462, 782 N.E.2d 275, 281, 270 Ill.Dec. 81 (2002). Without these specific and articulable facts any subsequent dog sniff during a traffic stop would have been found to have unjustifiably extended the traffic stop and result in the suppression of any contraband that the police recover. People v. Caballes, 207 Ill.2d 504, 802 N.E.2d 202, 204, 280 Ill.Dec. 277 (2003). That changed when the United States Supreme Court reversed the Illinois Supreme Court in Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005).

In Caballes, a police officer stopped the defendant for speeding. The officer radioed in that he was stopping the defendant, but did not ask for assistance or for a drug dog. Another officer who was with a drug dog heard the radio transmission and went to the scene of the stop. While the first officer was writing a warning ticket, the second officer, with the drug dog, walked around the exterior of the defendant's car. The dog then alerted on the defendant's trunk. The officers searched the trunk and recovered cannabis. The defendant was arrested and was subsequently sentenced to twelve years in the penitentiary. The United States Supreme Court considered one narrow issue in the case: Whether the fourth amendment requires reasonable articulable suspicion to justify using a drug detection dog to sniff a vehicle during a legitimate traffic stop. 160 L.Ed.2d at 846. The court held that there is no such requirement

In reaching its decision, the court accepted the conclusions made in the lower courts that the traffic offense and the ordinary inquiries incident to the stop justified the duration of the traffic stop. 160 L.Ed.2d at 846-47. The court rejected the Illinois Supreme Court's holding that the dog sniff changed the character of the stop. The court held that conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff infringed on the defendant's constitutionally protected interest in privacy. Id. The court held that the defendant had no legitimate privacy interest as any interest in possessing contraband is not legitimate and governmental conduct that merely reveals the possession of contraband compromises no legitimate privacy interest. Id. The court stated that "the use of a well-trained narcotics-detection dog-one that 'does not expose

noncontraband items that otherwise would remain hidden from public view,' (citation omitted)-during a lawful traffic stop generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement." Caballes, 160 L.Ed. at 847. A dog sniff conducted during a lawful traffic stop that reveals only the location of a substance that no individual has a right to possess does not violate the fourth amendment. Caballes, 160 L.Ed.2d at 848.

The Illinois Supreme Court held a dog sniff valid in People v. Driggers, 222 Ill.2d 65, 73, 853 N.E.2d 414, 304 Ill.Dec. 625 (2006) as it was conducted during a lawful traffic stop and revealed no information other than the location of items that the defendant had no right to possess.

Illinois law holds that while an alert by a dog during a drug sniff gives an officer probable cause to search a **vehicle,** People v. Easley, 288 Ill.App.3d 487, 680 N.E.2d 776, 780, 223 Ill.Dec. 826 (3rd Dist. 1997)(emphasis added), a positive reaction by a dog on the exterior of a vehicle does not, without more, give the police grounds to search the **occupants** of that vehicle. People v. Fondia, 317 Ill.App.3d 966, 740 N.E.2d 839, 843, 251 Ill.Dec. 553 (4th Dist. 2001)(emphasis added). In Fondia, the police searched the person of a passenger of a vehicle and recovered drug paraphernalia after a dog gave a positive reaction to the exterior of the vehicle. The court held that in order to search the individual occupants of the vehicle, the police must have some independent basis for searching the occupants. Id, citing Woodbury v. Florida, 730 So.2d 354, 359 (Fla.App. 1999)(Harris, J., dissenting). The court held that the officer should have had the dog sniff the defendant to determine if the dog would again alert and if the dog did alert on the defendant, then the police would have had probable cause to search the defendant's person. Fondia, 740 N.E.2d at 842.

A warrantless canine sniff within the curtilage of a home violates the fourth amendment since the curtilage of a home enjoys the same constitutional protection as the house itself. Florida v. Jardines, 569 U.S. ___, 133 S.Ct. 1409, 1414-15 (2013); People v. Brown, 2015 IL App (1st) 140093 (2015). The Illinois Supreme Court has deemed the common area outside of an apartment door located within a locked apartment building is part of the curtilage of a home, and, thus, the warrantless use of a drug-detection dog in that area violated the defendant's fourth amendment rights. People v. Burns, 2016 IL 118973. When faced with virtually the same issue, the court in United States v.Whitaker, 820 F.3d 849, 853-854 (7th Cir. 2016) did not wade into the curtilage issue and held that, pursuant to Kyllo v. United States, 533 U.S. 27, 150 L.Ed.2d 94, 121 S.Ct. 2038 (2001), the warrantless use of a drug-detection dog violated the defendant's privacy interests.

A. Set up procedures

In a case of first impression in Illinois and nationally, the Illinois Supreme Court in People v. Bartelt, 214 Ill.2d 217 (2011), discussed the constitutionality of set up

procedures that the police use prior to a dog sniff. In Bartelt, prior to conducting a dog sniff, the police ordered the defendant to roll up the windows of her truck and turn her fan on high before conducting the test. After this was done, the dog sniff was conducted and it resulted in an alert on the doors of the truck. The defendant was subsequently charged with possession of methamphetamine.

The court stated that "the dog sniff was conducted on the exterior of the defendant's truck while she was lawfully seized for a traffic violation." Bartelt, 214 Ill.2d at 231. The court held that any infringement on the defendant's expectation of privacy did not rise to the level of a constitutional violation and that the set up procedures were not an unreasonable search as the procedures fit under the parameters of Caballes. Bartelt, 214 Ill.2d at 231.

It is crucial to keep in mind, however, that while Bartelt held that the set up procedures were not an unreasonable **search**, the majority opinion did not and refused to address whether the set up constituted an unreasonable **seizure**. Bartelt, 214 Ill.2d at 229.

B. Reliability of Dog

The court in People v. Litwhiler, 2014 IL App (3d) 120431 discussed the amount of proof needed to establish the reliability of a drug dog. The court reiterated the holding in Florida v. Harris, 135 S.Ct. 1050, 1056 (2013) that the issue is not to be settled by resorting to a "strict evidentiary checklist." The Litwhiler court held that certification by the ISP was sufficient to allow a court to presume that the dog was reliable. The court also looked to the facts that the dog was certified twice a year, his reliability remained the same or improved over time and that the dog's alert method never changed in determining that the dog's reliability had been established.

XVII. Delay in defendant being taken in front of a judge

725 ILCS 5/109-1 provides that after any arrest, the State must present, without any unnecessary delay, the defendant before a judge. This section, in essence, codifies the United States Supreme Court holding in Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). Defendants will often seek to have evidence suppressed, mainly their confessions, on the basis that they were not promptly taken before a judge after being arrested.

While 725 ILCS 5/109-1 sets out a clear mandate for the State, the statute provides no remedy for its violation. The fact that 725 ILCS 5/109-1 was violated does not, of itself, mean that a defendant's confession is inadmissible at trial. Past precedent has held that the State's failure to promptly present a defendant before a judge does not *per se* invalidate a confession; rather it is one factor a court is to consider in determining the voluntariness of a statement. People v. House, 141 Ill.2d 323, 380, 566 N.E.2d 259, 152 Ill.Dec. 572 (1990); People v. Groves, 294 Ill.App.3d 570, 691 N.E.2d 86, 229 Ill.Dec. 150 (1st Dist. 1998); People v. Willams, 303 Ill.App.3d 33, 707 N.E.2d 679, 236 Ill.Dec. 552 (1st Dist. 1999).

This clear cut, long standing precedent was ignored in People v. Willis, 344 Ill.App.3d 868, 801 N.E.2d 47, 279 Ill.Dec. 755 (1st Dist. 2003). The Willis court held that an otherwise lawful detention becomes unlawful and violates the fourth amendment after the passage of forty-eight hours. The court further held that any evidence gathered after the forty-eight hours is subject to an attenuation analysis

The Illinois Supreme Court restored order and reversed the Illinois Appellate Court in People v. Willis, 215 Ill.2d 517, 831 N.E.2d 531, 294 Ill.Dec. 581 (2005). The court held, consistent with all of the other precedent in this area, that even though the defendant's confession after forty-eight hours in custody violated the Fourth Amendment, this violation was only one factor to consider in determining whether the defendant's confession was voluntary under the Fifth Amendment. Willis, 215 Ill.2d at 535.

While the Willis opinion states that time in custody remains one factor in determining voluntariness, for all practical purposes it and the reasons behind the time in custody are **the** factors reviewing courts and defense attorneys look at in determining the voluntariness of a defendant's statement. This is especially true where the police repeatedly question a defendant while the defendant continues to deny involvement in the crime. See People v. Mitchell, 366 Ill.App.3d 1044, 853 N.E.2d 900, 304 Ill.Dec. 823, (1st Dist. 2006) and People v. Sams, 367 Ill.App.3d 254, 855 N.E.2d 158, 305 Ill.Dec. 267 (1st Dist. 2006).

Even where a defendant is brought to court within forty-eight hours, a defendant can still claim that there was unreasonable delay. This is because delay in taking a defendant in front of a judge in order to gather evidence to justify the defendant's arrest is unreasonable delay. County of Riverside v. McLaughlin, 500 U.S. 44, 56, 114 L.Ed.2d 49, 111 S.Ct. 1661 (1991). The forty-eight hour mark determines who has the burden in demonstrating that the delay was unreasonable.

In cases where the defendant was brought to court within forty-eight hours and still claims unreasonable delay, the defendant has the burden of showing that any delay in being brought in front of a judge was unreasonable. McLaughlin, 500 U.S. at 56; People v. Nicholas, 218 Ill.2d 104, 116, 842 N.E.2d 674, 299 Ill.Dec. 637 (2006). In cases where the defendant was brought in front of a judge after forty-eight hours the defendant no longer has the burden of showing unreasonable delay. The burden shifts to the state to show the existence of an emergency or other extraordinary circumstance. McLaughlin, 500 U.S. at 57; Mitchell, 853 N.E.2d 906.

In litigating these types of motions the record must contain evidence of a *bona fide* emergency or extraordinary circumstance to explain the Gerstein delay. Mitchell, 853 N.E.2d at 910.

XVIII. Warrant checks

A situation that arises with some regularity is where the defendant is name checked and found to be the subject of a valid arrest warrant and then challenges his arrest on the basis of the stop. This was the case in People v. Murray, 307 Ill.App.3d 856, 719 N.E.2d 123, 241 Ill.Dec. 262 (1st Dist. 1999). In Murray, the defendant was a passenger in a car that was the subject of a traffic stop. Murray, 719 N.E.2d at 125. A gun was subsequently recovered from the car and the defendant and all of the other occupants of the car were ordered out of the car. Id. A name check of the defendant revealed that he was wanted on an outstanding arrest warrant. Id. The defendant was arrested on the warrant and, while in custody, confessed to a murder. Murray, 719 N.E.2d at 125-126. The driver of the car was charged with UUW and filed a motion to suppress evidence that was granted as that judge found that the driver's arrest was a sham. Murray, 719 N.E.2d at 126. The defendant filed his own motion seeking to suppress his confession claiming that it was the fruit of an illegal arrest. Id. The defendant argued "but for the illegal traffic stop of the vehicle in which he was a passenger, he never would have been asked his name by the Country Club Hills police officer, who in turn discovered through the computer check that there was this outstanding arrest warrant from which incriminating statements flowed." Murray, 719 N.E.2d at 127.

The Murray court following United States v. Green, 111 F.3d 515 (7th Cir. 1997) rejected the defendant's argument. In Green, there was an improper stop of a vehicle followed by an identification check of a passenger that revealed an outstanding arrest warrant. The Green court held, after using an attenuation analysis, that the discovery of the arrest warrant purged that evidence of the taint of the initial stop. The Murray court specifically stated, "It would be illogical and nonsensical for us to hold that once the police illegally stop an automobile they can never arrest an occupant who is found to be wanted on an arrest warrant." Murray, 719 N.E.2d at 128.

The court in Atkins v. City of Chicago, 631 F.3d 823 (7th Cir. 2011) followed Green. The Atkins court discussed attenuation but succinctly stated the rationale underlying the law in this area stating "simply that the arrest was based on a valid warrant rather than on anything turned up in the illegal search. If police stopped cars randomly, looking for persons against who there were outstanding warrants, the drivers and passengers not named in warrants would have good Fourth Amendment claims. But a person named in a valid warrant has no right to be at large, and so suffers no infringement of his rights when he is apprehended unless some other right of his is infringed, as would be the case had the police roughed up Atkins gratuitously in the course of trying to determine whether he was the person named in the warrant." Atkins, 631 F.3d at 827.

Without mentioning the Murray or Green decisions or worrying about nonsensical or illogical holdings, two Illinois courts limited, for a short time, if not in practice prohibited, warrant checks of individuals during Terry stops. The Illinois Supreme Court, in People v. Harris, 207 Ill.2d 515, 802 N.E.2d 219, 280 Ill.Dec. 294 (2003), held that a police officer's holding onto a passenger's identification card and performing a warrant check for outstanding warrants that led to the defendant's arrest on those warrants was outside the scope of the initial traffic stop and constituted an unlawful

seizure. Harris, 802 N.E.2d at 227. A warrant check of a passenger during a traffic stop must relate to the traffic stop or the officer must have reasonable, articulable suspicion that the passenger has committed a crime or the passenger's conduct must cause the officer to fear for his safety. Harris, 802 N.E.2d at 229. The Harris majority claimed that they were following the holding in People v. Gonzalez, 204 Ill.2d 220, 789 N.E.2d 260, 273 Ill.Dec. 360 (2003). It is interesting to note that the author of the Gonzalez decision, Justice Fitzgerald, filed a dissent in the Harris case.

On February 22, 2005 the United States Supreme Court vacated the decision in Harris and remanded the case to the Illinois Supreme Court for further consideration in light of Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). Illinois v. Harris, 543 U.S. 1135, 125 S.Ct. 1292, 161 L.Ed.2d 94 (2005). When it reconsidered the matter in light of Caballes, the Illinois Supreme Court reversed its decision in the earlier Harris case. People v. Harris, 228 Ill2d 222, 886 N.E.2d 947, 319 Ill.Dec. 823 (2008). In Harris, the defendant was a passenger in a car stopped for a traffic offense. Harris, 228 Ill.2d at 224. During the course of the stop, the officer asked the defendant for identification and the defendant complied. *Id*. The officer ran a computer search, which determined that the defendant had an outstanding arrest warrant. *Id*. The officer arrested the defendant and a search incident to arrest found the defendant in possession of cocaine. *Id*. The court first held that as an arrest warrant is a matter of public record, the defendant had no reasonable expectation of privacy in the fact that a judge has ordered the defendant's arrest and that a warrant check does not implicate any legitimate privacy interests. Harris, 228 Ill.2d at 237. The Harris court then held that a warrant check on the occupant of a lawfully stopped vehicle does not infringe on the occupant's Fourth Amendment rights as long as the duration of the stop is not unnecessarily prolonged in order to conduct the check and the stop is otherwise carried out reasonably. *Id*. Applying this standard the court held that because the initial stop of the defendant was lawful, that the seizure's duration was reasonable and that the warrant check did not infringe on a constitutionally protected privacy interest, the warrant check did not violate the Fourth Amendment. Harris, 228 Ill.2d at 238.

Keep in mind that "**even when officers have no basis for suspecting a particular individual, they may** generally ask questions of that individual (citations omitted); **ask to examine the individual's identification** (citations omitted); and request consent to search his or her luggage (citations omitted)-- as long as the police do not convey a message that compliance with their requests is required." Florida v. Bostick, 501 U.S. 429, 434-35, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991)(emphasis added).

Three other cases addressed warrant checks. The first case is People v. Roberson, 367 Ill.App.3d 193, 854 N.E.2d 317, 304 Ill.Dec. 545 (4th Dist. 2006). In Roberson, the defendant was stopped for a routine traffic violation. During the stop, the police did a name check on a passenger and found that there was an outstanding warrant for the passenger and arrested him. The officer then conducted a search incident to arrest of the defendant's car and recovered drugs and arrested the defendant. The trial court granted the defendant's motion to suppress evidence finding that the warrant check of the

passenger was impermissible as it changed the fundamental nature of the traffic stop. The state appealed the trial court's ruling.

In reversing the trial court, the Roberson court followed Illinois v. Caballes, 543 U.S. 405, 160 L.Ed.2d 842, 125 S.Ct. 834 (2005). Caballes held that a lawful traffic stop could violate the constitution if the police "unreasonably infringe" constitutionally protected interests. Caballes, 543 U.S. at 407. Following Caballes, the Roberson court held that a warrant check on a passenger "changes the fundamental nature of the traffic stop only if (1) it causes the seizure to last longer than the time reasonably required for such a traffic stop or (2) it infringes upon the passenger's legitimate interest in privacy." Roberson, 854 N.E.2d at 324. Please note that People v. Harris, 228 Ill2d 222, 244, 886 N.E.2d 947, 319 Ill.Dec. 823 (2008) removed the altering the fundamental nature of a traffic stop from the analysis of whether a traffic stop was unreasonably long in duration.

The Roberson court held that there was no evidence in the record that checking the passenger for warrants caused the stop to be unreasonably long. *Id*. As to the passenger's legitimate interest in privacy, the Roberson court held that the defendant had none, '"as the existence of a warrant is a matter of public record.'" Roberson, 854 N.E2d at 324 20-21 quoting Gist v. Macon County Sheriff's Department, 284 Ill.App.3d 367, 377, 671 N.E.2d 1154, 1161, 219 Ill.Dec. 701 (4th Dist. 1996).

Likewise, in People v. Morrison, 367 Ill.App.3d 581, 855 N.E.2d 253, 305 Ill.Dec. 362 (1st Dist. 2006) a warrant check was held to be valid. In Morrison, the police saw the defendant in the middle of a street, arguing with another man. The officer conducted a field interview with the defendant and learned his name. The officer, from his car, ran a name check on the defendant and learned that there was an outstanding warrant for the defendant's arrest and arrested him. The officer did a custodial search of the defendant and recovered cocaine. The Morrison court first held that the initial stop of the defendant was valid at its inception. The court then turned to whether the officer's questioning and subsequent name check of the defendant unreasonably prolonged the stop. After inferring from the record that the stop lasted only a few minutes, the court held that the name check of the defendant did not improperly prolong the stop.

In People v. Bailey, 232 Ill2d 285, 903 N.E.2d 409, 328 Ill.Dec. 22 (2009) the Illinois Supreme Court upheld a warrant check of a front seat passenger of a car that the police stopped because the defendant and the driver of the car were not wearing seatbelts. The defendant claimed that the seat belt statute, 625 ILCS 5/12-601.3(f), as well as 725 ILCS 5/108-1(3) prevented the police from searching or inspecting the driver or passenger of a vehicle that had been stopped solely for a seatbelt violation. In rejecting the defendant's argument and upholding the warrant check, the Illinois Supreme Court reiterated its holding in Harris that the existence of an arrest warrant is a matter of public record. Bailey, 232 Ill.2d at 291. Because the initial warrant check did not implicate any area of privacy, the court reasoned, the check did not constitute a search under the statutes on which the defendant relied. Bailey, 232 Ill.2d at 291. The court further held that the term "inspect" in the statute's provisions gives an individual no additional protection beyond those provided by the term "search". Bailey, 232 Ill.2d at 294.

XIX. Curtilage

A person does not have a legitimate expectation of privacy for actions conducted outside of his home in fields, except in the area immediately surrounding the home. Oliver v. United States, 466 U.S. 170, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984). The fourth amendment applies to a home's curtilage-the land immediately surrounding and associated with the home and no legitimate expectation of privacy attaches to land outside the home's curtilage. Oliver, 466 U.S. at 180; People v. Nielson, 187 Ill2d 271, 280, 718 N.E.2d 131, 240 Ill.Dec. 650 (1999).

How far the curtilage extends in a particular case is determined by factors "that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." United States v. Dunn, 480 U.S. 294, 300 94 L.Ed.2d 326, 107 S.Ct. 1134 (1987). The factors include:

(1) The proximity of the area claimed to be the home's curtilage;
(2) Whether the area is included within an enclosure surrounding the home;
(3) The nature of the uses to which the area is put;
(4) The steps taken by the resident to protect the area from observation by people passing by.

Dunn, 480 U.S. at 301.

Even though a barn or other type of building may be located outside of a home's curtilage, a person may still have a protected expectation of privacy in the barn or building. Dunn, 4380 U.S. at 303-304; People v. Pitman, 211 Ill.2d 502, 813 N.E.2d 93, 104 286 Ill.Dec. 36, 47 (2004). Structures, other than dwellings, need not be within the curtilage of the home as the fourth amendment applies to structures other than dwellings. United States v. Santa Maria, 15 F.3d 879, 882-883 (9th Cir. 1994). In determining whether a defendant has a legitimate expectation of privacy in a building outside of a home's curtilage, the traditional standing analysis of People v. Johnson, 114 Ill2d 170, 499 N.E.2d 1355, 102 Ill.Dec. 342 (1986) applies. Pitman, 286 Ill.Dec.at 48.

A search warrant that expressly includes only a defendant's residence can also authorize searches within the curtilage of the home described in the warrant. This was the situation in People v. Valle, 2015 IL App (2d) 131319. In Valle, a search warrant was issued for the defendant and his residence. During the execution of the warrant, the officers searched a detached garage and recovered cocaine for which the defendant was charged and convicted. The defense filed a motion to suppress arguing that the search exceeded the scope of the warrant as it limited any search to the defendant's person and the residence described in the warrant. The appellate court disagreed holding that the garage was located within the curtilage of the home. "Necessarily, if the curtilage is considered part of the home for purposes of the fourth amendment's protection against warrantless searches, then the curtilage must be considered part of the home for purposes of a warrant to search that home. In other words, a warrant to search the home

legitimizes the search of those areas considered under the fourth amendment to be part of that home." Valle, 2015 IL App (2d) 131319, paragraph 14.

Along the same lines, since the curtilage of a home enjoys the same constitutional protection as the house itself, a warrantless canine sniff within the curtilage violates the fourth amendment. Florida v. Jardines, 569 U.S. ___, 133 S.Ct. 1409, 1414-15 (2013); People v. Brown, 2015 IL App (1st) 140093 (2015). The Illinois Supreme Court has deemed the common area outside of an apartment door located within a locked apartment building is part of the curtilage of a home, and, thus, the warrantless use of a drug-detection dog in that area violated the defendant's fourth amendment rights. People v. Burns, 2016 IL 118973. When faced with virtually the same issue, the court in United States v.Whitaker, 820 F.3d 849, 853-854 (7th Cir. 2016) did not wade into the curtilage issue and held that, pursuant to Kyllo v. United States, 533 U.S. 27, 150 L.Ed.2d 94, 121 S.Ct. 2038 (2001), the warrantless use of a drug-detection dog violated the defendant's privacy interests.

XX. Surveillance Issues

A. Video/Photo Surveillance

Videotaping an individual in a public place does not violate any constitutional right to privacy and is not an illegal search or seizure. M.R. by his next friend and father, R.R. v. Lincolnwood board of Education, District 74, 843 F.Supp. 1236, 1239 (N.D.Ill. 1994). The police may memorialize what was seen by the naked eye if the observation itself was not a search. United States v. Taketa, 925 F.2d 665, 677 (9th Cir. 1991); United States v. McMillan, 350 F.Supp. 593 (D.D.C. 1972). In other words, the police need to be in a location where they are entitled to be in doing their surveillance.

1. Visual and Technological Aids

The use of artificial means to illuminate darkened areas does not constitute a search under the fourth amendment. People v. Hampton, 307 Ill.App.3d 464, 718 N.E.2d 591, 241 Ill.Dec. 20 (1st Dist. 1999). See also, People Chavez, 228 Ill.App.3d 54, 592 N.E.2d 69, 169 Ill.Dec. 582 (1st Dist. 1997). Using a flashlight to illuminate a vehicle located on a public way is not a fourth amendment search. Texas v. Brown, 460 U.S. 730, 739-40, 75 L.Ed.2d 502, 103 S.Ct. 1535 (1983), People v. Luedemannn, 222 Ill.2d 530, 561, 857 N.E.2d 187, 306 Ill.Dec. 94 (2006).

Similarly, using visual aids "to the senses such as binoculars does not convert unobjectionable surveillance into a prohibited search." United States v. Christensen, 524 F.Supp. 344, 347 (N.D.Ill. 1981).

Using a thermal imaging device aimed at a private home is a search under the fourth amendment and as such, it is presumptively unreasonable without a search warrant. Kyllo v. United States, 533 U.S. 27, 150 L.Ed.2d 94, 121 S.Ct. 2038 (2001). Where "the Government uses a device that is not in general public use, to explore details

of the home that would previously been unknowable without intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." 533 U.S. at 40. The rationale and holding in Kyllo was extended to the warrantless use of a drug-detection dog search conducted from the hallway of an apartment building. People v. Whitaker, 820 F.3d 849 (7th Cir. 2016).

A police flyover of property in and of itself is not an improper search because property owners have no reasonable expectation of privacy in curtilage areas visible to the naked eye from public vantage points including public airways. United States v. 47 West 644 Route 38, Maple Park, Illinois, 962 F.Supp. 1081 (N.D.Ill. 1997).

2. Areas of focus

Courts look at two main issues in this area: 1) whether the surveillance was done of the individual in his home or other area where there was a reasonable expectation of privacy, and 2) whether the device the police used was one that is in the general public use.

Where the police gather "by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area', [citation omitted], constitutes a search - - least where (as here) the technology in question is not in general public use. Kyllo, 537 U.S. 27 at 34. See also United States v. Kim, 415 F.Supp. 1252 (D.HI. 1976) and United States v. Lace, 669 F.2d 46 (1982). In short, when a surveillance device not in the general public is used to explore details of a home that cannot be known without physical intrusion into the home the surveillance becomes a search and is presumed unreasonable without a warrant. Please keep in mind that the types of surveillance in Kyllo, thermal imaging, and in Kim, very high-powered binoculars, can be used with judicial authorization such as a search warrant.

B. Electronic Tracking

In the past, warrantless installations of tracking devices by methods that do not violate reasonable expectations of privacy had been allowed. The court in United States v. Michael, 645 F.2d 252, 258 (5th Cir. 1981) allowed the attachment of a tracking device to the exterior of a car parked in a public place because the attaching was supported by reasonable suspicion that the defendant was engaged in criminal activity.

That changed with United States v. Jones, 586 U.S. ___, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). In Jones the United States Supreme Court held that the police should have obtained a warrant prior to placing a tracking device to the exterior of the defendant's car. The court reasoned that attaching and monitoring the tracker constituted a search for which a warrant was needed. As a practical matter a warrant to allow the installation of such a device should also contain language that allows for the monitoring of and collection and storage of information from the device.

Installing a tracking device to the interior of a car, or home or any other location where the defendant has a reasonable expectation of privacy requires a search warrant. United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 82 L.E.d.2d 530 (1984).

XXI. Special needs exception to the fourth amendment

The United States Supreme Court has recognized what is known as a special needs exception to the fourth amendment. The court has allowed exceptions to the fourth amendment where "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." New Jersey v. T.L.O., 469 U.S. 325, 351, 83 l.E.2d 720, 105 S.Ct. 748 (1985). See also, Griffin v. Wisconsin, 483 U.S. 868, 873-74, 97 L.Ed.2d 709, 107 S.Ct. 3164 (1987).

A. Areas where the exception has been applied

1. Searches of government employees' desks and offices: O'Connor v. Ortega, 480 U.S. 709, 94 L.Ed.2d 714, 107 S.Ct. 1492 (1987).

2. Searches of some types of student property by school officials: New Jersey v. T.L.O., 469 U.S. 325, 83 L.Ed.2d 720, 105 S.Ct. 733 (1985).

3. Roadblock searches to identify drunk drivers: Michigan Department of Police v. Sitz, 496 U.S. 444, 110 L.Ed.2d 412, 110 S.Ct. 2481 (1990).

4. Roadblock searches to identify illegal immigrants: United States v. Martinez-Fuerte, 428 U.S. 543, 49 L.Ed.2d 1116, 96 S.Ct. 3074 (1976).

5. Chemical testing of railroad employees: Skinner v. Railway Labor Executives' Asssociation, 489 U.S. 602, 103 L.Ed.2d 639, 109 S.Ct. 1402 (1989).

6. Searches of regulated businesses: New York v. Burger, 482 U.S. 691, 96 L.Ed.2d 601, 107 S.Ct. 2636 (1987).

XXII. Murder/Crime Scene "Exception" to warrant requirement

There is no murder scene or crime scene exception to the Fourth Amendment. The United States Supreme Court in Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978) refused to recognize the search of a homicide scene as an exception to the warrant requirement. The Mincey court held that "the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises." Mincey, 437 U.S. at 392. The police are allowed to seize any evidence that is in plain view during this type of search. Mincey, 437 U.S. at 393.

Keep in mind that the presence of consent or exigent circumstances may allow a search that goes beyond what is outlined in Mincey. In Mincey there were no exigencies as "[a]ll the persons in Mincey's apartment had been located before the investigating officers arrived there and began their search. And a four-day search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency search." Mincey, 437 U.S. at 393.

XXIII. Emergency Aid Exception

Law enforcement officers are allowed to "enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." Brigham City v. Stuart, 547 U.S. 398, 403, 164 L.Ed.2d 650, 126 S.Ct. 1943 (2006). What is referred to, as the emergency aid exception does not depend on the officers' subjective intent or the seriousness of the offense that they are investigating. Brigham City, 547 U.S. at 404-405. The officers need only have "an objectively reasonable basis for believing (citation omitted) that a person within [the house] is in need of immediate aid (citation omitted)." Michigan v. Fisher, 130 S.Ct. 546, 548, 175 L.Ed.2d 410, 2009 US Lexis 8773, (2009). This objective test does not require "iron clad proof of a likely serious, life threatening injury." Fisher, 130 S.Ct. at 549. It is error for a court to substitute this "objective inquiry into appearances with its hindsight determination that there was in fact no emergency." Ibid.

In Illinois, there is a two prong test to determine whether this exception applies. The police must have reasonable grounds to believe that an emergency exists; and second, the police must have some reasonable basis, approximating probable cause, associating the emergency with the area to be entered or searched. People v. Lomax, 2012 IL App (1st) 103016, p. 29. There had been a third prong to the test-the search must not have been primarily motivated by an intent to arrest and seize property-but it was held unconstitutional in Brigham City. The test is one of reasonableness and courts are to look to the totality of the circumstances known to the officer at the time of entry. People v. Ferral, 397 Ill.App.3d 697, 705 (2009). In assessing whether an emergency exists, "the number of facts known to the police may be important, but it is the true content of the facts that is most important." Lomax, 2012 IL App (1st) 103016 at p. 38.

As to the second prong, probable cause in an emergency situation may be met where officers reasonably believe that a person is in danger because, in these circumstances, probable cause is based upon the desire to locate potential victims and ensure their safety as opposed to a reasonable belief that the search will turn up evidence of a crime. Lomax, 2012 IL App (1st) 103016 at p. 50 citing United States v. Holloway, 290 F.3d 1337-38 (11th Cir. 2002).

XXIV. Warrantless Searches of Cell Phones

One issue that is arising with greater frequency is the warrantless search of a person's cell phone to determine what calls the person has made or received or to see

what phone numbers the person has stored in the phone. While no Illinois state appellate court had addressed the issue, there had been a split of authority nationally as to whether such a search was constitutional as a valid search incident to arrest.

The United States Supreme Court resolved the issue in Riley v. California, 573 U.S. ___, 2014. The court held that, in general, a search warrant is required to search a cell phone for electronic data and that such a search was not a valid search incident to arrest. The court stated that officers are still free to "examine that physical aspects of the phone to ensure that it will not be used as a weapon". Riley, 573 U.S. at ___.

It is important to note that the court did not bar searches of cell phones for electronic data; the court held that a search warrant must be obtained prior to such a search. The court also specifically noted that in specific cases, exigent circumstances would justify the warrantless search of a cell phone for electronic data. Riley, 573 U.S. at ___.

XXV. Community Caretaking Function

The United States Supreme Court first set out the community caretaking function in Cady v. Dombrowski, 413 U.S 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). The court upheld a search of a car after it had been towed from the scene of a crash reasoning that the police "frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute." Cady, 413 U.S. at 447.

This community caretaking function of the police is an exception to the warrant requirement. People v. Luedemann, 222 Ill.2d 530, 545-46, 857 N.E.2d 187, 306 Ill.Dec. 94 (2006). It is not one of the three tiers of police-citizen interaction and the term is not interchangeable with the correct term describing the third tier, consensual encounters. *Id*. at 548-49. This is because the police are allowed to use and do use their community caretaking function in non-consensual situations and, by definition, third tier encounters "are consensual encounters involving no coercion or detention." *Id*. at 545. This community caretaking function "is analytically distinct from consensual encounters and is invoked to validate a search or seizure as reasonable under the fourth amendment. It is not relevant to determining whether police conduct amounted to a seizure in the first place." *Id*. at 548.

As opposed to describing one of the tiers of police-citizen interaction, "community caretaking refers to a capacity in which the police act when they are performing some task unrelated to the investigation of crime, such as helping children find their parents, mediating noise disputes, responding to calls about missing persons or sick neighbors, or helping inebriates find their way home. Courts use the term 'community caretaking' to uphold searches and seizures as reasonable under the fourth amendment when police are performing some function other than investigating the

violation of a criminal statute." People v. McDonough, 239 Ill.2d 260, 269, 940 N.E.2d 1100, 346 Ill.Dec. 496 (2010).

Given the confusion regarding the use of the term in the past, it is important to remember that the analysis of the community caretaking function exception to the warrant requirement has nothing to do with whether the encounter between the police and the citizen was consensual. Luedemann, 222 Ill.2d at 548. Searches and seizures can take place pursuant to the community caretaking exception where the police have stopped an individual's vehicle and the individual did not consent to a subsequent search. *Id*. at 548, citing State v. Chisolm, 39 Wn.App. 864, 696 P.2d 41 (1985).

There are two general criteria a court must find in order for the community caretaking exception to the warrant requirement to apply. The first is that the police must be performing a function other than investigating a crime. People v. McDonough, 239 Ill.2d 260, 272, 940 N.E.2d 1100, 346 Ill.Dec. 496 (2010). In making this determination, a court is to look at the objective circumstances of the situation and not the subjective motives of the police officer. *Id*. at 272.

The second criterion is that the scope of the search must be reasonable because it was done to protect the public's safety. McDonough, 239 Ill.2d at 272. Reasonableness, in turn, is "measured in objective terms by examining the totality of the circumstances." Ohio v. Robinette, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). In assessing the second prong, the court is to "balance a citizen's interest in going about his or her business free from police interference against the public's interest in having police officers perform services in addition to strictly law enforcement." McDonough, 239 Ill.2d at 272.

People v. Dittmar, 2011 IL App (2d) 91112 provides an excellent example of how these two criteria should be analyzed. In that case upon observing a car slow to a stop on the shoulder of a road and then the driver and the passenger switched positions as if the passenger was going to drive the car, the officer activated his emergency equipment and pulled his squad car behind the defendant's vehicle. Dittmar, 2011 IL App (2d) 91112, paragraph 5. The officer then made observations of the defendant which gave the officer probable cause to arrest the defendant for DUI. *Id*. at paragraph 9. In addressing the legality of the stop of the defendant, the court held that it was a "reasonable public-safety endeavor for [the officer] to check on the stopped vehicle and that the officer was performing his community caretaking function because he "had reason to believe that the occupants might need assistance." *Id*. at paragraph 29. See also People v. Ciborowski, 2016 IL App (1st) 143352, paragraph 83 holding that the officer was acting pursuant to his valid community caretaking function when he asked the defendant to exit his vehicle and sit in the officer's squad car after the officer arrived on the scene of a crash site and suspected that the defendant may be injured based on observing significant damage to the defendant's vehicle and another vehicle.