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Application of the Fourth Amendment to the Inspection of Commercial Motor Vehicles and Drivers

This report was prepared under NCHRP Project 20-6, "Legal Problems Arising out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Richard O. Jones. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

In the past, papers such as this were published in addenda to *Selected Studies in Highway Law* (*SSHL*). Volumes 1 and 2 of *SSHL* dealt primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covered government contracts. Volume 4 covered environmental and tort law, intergovernmental relations, and motor carrier law. Between addenda, legal research digests were issued to report completed research. The text of *SSHL* totals over 4,000 pages comprising 75 papers. Presently, there is a major rewrite and update of *SSHL* underway. Legal research digests will be incorporated in the rewrite where appropriate.

Copies of *SSHL* have been sent, without charge, to NCHRP sponsors, certain other agencies, and selected university and state law libraries. The officials receiving complimentary copies in each state are the Attorney General and the Chief Counsel of the highway agency. The intended distribution of the updated *SSHL* will be the same.

APPLICATION

Law enforcement officers are expected to conduct traditional motor carrier safety inspections. They must also watch for and intercept drugs and other illegal cargo. In doing so, they confront challenges to their actions based on alleged violations of the U.S. Constitution's Fourth Amendment against unreasonable search and seizures. This report reviews court decisions, statutes, administrative regulations, and other authorities concerning commercial motor vehicle stops and inspections, and suggests guidelines to assist state law enforcement personnel in stopping and inspecting such vehicles without violating the Fourth Amendment.

Therefore, the report should be useful to law enforcement personnel, training officials, attorneys, legislative personnel, and planning officials.

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APPLICATION OF THE FOURTH AMENDMENT TO THE INSPECTION OF COMMERCIAL MOTOR VEHICLES AND DRIVERS

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I. INTRODUCTION

This report will examine the extent to which the Fourth Amendment to the United States Constitution[1] authorizes law enforcement officers to stop, search, and inspect commercial motor vehicles and drivers. The objectives of this study are to: (1) review the court decisions, statutes, administrative regulations and other authorities concerning the search and inspection of commercial motor vehicles and drivers; and (2) suggest principles and provide guidance to assist law enforcement personnel in searching and inspecting commercial motor vehicles and drivers without violating the Fourth Amendment.

While the primary focus of this report is the Fourth Amendment and the U.S. Supreme Court decisions interpreting that amendment, it must be noted that a particular search or seizure, while legal under the federal Constitution, may still be illegal under a state constitution, statute, or regulation.[2] For this reason, the report will refer to various state court decisions rejecting U.S. Supreme Court decisions based upon state constitutional provisions that are parallel to, but grant more protection than, the Fourth Amendment. According to one commentator,[3] over an approximate 20-year period U.S. Supreme Court doctrine was rejected 32 percent of the time by state high courts based upon interpretation of state constitutions. This reflects the trend toward reliance on state constitutional law that began in the early 1970s and has been called by various names, including "new federalism," "judicial federalism," "state law movement," and "state constitutional revolution."[4] This trend of emphasizing state law first coincided with the Supreme Court change from the rights-expanding Warren era (1953 to 1969) to the rights-contracting Burger era (1969 to 1986). The initial spark for the movement was the state courts' perception that the Supreme Court was interpreting the Bill of Rights too narrowly. The state courts realized that even though they could not reduce the rights mandated by the Court, they were free to expand rights as a matter of state law. In addition, conservative forces also made their mark.[5] At least a dozen state courts have announced the practice of looking first to the state constitution to settle claims of rights violations, before going to federal law.[6] At least six more are moving in that direction.[7] According to Friesen, "State courts that endorse the 'state law first' rule also endorse a consistent practice of giving the state provision an interpretation not dictated by fed-

[1] The Fourth Amendment to the U.S. Constitution provides:

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

[2] "[A] State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." Justice Ginsburg's concurring opinion in Ohio v. Robinette, 117 S. Ct. 417, 422 (1996), quoting Oregon v. Hass, 420 U.S. 714, 719, 95 S. Ct. 1215, 1219, 43 L. Ed. 2d 570 (1975).

[3] Barry Latzer, The Hidden Conservatism of the State Court "Revolution," 74 JUDICATURE 190 (1991).

[4] *See generally* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 1–56 (2d ed. 1996), (hereinafter FRIESEN); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 126–44 (3rd ed. 1996), (hereinafter LAFAVE); BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 1–30 (1st ed. 1991), (hereinafter LATZER).

[5] LATZER, *supra* note 4, at 2–4.

[6] FRIESEN, *supra* note 4, at 27–28., *citing:*

Arizona: Large v. Superior Court, 714 P.2d 399, 405 (Ariz. 1986); Phoenix Newspapers Inc. v. Jennings, 490 P.2d 563 (Ariz. 1971).

Florida: Traylor v. State, 596 So. 2d 957 (Fla. 1992).

Louisiana: State v. Perry, 610 So. 2d 746, 750-51 (La. 1992).

Maine: City of Portland v. Jacobsky, 496 A.2d 646, 648 (Me. 1985).

Montana: State v. Johnson, 719 P.2d 1248, 1255 (Mont. 1986).

New Hampshire: State v. Chaisson, 486 A.2d 297, 301 (N.H. 1984).

North Carolina: State v. Moore, 404 S.E.2d 845, 848 (N.C. 1991).

Oregon: Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981).

Texas: Davenport v. Garcia, 834 S.W.2d 4, 11 (Tex. 1992).

Utah: West v. Thomson Newspapers, 872 P.2d 999, 1006 (Utah 1994).

Washington: State v. Young, 867 P.2d 593 (Wash. 1994).

Wyoming: Johnson v. State of Wyoming Hearing Examiner's Office, 838 P.2d 158 (Wyo. 1992).

[7] *Id.* at n.109, citing:

Ohio: Arnold v. City of Cleveland, 616 N.E.2d 163, 169 (Ohio 1993).

Idaho: State v. Guzman, 842 P.2d 660, 677 (Idaho 1992).

Indiana: Collins v. Day, 644 N.E.2d 72 (Ind. 1994).

Pennsylvania: Commonwealth v. Edmunds, 586 A.2d 887-95 (Pa. 1991).

Texas: Heitman v. State, 815 S.W.2d 681, 682 (Tex. Crim. App. 1991).

Wisconsin: Brandmiller v. Arreola, 544 N.W.2d 894, 899 (Wis. 1996).

eral precedent, though federal cases may be used as illustrative."[8]

There is a long-established doctrine concerning the authority of the United States Supreme Court to review state court judgments, known as "independent and adequate state grounds." Under this doctrine the Supreme Court has no authority to review state court judgments resting on state law, although it may review any federal question decided by the state court.[9] Where the state court judgment rests upon two grounds, one federal and the other nonfederal, the Supreme Court has long recognized that its jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment.[10] However, a problem arises when the state court judgment is ambiguous as to whether it is based upon independent state grounds or reviewable federal grounds. The Supreme Court's jurisdictional test was enunciated by Justice O'Connor in *Michigan v. Long*:[11]

> Accordingly, when...a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so...If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

The *Long* case has become known as "the plain statement rule" case, because of this further language in Justice O'Connor's opinion:

> [A] state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.[12]

Justice Ginsburg's concurring opinion in *Ohio v. Robinette,* supra, approved the use of such a "plain statement" by the Montana Supreme Court:[13]

> It is incumbent on a state court, therefore, when it determines that its States laws call for protection more complete than the Federal Constitution demands, to be clear about its ultimate reliance on state law. Similarly, a state court announcing a new legal rule arguably derived from both federal and state law can definitively render state law an adequate and independent ground for its decision by a simple declaration to that effect. A recent Montana Supreme Court opinion...includes such a declaration:
>
> While we have devoted considerable time to a lengthy discussion of the application of the fifth amendment to the United States Constitution, it is to be noted that this holding is also based separately and independently on [the defendant's] right to remain silent pursuant to Article II, Section 25 of the Montana Constitution. *State v. Fuller*, 276 Mont. 155, ___, 915 P.2d 809, 816, cert. denied, 519 U.S.___, 117 S. Ct. 301, ___L. Ed. 2d___1996.

An explanation of this order meets the Court's instruction in *Long*.

Other model plain statements are provided by Friesen.[14]

II. WARRANT REQUIREMENT

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. The basic constitutional rule is that searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable, subject only to a few specifically established and well-defined exceptions. [16]Fundamental to the Fourth Amendment's protection from unreasonable search and seizure is the expectation of privacy, and "[i]f the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant Clause.[16]

Thus, "the Fourth Amendment protects people, not places."[17]

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[8] *Id.* at n.110, citing as an example Large v. Superior Court, 714 P.2d 399, 405 (Ariz. 1986).

[9] Herb v. Pitcairn, 324 U.S. 117, 125–126 (1945), where the Court made this statement:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds...The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions... (citations omitted).

[10] Fox Film Corp. v. Muller, 296 U.S. 207, 210, 56 S. Ct. 183, 80 L. Ed. 158 (1935).

[11] 463 U.S. 1032, 1041, 103 S. Ct. 3469, 3476, 77 L. Ed. 2d 1201 (1983).

[12] 463 U.S. 1041.

[13] 117 S. Ct. 417, 423–424 (1996).

[14] FRIESEN, *supra* note 4, at 56.

[16] Mincey v. Arizona, 437 U.S. 385, 390 (1978); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Johnson v. United States, 333 U.S. 10 (1948). The classic statement of this policy is by Justice Jackson in Johnson v. United States, 333 U.S. 10, 13–14:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime...When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government agent.

[16] Illinois v. Andreas, 463 U.S. 765,771 (1983).

[17] Katz v. United States, 389 U.S. 347, 351 (1967). Rather than property rights, the primary object of the Fourth Amendment was determined to be the protection of privacy. Warden v.

III. EXCEPTIONS TO THE WARRANT REQUIREMENT

Warrantless searches of motor vehicles and drivers are authorized under a number of recognized exceptions including:

- The automobile exception
- The consent exception
- The plain view exception
- The pervasively regulated business exception
- The investigatory stop exception
- The search incident to arrest exception
- The stop and frisk exception
- The vehicle inventory exception
- The vehicle checkpoint or roadblock exception.

Depending upon the specific circumstances of particular searches, all of these exceptions are potentially applicable to the inspection and search of commercial motor vehicles and drivers. These warrant exceptions will be increasingly relied upon by law enforcement officers because of emerging new enforcement practices and technologies. For example, Congress has required law enforcement agencies administering the Motor Carrier Safety Assistance Program to develop and use prior data on individual motor carriers to guide in the selection of vehicles and drivers for inspection. The Federal Highway Administration (FHWA) has developed a computer software system to help implement this requirement. A computerized inspection selection system developed for the Motor Carrier Safety Assistance Program could be used as a factor in deciding whether to inspect a particular vehicle or driver. However, the inspection would have to be justified by the "investigatory stop" or "pervasively regulated business" exceptions, which are discussed later.

A. The Automobile Exception

Commercial motor vehicles are subject to the automobile exception. The automobile exception allows law enforcement officers to stop and search a vehicle if there is probable cause to believe that the vehicle contains evidence of a crime and there are exigent circumstances making it impractical to obtain a warrant before a search. Every part of the vehicle can be searched, including the trunk and closed containers.

Probable cause to search exists where the known facts and circumstances are sufficient to warrant an officer of reasonable prudence in the belief that contraband or evidence of a crime will be found. Exigent circumstances exist when there is an imminent danger that evidence can be hidden, altered, destroyed, or removed, or when there is a serious and imminent threat to an officer's or the public's safety.

Automobiles are clearly "effects under the Fourth Amendment, [and] searches and seizures of automobiles are therefore subject to the constitutional standard of reasonableness...."[18] In terms of the circumstances justifying a warrantless search, the Supreme Court has long distinguished between an automobile and a home or office. The reduced expectation of privacy relative to the automobile is a major consideration.[19] The seminal case, *Carroll v. United States*,[20] involved a prohibition-era warrantless search and seizure of contraband liquor from an automobile on the highway. The Supreme Court, after reviewing the common law and statutory history relating to warrantless searches from the time of the adoption of the Fourth Amendment onward, held as follows:

> We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.
>
> Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made...[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise....
>
> The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops

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Hayden, 387 U.S. 294, 302–306 (1967); Jones v. United States, 357 U.S. 493, 498 (1958): "The decisions of this Court have time and again underscored the essential purpose of the Fourth amendment to shield the citizen from unwarranted intrusions into his privacy."

[18] United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977).

[19] Reflective of this consideration are these excerpts from the Court's plurality opinion by Justice Blackmun in Cardwell v. Lewis, 417 U.S. 583, 588–592 (1974):

> The evidence with which we are concerned is not the product of a 'search' that implicates traditional considerations of the owner's privacy interest...The issue, therefore, is whether the examination of an automobile's exterior upon probable cause invades a right to privacy which the interposition of a warrant requirement is meant to protect...At least since Carroll v. United States...the Court has recognized a distinction between the warrantless search and seizure of automobiles or other moveable vehicles, on the one hand, and the search of a home or office, on the other...With the 'search' limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, we fail to comprehend what expectation of privacy was infringed...Under circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is not unreasonable under the Fourth and Fourteenth Amendments.

[20] 267 U.S. 132 (1925).

and seizes has contraband liquor therein which is being illegally transported.[21]

Thus, probable cause to search an automobile exists where the known facts and circumstances are sufficient to warrant an officer of reasonable prudence in the belief that contraband or evidence of a crime will be found. The probable-cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officer.[22] However, under *Carroll*,[23] in addition to probable cause, there must also exist *exigent circumstances* making it impractical to obtain a warrant before a search is undertaken. Exigent circumstances exist when there is an imminent danger that evidence can be hidden, altered, destroyed, or removed, or when there is a serious and imminent threat to an officer's or the public's safety.

The Supreme Court somewhat eroded the "exigency requirement" by its decision in *Chambers v. Maroney*,[24] where, immediately following an armed robbery, the police were found to have probable cause to stop an automobile carrying the suspected robbers and to arrest the occupants. However, rather than search the seized automobile at the place of arrest, the police had it towed to the station house where it was searched without a warrant. This search produced two .38-caliber revolvers and fruits of the robbery, concealed in a compartment under the dashboard. Justice White, writing for the majority, ruled that the search made some time after the arrest and at a different place was not incident to the arrest: "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to arrest."[25] However, the search was held reasonable because:

> The probable-cause factor still obtained at the station house and so did the mobility of the car...[and] [a] careful search at [a dark parking lot in the middle of the night] was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and the safety of his car to have the vehicle and the keys together at the station house.[26]

Latzer considers the decision in *California v. Carney*[27] to have eroded the exigency requirement even further,[28] and Friesen cites the decision as precedent that "exigent circumstances are not required in order to dispense with a warrant when searching an automobile, as its potential mobility supplies the exigency needed."[29]

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[21] 267 U.S. 132, at 153–54, 155–56.

[22] United States v. Ross, 456 U.S. 798, 808 (1982).

[23] *Supra*.

[24] 399 U.S. 42 (1970).

[25] 399 U.S. 42, 47, citing Preston v. United States, 376 U.S. 364, 367, 84 S. Ct. 881, 883, 11 L. Ed. 2d 777 (1964). Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 88 S. Ct. 1472, 20 L. Ed. 2d 538 (1968). *Accord*: State v. Boyce, 758 P.2d 1017 (Wash. App. Ct. 1998) (applying Washington Constitution art. 1, § 7: automobile may not be searched incident to arrest once occupants are transported from the scene of arrest). Friesen notes that Pennsylvania and Rhode Island similarly demand a showing that circumstances render the procurement of a warrant impracticable at least when the driver is in custody. Commonwealth v. White, 669 A.2d 896 (Pa. 1995) (whether police could conduct a warrantless search of an automobile, absent exigent circumstances, after its occupants had been arrested and were outside of the automobile in police custody...[holding]...that art. 1, § 8 of the Pennsylvania Constitution was more protective in this situation than the federal rule, and invalidated the search...[adhering] to its 1980 decision in Commonwealth v. Timko, 417 A.2d 620 (Pa. 1980), limiting the warrantless search of an automobile incident to an arrest to areas and clothing immediately accessible to the arrestee.) State v. Benoit, 417 A.2d 895 (R.I. 1980) (search and seizure clause of R.I. Const. art. I, § 6, declares all warrantless searches and seizures to be unreasonable; 4 hours after the defendant was arrested, and after his car had been impounded, a search warrant was required to search it). *But see* State v. Werner, 615 A.2d 1010 (R.I. 1992) (conforming state standard to federal, court held that an automobile search may be justified by probable cause alone). FRIESEN *supra* note 4 at 647, n.252–53.

[26] *Id.*, at 52–53, n.10.

[27] 471 U.S. 386 (1985).

[28] LATZER *supra* note 4 at 68, noting that "[a]lthough the Court continues to pay lip service to requirements in addition to probable cause, these additional requirements can probably be met in every case involving the search of a motor vehicle." He points out that Wisconsin, "anticipating the trend, simply abandoned the need for any separate showing of exigency." State v. Friday, 147 Wis. 2d 359, 434 N.W.2d 85 (1989); State v. Tomkins, 144 Wis. 2d 116, 423 N.W.2d 823, 829 (1988); *cf.* (Connecticut) State v. Dukes, 209 Conn. 98, 547 A.2d 10 (1988) (adopting automobile exception without discussing exigency requirement), n.147.

Friesen notes that "[m]ost state courts facing this issue have adopted the *Chambers* rule into the state constitution. *See, e.g.,*. State v. Redfearn, 441 So. 2d 200, 202 (La. 1983); Commonwealth v. Moses, 557 N.E.2d 14 (Mass. 1990); State v. Gallant, 574 A.2d 385 (N.H. 1990); People v. Blasich, 73 N.Y.2d 673, 68 N.Y.S.2d 40, 541 N.E.2d 40 (1989). These decisions treat any justification for conducting a warrantless on-the-scene automobile search as sufficient justification for a search conducted after the automobile has been towed to the police station." FRIESEN *supra* note 4 at 648, n.259.

[29] Friesen *supra* note 4 at 645, noting in 1997 Supplement that "[i]n some states, warrantless searches of parked cars, when circumstances would allow a warrant to be obtained, are generally held to be unconstitutional." Brown v. State, 653 N.E.2d 77 (Ind. 1995) (in this case, state constitution mandated that the evidence be suppressed, in order to protect the privacy of all Hoosiers). See also State v. Gomez, 932 P.2d 1, n.14 (N. Mex. 1997) (departing from federal rule to hold that a warrantless search of an automobile and its contents required a particularized showing of exigent circumstances, defined as "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence."); State v. Hendrickson, 917 P.2d 563 (Wash. 1996),

> [A]ny search of an automobile that was parked, immobile and unoccupied at the time the police first encountered it in connection with the investigation of a crime must be authorized by a warrant issued by a magistrate or, alternatively, the prosecution

Carney involved a search by federal drug agents of a Dodge Mini Motor Home parked in a parking lot and believed to be used for exchanging marijuana for sex. When a youth emerged from the motor home and confirmed the agent's suspicions, they had him knock on the door of the motor home. When Carney stepped out, one agent, without warrant or consent, entered the motor home and observed marijuana and drug paraphernalia. When the agents took Carney into custody and took possession of the motor home, another search at the police station revealed additional marijuana. Carney was convicted of possession, but the California Supreme Court reversed, holding that the search of the motor home was unreasonable under the motor vehicle exception because a motor home is more like a dwelling than an automobile, with heightened expectations of privacy. The Supreme Court reversed and remanded, reasoning that "although ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception...[but also] because the expectation of privacy...is significantly less...."[30] The Court held as follows: "In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met."[31]

The Court of Appeals for the Sixth Circuit upheld a warrantless search of a Winnebago motor home in *United States v. Markham*,[32] under facts presenting a variation on *Carney* because the unattended vehicle searched was parked in a private driveway. The Court still found that the *Carney* rationale was controlling:

> [T]he *Carney* majority held that whenever a vehicle is readily capable of use on public roads, the automobile exception is applicable...[T]he motor home searched was on wheels and bore Tennessee license plates [and] was parked in a driveway connected to a public street...Moreover, there were no utility lines connected to the motor home. Clearly, [it] was so situated that an objective observer would conclude that it was being used as a vehicle and not as a residence. Therefore, in accordance with the holding in *Carney*, the underlying considerations justifying a warrantless search under the automobile exception came into play and the warrantless search...was proper pursuant to the automobile exception to the warrant requirement of the Fourth Amendment.[33]

Whereas a search must be based upon probable cause, stemming from objective facts, an "investigatory stop" is permissible under the Fourth Amendment if supported by *reasonable suspicion*.[34] In *Whren v. United States*,[35] the Court dealt with the reasonableness of a traffic stop, where the arresting officer observed two large plastic bags containing what appeared to be crack cocaine. The defendant, Whren, argued that when the officer stopped his car to issue a warning concerning traffic violations, while based upon probable cause, it was really a pretextual stop to investigate for drugs, which rendered the stop and subsequent search and arrest invalid. Justice Scalia, writing for a unanimous Court, held that the constitutional reasonableness of traffic stops does not depend on the actual motivations of the individual officers involved, citing *United States v. Robinson*.[36]

The Supreme Court addressed the scope of permissible searches in *United States v. Ross*,[37] holding that it extends to every part of the vehicle, including closed containers:

> The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe it may be found.

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must demonstrate that exigent circumstances other than the potential mobility of the automobile exist,

adopting Oregon rule instead of federal rule; State v. Patterson, 774 P.2d 10 (Wash. 1989) (citing with approval on this point State v. Kock, 725 P.2d 1285 (Or. 1986)). p. 74, n.248.1. Friesen points out that

> In Oregon, the rule (narrower than the federal "automobile exception,") is that searches of automobiles that have just been lawfully stopped by police may be searched without a warrant, and without a demonstration of exigent circumstances, when police have probable cause to believe that the automobile contains contraband or crime evidence.

State v. Brown, 721 P.2d 1357 (Or. 1986). State v. Herrin, 323 Or. 188 (Or. 1996). *See also* State v. Vaughn, 757 P.2d 441 (Or. Ct. App. 1988) (parked car is not subject to any "automobile exception") FRIESEN *supra* note 4 at 646-47, n.249-51.

[30] 471 U.S. 386, 392.

[31] *Id.* at 392. A strong dissent by Justice Stevens, joined by Justices Brennan and Marshall, believed the decision to be premature, "according priority to an exception rather than to the general rule...[and] abandon[ing] the limits on the exception imposed by prior cases...," observing: "In the absence of any evidence of exigency in the circumstances of this case, the Court relies on the inherent mobility of the motor home to create a conclusive presumption of exigency." *Id.* at 396, 404.

[32] 844 F.2d 366 (6th Cir. 1988).

[33] 844 F.2d 366, 369. *Cf.* United States v. Adams, 46 F.3d 1080 (Fed. Cir. 1995), affirming suppression of evidence seized in search of a motor home, without reaching issues "that would help define the dichotomy concerning the search of motor homes." The court further noted: "The law regarding whether to apply to motor homes the established search and seizure principles applicable to motor vehicles, or those applicable to fixed places of residence has not been developed. This is not an appropriate case for setting any precedent in this regard," at 1081.

[34] Ornelas v. United States, 517 U.S. 690, ____ (1996), 134 L. Ed. 2d 911, 917 (1996), citing Terry v. Ohio, 392 U.S. 1 (1968).

[35] 116 S. Ct. 1769 (1996).

[36] 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973):

> [W]e held that a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was "a mere pretext for a narcotics search,"...and that a lawful post-arrest search of the person would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches. 116 S. Ct. 1774.

[37] 456 U.S. 798 (1982).

> The scope...is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.[38]

The Supreme Court recently reaffirmed *Carrol* and *Ross*, in its decision in *Wyoming v. Houghton*,[39] which presented the question of whether police officers violate the Fourth Amendment when they search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband. The case involved a routine traffic stop by a Wyoming Highway Patrol officer who noticed a hypodermic syringe in the driver's shirt pocket. When the driver admitted using the syringe to take drugs, the officer searched the passenger compartment for contraband, including a purse found on the back seat, admittedly belonging to respondent Houghton (a passenger seated in the front seat), where he found drug paraphernalia, a syringe with 60 ccs of methamphetamine, and a black container containing additional drug paraphernalia and a syringe with 10 ccs of methamphetamine. Houghton was charged with felony possession of methamphetamine and the trial court denied her motion to suppress all evidence obtained from the purse as the fruit of a violation of the Fourth and Fourteenth Amendments. On appeal of her conviction, the Wyoming Supreme Court reversed, holding that the purse was outside the scope of the search.[40] In an opinion by Justice Scalia, joined by four other justices and concurred in by a fifth justice, the Court reversed the Wyoming Supreme Court, holding, inter alia:

> In sum, neither *Ross* itself nor the historical evidence it relied upon admits of a distinction among packages or containers based on ownership. When there is probable cause to search for contraband in a car, it is reasonable for police officers—like customs officials in the Founding era—to examine packages and containers without a showing of individualized probable cause for each one. A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are 'in' the car, and the officer has probable cause to search for contraband in the car...Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars...Effective law enforcement would be appreciably impaired without the ability to search a passenger's personal belongings when there is reason to believe contraband or evidence of criminal wrongdoing is hidden in the car...We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search....[41]

Justice Breyer noted in his concurring opinion that the bright-line rule that the Court describes "[o]bviously...applies only to automobile searches...[and]...only to containers found within automobiles [a]nd it does not extend to the search of a person found in that automobile."[42] The dissenting opinion by Justice Stevens, joined by Justices Souter and Ginsburg, also observes: "Thankfully, the Court's automobile-centered analysis limits the scope of its holding."[43] Justice Stevens' dissent further observed that "the rule the Court fashions would apparently permit a warrantless search of a passenger's briefcase if there is probable cause to believe the taxidriver had a syringe somewhere in his vehicle."[44] The dissent was not "persuaded that the mere spatial association between a passenger and a driver provides an acceptable basis for presuming that they are partners in crime or for ignoring privacy interests in a purse."[45]

Based upon these observations by Justices Breyer and Stevens, it seems clear that the case does not provide precedent for a warrantless search of containers belonging to passengers in a commercial limousine or passenger bus, despite probable cause for search of the driver's belongings found within the passenger compartment.

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[38] United States v. Ross, 456 U.S. 798, 824, 825 (1982). *Accord*: California v. Acevedo, 500 U.S. 565 (1991), reaffirming the Ross principle: "We therefore interpret Carroll as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." (at 580). Latzer notes that nine states have brought their constitutions in line with Ross: Illinois, Kentucky, Louisiana, Maine, Mississippi, North Carolina, Oklahoma, Oregon, and Wisconsin. LATZER *supra* note 4 at 68, n.14 (citing cases). California, New York, and Texas also appear to have adopted the Ross rule; *see* People v. Rodriquez-Fernandez, 235 Cal. App. 3d 543, 286 Cal. Rptr. 700 (1991), noting that an amendment had superseded Cal. Const. art. 1, § 13, which had been construed to require a warrant to search a briefcase and tote bags found in trunk of vehicle, People v. Ruggles, 39 Cal. 3d 1, 702 P.2d 170, 216 Cal. Rptr. 88 (1985); People v. Blasich, 73 N.Y.2d 673, 541 N.E.2d 40, 543 N.Y.S.2d 40 (1989) (gym bag removed from automobile from seat); People v. Langen, 60 N.Y.2d 170, 456 N.E.2d 1167, 469 N.Y.S.2d 44 1983) (locked traveling bag recovered from passenger compartment of pickup truck); Heitman v. State, 836 S.W.2d 840 (Tex. Ct. App. 1992) (inventory search of defendant's locked briefcase found in passenger section of automobile after vehicle impounded.) *Contra*: Alaska, State v. Daniel, 589 P.2d 408 (Alaska 1979) (applying Alaska Const. art. I, § 14) (if circumstances permit, the driver or owner of the vehicle should be consulted and offered the opportunity to request an inventory of the contents of any closed or locked containers.)

[39] 526 U.S. ___, 143 L. Ed. 408, 119 S. Ct. 1297 (1999).

[40] 956 P.2d 363 (1998), holding:

> Generally, once probable cause is established to search a vehicle, an officer is entitled to search all containers therein which may contain the object of the search. However, if the officer knows or should know that a container is the personal effect of a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal the contraband within the personal effect to avoid detection. 956 P.2d 372.

[41] 143 L. Ed. 2d 416–17, 419.

[42] 143 L. Ed. 2d 419.

[43] 143 L. Ed. 2d 423.

[44] 143 L. Ed. 2d 421.

[45] *Id.*

B. The Consent Exception

This is an important, and commonly used, warrant exception relied upon by officers searching and inspecting commercial motor vehicles. Law enforcement officers may search a vehicle, including any closed containers in the vehicle, if the owner or driver voluntarily consents to a search. The totality of circumstances test is used in determining whether consent to search is voluntary.

It is well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.[46] The Fourth Amendment test for a valid consent to search is that the consent be voluntary.[47] The burden of proving that consent was ,in fact, freely and voluntarily given lies with the prosecution.[48] The question of whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact "to be determined from the totality of all the circumstances."[49] While the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent, nor is it required to establish that the officer advised the defendant that he was "free to go" before his consent to search would be considered as voluntary.[50]

It has been held that a search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid.[51] In *Bumper*, after officers announced they had a search warrant, the defendant's grandmother allowed a search of her house, where they found a rifle later admitted in evidence as the murder weapon. The officers did not, in fact, have a warrant, and the Supreme Court held the rifle to be inadmissible evidence under *Mapp v. Ohio*,[52] because there was no consent to the search due to "coercion": "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent."[53]

The "scope" of a suspect's consent was addressed by the Supreme Court in *Florida v. Jimeno*.[54] The question before the Court was whether it was reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the car floor. Chief Justice Rehnquist, writing for the majority, noted that the "touchstone of the Fourth Amendment is reasonableness [and] [t]he standard for measuring the scope of a suspect's consent...is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[55] The Court went on to hold as follows:

> We think that it was objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car which might bear drugs. A reasonable person may be expected to know that narcotics are generally carried in some form of a container...The authorization to search in this case, therefore, extended beyond the surfaces of the car's interior to the paper bag lying on the car's floor.[56]

C. The Plain View Exception [57]

The "plain view" exception is another important, often used, warrant exception relied upon by officers searching and inspecting commercial motor vehicles. It has long been settled that objects falling in the plain

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[46] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[47] Ohio v. Robinette, 117 S. Ct. 417, 421 (1996).

[48] Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788 (1968).

[49] Schneckloth v. Bustamonte, 412 U.S. 220 (1973). The "totality of circumstances" test was reaffirmed in Ohio v. Robinette, 117 S. Ct. 417 (1996), with the Court noting that in applying this test it had "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry...hav[ing] previously rejected a *per se* rule..." (at 421).

[50] Ohio v. Robinette, 117 S. Ct. 417, 421 (1996). Friesen notes that "[s]tate courts have not, by and large, carved out an independent doctrine to assess the voluntariness of consent given to police officers...State courts are more likely, under state constitutions to require police to inform citizens of the right to refuse consent." New Jersey rejected Schneckloth in State v. Johnson, 346 A.2d 66 (N.J. 1975), (holding the state must prove the person knew or was advised of the right to refuse.); Hawaii also considers knowledge of the right to refuse when considering voluntary consent. *See* State v. Kearns, 867 P.2d 903 (Haw. 1994); Ohio Supreme Court's decision in State v. Robinette, 653 N.E.2d 695 (Ohio 1995), requiring police in the future to inform motorists clearly at the end of a valid traffic stop that they have a legal right to leave, before the police officer engages in any consensual extension of the original detention, was reversed by the Supreme Court in Robinette. However, since it rested on both Fourth Amendment grounds and on state constitutional grounds, the Ohio Supreme Court may reinstate it. FRIESEN *supra* note 4 at 670, n.351.

Latzer adds Mississippi as a state rejecting Schneckloth, citing Penick v. State, 440 S.2d 547 (Miss. 1983) (state must prove knowledgeable waiver by clear and convincing evidence.); LATZER *supra* note 4 at 63, n.102.

[51] Bumper at 391 U.S. 543, 549.

[52] 367 U.S. 643.

[53] 391 U.S. 543, 550.

[54] 111 S. Ct. 1801 (1991).

[55] *Id.* at 1803–04.

[56] *Id.* at 1804.

[57] To be distinguished from the "plain-feel exception" developed by the U.S. Supreme Court in Minnesota v. Dickerson, 508 U.S. 366, 124 L. Ed. 2d 334, 113 S. Ct. 2130 (1993), allowing officers to seize an item detected during a protective "frisk" for weapons that is clearly not a weapon, but which seems to be contraband. The Court analogized the new exception to the "plain view" exception. *See e.g.*, Michigan v. Champion, 452 Mich. 92, 549 N.W.2d 849, 50 ALR 5th 875 (1996), adopting the Dickerson "plain-feel exception."

view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.[58] When there is probable cause to believe that a vehicle has been used in a crime, and exigent circumstances exist, an officer may make a limited external examination of a vehicle. The vehicle must be parked on the street or otherwise subject to public view.

The Supreme Court noted in *Texas v. Brown*:[59]

> The question whether property in plain view of the police may be seized therefore must turn on the legality of the intrusion that enables them to perceive and physically seize the property in question...'Plain view' is perhaps better understood, therefore, not as an independent 'exception' to the Warrant Clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be.

Justice Stewart's plurality opinion in *Coolidge v. New Hampshire*[60] emphasized that what the "plain view" cases have in common is that not only did the police officer in each of them have a prior justification for an intrusion, but that the piece of incriminating evidence was discovered "inadvertently." This meant that the officer may not know in advance the location of [certain] evidence and intend to seize it, relying on the plain-view doctrine only as a pretext.[61] However, the majority opinion by Justice Stevens in *Horton v. California*[62] determined that the absence of inadvertence was not essential to the Court's rejection of the "plain-view" argument in *Coolidge*, holding that the Fourth Amendment does not prohibit the warrantless seizure of evidence in plain view even though the discovery was not inadvertent. The opinion in *Horton* provides a summary of the revised conditions to be met under the "plain view" exception:

> It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. First, not only must the item be in plain view; its incriminating character must also be "*immediately apparent.*" [Citations omitted]...Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.[63] (emphasis added).

The requirement that the incriminating character of the evidence under the plain view exception be "immediately apparent" was clarified in the *Texas v. Brown* decision. A police officer stopped Brown's automobile at night at a routine driver's license checkpoint, asked him for his license, shined his flashlight into the car, and saw an opaque green party balloon, knotted near the tip, fall from the respondent's hand to the seat. Because of his experience in drug arrests, and his knowledge that drugs were often packaged in such balloons, the officer shifted his position to get a better view as Brown looked for his license in the glove compartment. The officer then noticed small plastic vials, loose white powder, and an opened bag of balloons in the glove compartment. When Brown could not produce a driver's license, the officer ordered him out of the automobile and examined the balloon, which seemed to contain a powdery substance. He then arrested Brown and conducted an on-the-scene inventory search of the automobile, seizing other items. At the suppression hearing conducted by the District Court, a police department chemist testified that he had examined the substance in the balloon seized by the arresting officer, determined that it was heroin, and that narcotics frequently were packaged in ordinary party balloons. The Texas Court of Criminal Appeals held this was not admissible evidence because it did not meet the requirement that the incriminating nature of the items be "immediately apparent" to the police officer. In reversing and remanding, the Court provided this clarification of the "immediately apparent" condition:

> As the Court frequently has remarked, probable cause is a flexible, common sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," *Carroll v. United States*, 267 U.S. 132, 162, 45 S. Ct. 280, 288, 69 L. Ed. 543 (1925), that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical, probability that incriminating evidence is involved is all that is required...With these considerations in mind it is plain that Officer Maples possessed probable cause to believe that the balloon in Brown's hand contained an illicit substance...The fact that Maples could not see through the opaque fabric of the balloon is all but irrelevant: the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer.[64]

Friesen notes that the plain view rule has also been used by state courts relying on state constitutions, some holding to a stricter standard than the Supreme Court. She points out that the "disagreements are less over the form of the rule than whether the factual predicates necessary to apply have been met."[65]

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[58] Harris v. United States, 390 U.S. 234 (1968).

[59] 460 U.S. 730, 737–39 (1983).

[60] 403 U.S. 443 (1971).

[61] 403 U.S. 443, at 466–70.

[62] 496 U.S. 128 (1990).

[63] *Id. at* 136–37.

[64] 460 U.S. 730, at 742–43. *Contra*: Reeves v. State, 599 P.2d 727 (Alaska 1979) (no probable cause to believe tied-off opaque balloon of DWI arrestee incriminating); State v. Ball, 471 A.2d 347 (N.H. 1983) (rejecting Texas v. Brown, relying on state constitution).

[65] Hawaii, in State v. Meyer, 893 P.2d 159 (Haw. 1995) (retaining inadvertence factor to justify a plan view seizure of evidence); Massachusetts' version of the plain view exception requires exigent circumstances and probable cause to conduct a warrantless seizure of the object in plain view. Commonwealth v. Viriyahiranpaiboon, 588 N.E.2d 643 (Mass. 1992); Washing-

The attempt to suppress plain view evidence in *Harris v. United States*[66] involved evidence discovered in an impounded vehicle that had been towed to a police impoundment lot upon the arrest of Harris for robbery. Acting pursuant to a police regulation requiring removal of all valuables from an impounded vehicle, but without a warrant, the arresting officer opened the front passenger door and saw a registration card belonging to the robbery victim. In a per curiam opinion, the Supreme Court found that the Fourth Amendment did not require a warrant in these narrow circumstances, that the door had been lawfully opened, and that the registration card, being plainly visible, was subject to seizure and could be introduced in evidence under the "plain view" exception.

The decision in *Cardwell v. Lewis*[67] also involved evidence recovered from an impounded vehicle following Cardwell's arrest for murder, but from a warrantless examination of the exterior of the vehicle. The impoundment took place at a public parking lot following Cardwell's arrest at the police station and release to the police of the car keys and parking lot claim check. The exterior examination was done the next day by a technician, with the evidence consisting of paint scrapings from the exterior and an observation of the tread of a tire. Although the Court in *Cardwell* does not refer to nor discuss the "plain view" exception, the case provides valuable precedent on the lawful collection of evidence from a vehicle's exterior.

Noting this to be a case of first impression, the Court stated the issue to be "whether the examination of an automobile's exterior upon probable cause invades a right to privacy which the interposition of a warrant requirement is meant to protect."[68] The focus of the plurality opinion by Justice Blackmun is the fact that the automobile had been left in a public parking lot.[69] He reasoned as follows in reversing the lower court's denial of the use of this evidence:

> But insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry...With the "search" limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, we fail to comprehend what expectation of privacy was infringed...Under circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is not unreasonable under the Fourth and Fourteenth Amendments...Since the Coolidge car was parked on the defendant's driveway, the seizure of that automobile required an entry upon private property. Here, as in *Chambers v. Maroney* [citation omitted], the automobile was seized from a public place where access was not meaningfully restricted...The fact that the car in *Chambers* was seized after being stopped on a highway, whereas Lewis' car was seized from a public parking lot, has little, if any, legal significance.[70]

D. The Pervasively Regulated Industry Exception

The warrant exception known as the "pervasively regulated industry exception" is not commonly known or generally understood by law enforcement officers, but is a very useful exception because a number of courts have recognized the commercial motor vehicle industry as a pervasively regulated industry.

Warrantless inspections of pervasively regulated businesses are authorized if: (1) there is a substantial government interest, (2) warrantless inspection is necessary to further the government interest, and (3) there is a certain minimum level of certainty and regularity in conducting inspections to provide an adequate substitute for a warrant.[71]

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ton, in State v. Chrisman, 676 P.2d 419 (1984), holding that plain view exception will apply "only if the following requirements are met: (1) a prior justification for the intrusion; (2) inadvertent discovery of incriminating evidence; and (3) immediate knowledge by the officer that he had evidence before him." FRIESEN *supra* note 4 at 668–69, n.342–43.

[66] Harris v. United States, 390 U.S. 234 (1968).

[67] 417 U.S. 583 (1974).

[68] *Id.* at 589.

[69] LaFave, reviewing the issue of exterior examination of vehicles in Sec. 2.5(b), notes the Supreme Court's statement in Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) that "what a person knowingly exposes to the public is not subject of Fourth Amendment protections," concluding that, "it is apparent that when a vehicle is parked on the street or in a lot or at some other location where it is readily subject to observation by members of the public, it is not search for the police to look at the exterior of the vehicle." LAFAVE *supra* note 4 at 554–56, n.26–33.

[70] *Id.* at 591–94.

[71] Latzer observes that

> [t]here is a broad range of government intrusions not immediately aimed at obtaining evidence of crime but rather at seeking to regulate or inspect in order to protect public health or safety. Examples include inspection of buildings to insure housing code compliance; inspection of businesses, such as restaurants, to guarantee sanitary conditions; examination of license plates or safety inspections of automobiles; screening of those crossing the nation's borders; and so on. The latest example is the testing of certain employees and athletes for improper drug use...The legal theory of...[the] cases is similar to that used in *Terry v. Ohio*: the intrusion is not severe enough to fall under the warrant clause of the Fourth amendment, and a balancing of governmental and privacy interests is sufficient to determine "reasonableness." ...There are only a few state constitutional law rulings on administrative searches...[citations omitted]...the states have accepted the concept of the balancing test to justify certain searches, dubbed regulatory or administrative, on less than probable cause. However, for regulatory inspections of motor vehicles, such as inventory searches and roadblock stops...the state court protests have been considerably stronger.

LATZER *supra* note 4 at 71–73.

Friesen agrees:

> Few states have addressed the question what would constitute a valid administrative or regulatory search under the state constitution. [citations omitted]. Some states seem to follow the view that the regulatory purpose of laws authorizing inspection of business premises and the like justifies an exception to the warrant requirement [citations omitted], and the usual need for individualized suspicion [citations omitted], but others disagree. *See, e.g.*, People v. Scott, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992) (law authorizing police to conduct random warrantless searches of vehicle dismantling businesses to de-

Persons have a reduced expectation of privacy in motor vehicles because of the government's pervasive regulation of motor vehicle travel on public highways. Persons have no reasonable expectation of privacy as regards the vehicle identification number (VIN). Law enforcement officers can enter a vehicle to look for a VIN because the VIN plays an important role in the pervasive regulation of motor vehicles.

The "automobile exception" to the warrant requirement, first set forth in *Carroll v. United States,* supra, while recognizing that the privacy interests in an automobile are constitutionally protected, held that the ready mobility of the automobile justified a lesser degree of protection of those interests. While mobility alone was the original justification for the automobile exception, later cases have made clear that it is not the only basis for the exception, with a further basis being "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office.[72] In *California v. Carney,*[73] the Court, in upholding the warrantless search of a mobile home, observed that:

> These reduced expectations of privacy derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways. *Cady v. Dombrowski*, 413 U.S., at 440-441, 93 S. Ct., at 2527-2528...In short, the *pervasive schemes of regulation,* which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met. (emphasis added).[74]

The Supreme Court used the pervasive regulation of vehicles rationale once again in reaching its decision in *New York v. Class,*[76] recognizing that there is no reasonable expectation of privacy in the VIN for Fourth Amendment purposes. The case involved a routine traffic stop for speeding and a cracked windshield during which an officer, finding no VIN on the doorjamb of the car, reached into the interior to move papers obscuring the area of the dashboard where the VIN is located. In doing so, the officer saw the handle of a gun protruding from underneath the driver's seat, seized the gun, and promptly arrested defendant Class.[78] The majority opinion by Justice O'Connor readily recognized that the VIN "is a significant thread in the web of regulation of the automobile," assisting both federal and state government in identification of vehicles and owners for recall campaigns, registration requirements, safety inspections, and in reduction of automobile theft.[77] The opinion noted that

> In light of the important interests served by the VIN, the Federal and State Governments are amply justified in making it a part of the web of pervasive regulation that surrounds the automobile, and in requiring its placement in an area ordinarily in plain view from outside the passenger compartment...[that] it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile...[and holding] that there was no reasonable expectation of privacy in the VIN.[78]

The Court concluded:

> When we undertake the necessary balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion," *United States v. Place*, 462 U.S. 696, 703, (1983), the conclusion that the search here was permissible follows...We hold that this search was sufficiently unintrusive to be constitutionally permissible in light of the lack of a reasonable expectation of privacy in the VIN and the fact that the officers observed respondent commit two traffic violations...We note that our holding today does not authorize police officers to enter a vehicle to obtain a dashboard-mounted VIN when the VIN is visible from outside the automobile...[79]

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termine whether those businesses traffic in stolen automobile parts violated state constitutional proscription against unreasonable searches and seizures, N.Y. Const. Art. I, § 12); compare New York v. Burger 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d (1987) (sustaining same law as consistent with Fourth Amendment). Woods & Rohde, Inc. v. State, Dept of Labor, 565 P.2d 138 (Alaska 1977) (warrantless inspection authorized by Alaska's Occupational Safety and Health Act is unreasonable search under Alaska Const. Art. I, § 14)...True administrative searches are those with regulatory, preventive, or correctional objectives, as opposed to penal ones. *See, e.g.,* AFSCME Local 2623 v. Dep't of Corrections, 843 P.2d 409 (Or. 1992)...Suspicionless searches were traditionally confined to those with these objectives, but as some modern courts have let the "special needs" of law enforcement erode once-necessary individualized suspicion of wrongdoing, so the line between searches for law enforcement and searches for administrative reasons can start to blur....

FRIESEN *supra* note 4, p. 678.

[72] California v. Carney, 471 U.S. 386, 391, (1985), citing South Dakota v. Opperman, 428 U.S. 364, 367 (1976).

[73] 471 U.S. 386.

[74] *Id.* at 393.

[76] 475 U.S. 106 (1986).

[78] *Id.* at 106, 107-09.

[77] *Id.* at 111.

[78] *Id.* at 112–14, 119.

[79] *Id.* at 118-19. On remand, People v. Class, 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986), the New York Court of Appeals reinstated its original judgment, based on the state constitution, ruling that such an entry to examine the VIN required extraordinary or compelling circumstances; Oregon, in a pre-Class decision in State v. Turecheck, 702 P.2d 1131 (Or. 1985), held that opening a pickup truck door to look for a VIN, in the absence of probable cause, was an illegal search and seizure under the Oregon Constitution. *See also* State v. Larocco, 794 P.2d 460 (Utah 1990) (absent exigent circumstances, opening unlocked door of parked car to examine VIN constituted unreasonable search under art. I, § 14 of Utah Constitution); *Cf.* State v. Moore, 659 P.2d 70 (Hawaii 1983) (held that police officer's opening hood to check engine number without probable cause and exigent circumstances was illegal search), and People v. Piper, 101 Ill. App. 3d 296, 56 Ill. Dec. 815, 427 N.E.2d 1361 (1981), a pre-Class decision in Illinois, holding that officer's opening of vehicle door to examine VIN on doorpost in course of accident investigation without asking permission constituted illegal search.

Just as the Court has recognized a reduced expectation of privacy with respect to one's automobile because of pervasive regulation, the Court has also recognized a reduced expectation of privacy in commercial property employed in "closely regulated" industries.[80] For example, the Court in *Marshall v. Barlow's, Inc.* observed that "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy...could exist for a proprietor over the stock of such an enterprise."[81]

The Supreme Court first examined the "unique" problem of inspections of "closely regulated" businesses in two enterprises that had "a long tradition of close government supervision."[82] In *Colonnade Corp. v. United States*,[83] it considered a warrantless search of a catering business pursuant to several federal revenue statutes authorizing the inspection of the premises of liquor dealers. In *United States v. Biswell*,[84] the Court considered a warrantless inspection of a pawnshop, federally licensed to sell sporting weapons, pursuant to the Gun Control Act of 1968. "[T]he doctrine is essentially defined by 'the pervasiveness and regularity of the federal regulation' and the effect of such regulation upon an owner's expectation of privacy...[and] 'the duration of a particular regulatory scheme' would remain an 'important factor' in deciding whether a warrantless inspection pursuant to the scheme is permissible."[85]

The Supreme Court, in *New York v. Burger*,[86] upheld the warrantless search of an automobile junkyard conducted pursuant to a statute authorizing such a search, based upon the exception to the warrant requirement for administrative inspections of pervasively regulated industries. The Court so held notwithstanding the fact that the ultimate purpose of the regulatory statute—the deterrence of criminal behavior—was the same as that of penal laws. The Court enunciated three criteria that must be met before the warrantless inspection will be deemed to be reasonable:[87]

> First there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made.[88] ...Second, the warrantless inspections must be "necessary to further [the] regulatory scheme."[89]...Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.[90] In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.[91]...To perform this first function, the statute must be "sufficiently comprehensive and defined that the owner of the commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.[92]...In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be "carefully limited in time, place and scope."[93]

The United States Court of Appeals, Sixth Circuit, relied on the *Burger* decision in *United States v. Dominguez-Prieto*[94] in holding that a warrantless search of the trailer portion of a semi-truck did not violate the Fourth Amendment because it was made pursuant to the pervasively regulated business doctrine exception. The decision is particularly instructive because of its analysis of the extensive federal/state regulatory scheme relative to the commercial trucking industry in applying the three *Burger* elements listed above.

The warrantless search reviewed by the Court resulted when Dominguez-Prieto, driving a Kenworth tractor pulling a refrigerated trailer, entered a truck inspection station on I-75 for a routine examination by Tennessee Public Service Commission (TPSC) officers for compliance with federal and state safety and hauling regulations. TPSC Officer Clayton noticed that Dominguez-Prieto was visibly nervous and shaking, that he was driving without a load from Houston, Texas, to New York City, and that the trailer was

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[80] New York v. Burger, 482 U.S. 691, 700 (1987).

[81] *Id.* at 700, quoting from Marshall v. Barlow's, Inc. 436 U.S. 307, 313 (1978).

[82] *Id.*

[83] 397 U.S. 72 (1970).

[84] 406 U.S. 311 (1972).

[85] *Id.* at 701, quoting from Donovan v. Dewey, 452 U.S. 594, 600 (1981).

[86] New York v. Burger, 482 U.S. 691, 700 (1987).

[87] *Id.* at 702–03.

[88] *Id. See* Donovan v. Dewey, 452 U.S. 594, 602 (1981)("substantial federal interest in improving health and safety conditions in the Nation's underground and surface mines"); United States v. Biswell, 406 U.S., at 315 ("regulating the firearms traffic within their borders"); Colonnade Corp. v. United States, 397 U.S. at 75 (federal interest "in protecting the revenue against various types of fraud.").

[89] *Id. See* Donovan v. Dewey, 452 U.S. 594, 603. "For example, in Dewey we recognized that forcing mine inspectors to obtain a warrant before every inspection might alert mine owners or operators to impending inspection thereby frustrating the purposes of the Mine Safety and Health Act."

[90] *Id.*

[91] *See* Marshall v. Barlow's, Inc. 436 U.S., at 323.

[92] See Donovan v. Dewey, *supra* note 85, at 600.

[93] See United States v. Biswell, *supra*, at 315. *See also* Commonwealth v. Bizarria, 578 N.E.2d 424 (Mass. App. Ct. 1991) (*held*: even if auto repair shop is a closely regulated industry, and warrantless inspections are necessary to control vehicle theft, statute did not provide an adequate substitute for a warrant since there was no limitation on time, place, and scope to restrain officers' discretion.) As to the scope of inspection, *see* U.S. v. Branson, 21 F.3d 113, 118 (6th Cir. 1994) (review of motion to suppress evidence uncovered in search of a second room attic during inspection of automobile parts business; *held*: "Once the defendant admitted that the attic contained auto parts, the officers were justified in concluding that the statute authorized inspection of those auto parts as well.")

[94] 923 F.2d 464 (6th Cir. 1991).

padlocked, all of which Clayton found highly unusual. Upon examination of Dominguez-Prieto's logbook, he found that there had been no entries for 6 days. When Clayton asked to look into the trailer, Dominguez-Prieto could not produce the keys to the padlock. Clayton reported these matters to his sergeant and, becoming suspicious that Dominguez-Prieto might be transporting illegal cargo, decided to gain entry to the trailer by cutting the lock with bolt cutters. When this failed, the officers gained entry by acetylene torch. Inside, the officers found boxes filled with over 200 kilograms of cocaine. In a subsequent search of the tractor, the officers found $538,470 in cash and the keys to the trailer lock.

The Circuit Court made these relevant findings in applying the *Burger* analysis:

> The federal regulations governing the commercial trucking industry are extensive. Regulations cover driver's qualifications, motor vehicle's parts and accessories, reporting of accidents, drivers' hours of service, inspection, repair and maintenance of motor vehicles, recording itineraries, transportation of hazardous materials, and other safety issues. 49 C.F.R. 100-399. Not only is there comprehensive regulation of the common carriers in the trucking industry by the federal government, but they are also comprehensively regulated by most, if not all, states including Tennessee. (Citations omitted)...In view of this extensive state and federal regulation, we find the common carriers in the trucking industry to be a pervasively regulated business...[T]he substantial interests of the government are evident...As was the case in *Burger*, warrantless inspections are critical to the regulatory scheme in question here...[TPSC] must be able to check the cargo frequently...warrantless inspections are more compelling than those present in *Burger*...The third factor—that the statute's inspection program provides a constitutionally adequate substitute for a warrant...is met...Perhaps most important in the comparison with *Burger* is the fact that the inspection scheme in *Burger* required no level of suspicion while the Tennessee inspection scheme requires a "reasonable belief" that a violation is occurring...Clayton's sergeant met the standard of reasonable belief required under the Tennessee regulatory scheme before directing the search of Dominguez-Prieto's trailer.[95]

The United States Court of Appeals, Tenth Circuit, applied the *Burger* test to the warrantless search of defendant's rented truck in *United States v. Seslar*,[96] and held that the search violated the Fourth Amendment because the defendants were not motor carriers and therefore not part of a closely regulated industry. The defendants were stopped by Kansas Highway Patrol Officers to determine whether they were hauling a commercial load and, if so, whether they possessed all permits required by Kansas's law. However, the Court found that Kansas's spot check provisions did not authorize the random stop of *any* truck traveling on the Kansas highways to first determine whether the truck was carrying a commercial load. The Court said:

> In this case the defendants were not motor carriers. Instead, the defendants were driving a rental truck, which, like any other motor vehicle, could be used for commercial or personal purposes. Thus, these defendants did *not* have the reduced expectation of privacy of persons engaged in a closely regulated industry...the closely regulated industry line of cases does not justify the warrantless search of *un*-regulated persons....[97]

The United States Court of Appeals, Tenth Circuit, in *V-1 Oil Company v. Means*,[98] reviewed the grant of summary judgment to defendant and considered, de novo, the question of qualified immunity for Wyoming highway patrol officer Means for alleged violation of plaintiffs' civil rights under 42 U.S.C. 1983, by ordering the V-1 propane truck driver to drive the truck to a port of entry for safety inspection after a valid traffic stop. To overcome a defense of qualified immunity, the "plaintiff must show that the law was clearly estab-

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[95] 923 F.2d 964, 468–70. *See also* International Brotherhood of Teamsters v. Dep't Of Transportation, 932 F.2d 1292 (9th Cir. 1991) (Challenge to legality of Federal Highway Administration regulations, 49 C.F.R. 391.81–391.123 (1989), requiring warrantless testing of truck drivers for controlled substances without any measure of individualized suspicion. *Held*:

> the privacy expectations of commercial truck drivers are markedly less than those of the public in general. The trucking industry is highly regulated and drivers have long been subjected to federal regulation of their qualifications...We therefore hold that, given the comprehensive governmental regulation to which commercial drivers are already subject, the FHWA's random, biennial, pre-employment, and post-accident drug testing regulations are constitutional on their face.

At 1300, 1309. *Compare*: Owner-operator Independent Drivers Assoc., Inc. v. Pena, 862 F. Supp. 470 (D.D.C. 1993) (in challenge to federal pilot program of random state testing of truck drivers for drug use, held that neither stopping of trucks nor collection of urine samples violated Fourth Amendment; given safety problems with commercial vehicles, it is imperative that the government develop statistical information).

[96] 996 F.2d 1058 (10th Cir. 1993).

[97] 996 F.2d 1058, 1063. *Accord:* State v. Campbell, 875 P.2d 1010 (Kan. App. 1994) (random stop and inspection of rental vehicle to determine compliance with motor carrier laws "are, in the absence of established neutral criteria or guidelines governing the discretion of officer. . .constitutionally impermissible under Fourth Amendment..."); Arizona v. Hone, 866 P.2d 881 (Ariz. App. 1994) (statute authorizing livestock officers to conduct random stops of vehicles capable of carrying hides or livestock not justified under "closely regulated business" exception to Fourth Amendment) Dominguez v. Arkansas, 720 S.W.2d 703 (Arkansas 1986) (random administrative stop of rental truck without articulable facts inferring coverage under State's Motor Carrier Act violated Fourth Amendment); New Mexico v. Clark, 816 P.2d 1122 (N.M. App. 1991) (random stop of rental truck not authorized by fact that commercial trucking industry highly regulated). *Cf.* State v. Williams, 8 Kan. Ap. 2d 14, 648 P.2d 1156 (1982), upholding the random stopping of commercial trucks to inspect the required daily logs recording the hours driven based upon pervasively regulated industry exception ("Trucks carrying large cargoes present a substantial hazard...if operated by sleepy or ill drivers"). *See also*: State of New Jersey v. Jersey Carting, Inc., 611 A.2d 677 (N.J. Super. L. 1992) (local police did not have authority to conduct random inspection on commercial vehicle, absent special appointment by State Director of Motor Vehicles).

[98] 94 F.3rd 1420 (10th Cir. 1996).

lished when the alleged violation occurred and must come forward with facts or allegations sufficient to show the official violated the clearly established law."[99]

The Court concluded that it was not clearly established that a highway patrol officer's warrantless safety inspection of a commercial truck carrying hazardous material, pursuant to a valid traffic stop on a road near a port of entry, violated the Fourth Amendment.[100]

Although Means's inspection of the exterior of the truck was not a search subject to the warrant requirement, the Court concluded that the principles of *Burger* were applicable and that the "random detention and inspection of a vehicle used in a closely regulated industry therefore must meet essentially the same requirements as a warrantless regulatory search of business premises. [Citations omitted]"[101] Following the *Burger* test, the Court found that "[m]otor carriers are closely regulated by both state and federal governments"[102] [and] "[t]ransportation of hazardous materials by motor carriers is even more closely regulated."[103] Holding that the

> state clearly has a substantial interest in regulating that industry to protect public safety on the highways...[i]t could reasonably be concluded that random truck safety inspections are necessary to further that interest. [and that] [i]t could also reasonably be concluded that the statutes and regulations authorizing inspection are an adequate substitute for a warrant.[104]

The Court found that qualified immunity was justified because Means did not violate clearly established law, because there "are no Supreme Court or Tenth Circuit cases addressing the constitutionality of a random safety inspection of a commercial vehicle under the regulatory inspection doctrine...[and] [t]here is no clear weight of authority from other jurisdictions."[105] The Court noted several courts that have upheld random inspections,[106] and several that have held random inspections of commercial vehicles to violate the Fourth Amendment.[107] The Court concluded as follows: "[T]he inspection did not violate clearly established law. It was not clearly outside the scope of a valid regulatory inspection. We do not hold that the truck inspection was constitutional, only that it was not clearly unconstitutional".[108]

A 1998 decision by the Court of Appeals for the Tenth Circuit, *United States v. Burch*,[109] found a Kansas Trooper's random stop and inspection of a commercial semi-tractor/trailer rig justified pursuant to the regulatory search exception, based upon the decisions in, inter alia, *Dominguez-Prieto*, *V-1 Oil Co. v. Means*, and *State v. Campbell*, supra. However, the issue was not the validity of the regulatory scheme, which the defendant did not challenge, but whether the original justification ended when the Trooper issued a clean inspection report to the driver and returned his paperwork, thus preventing the Trooper from then legally inspecting the cargo blocking and bracing, pursuant to 49 C.F.R. 393.104. The court held:

> Although it is hardly model police procedure, we cannot say that issuing a clean inspection report prevented Trooper Smith from completing the regulatory search authorized by Kansas's law. The clean inspection report did not remove the trooper's inspection from the scope of actions authorized by "the circumstances that first justified' the stop...Trooper Smith had not yet completed the inspection authorized by law...Because we determined that the cargo inspection was reasonably related to the initially proper stop and search, we affirm the district court's denial of Defendant's Motion to Suppress.[110]

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[99] 94 F.3d 1420, 1422 (10th Cir. 1996).

[100] *Id.* at 1423.

[101] *Id.* at 1425.

[102] *Id.* at 1426, citing 49 C.F.R. 101–399; Wyo. Stat. Ann. 31-18-101 through 31-18-902; United States v. Dominguez-Prieto, 923 F.2d 464, 468 (6th Cir. 1991), *cert. denied* 500 U.S. 936, 111 S. Ct. 2063, 114 L. Ed. 2d 468 (1991); State v. Williams, 648 P.2d at 1160–61; McCauley v. Com., 17 Va. App. 150, 435 S.E.2d 164 (Va. App. 1994).

[103] *Id.*, citing 49 C.F.R. 177 and 397; Wyo. Stat. Ann. 31-5-959 and 31-18-303.

[104] *Id.*

[105] *Id.* at 1425.

[106] United States v. Burch, 906 F. Supp. 592, 598 (D. Kan. 1995); A-1 Disposal, 415 N.W.2d at 598; State v. Williams, 8 Kan. App. 2d 14, 648 P.2d 1156, 1162 (1982); Drive Trans. Corp. v. New York City Taxi and Limousine Com'n, 134 Misc. 2d 1035, 513 N.Y.S.2d 920, 921 (1987); People v. Velez, 109 Misc. 2d 853, 441 N.Y.S.2d 176, 181–82 (1981). *See also* State v. Moore, 701 P.2d 684 (upholding stopping all garbage trucks at temporary weigh station as valid regulatory search).

[107] *See* People v. Deacy, 140 Misc. 2d 232, 530 N.Y.S.2d 753 (1988); State v. Myers, 63 Ohio App. 3d 765, 580 N.E.2d 61 (1990). *Cf.* Shaefer, 637 F.2d at 204 (court rejected administrative search justification for weighing of trucks without reasonable suspicion because purpose was to investigate possible short-weighting of materials supplied for state road project rather than enforcement of truck weight regulations; State v. Clark, 112 N.M. 500, 816 P.2d 1122, 1124 (App. 1991)) (rejecting administrative search justification for random stop because such stops were not authorized by statute); State v. Thorp, 71 Wash. App. 175, 856 P.2d 1123, (1993) (rejecting administrative search justification for random stop to enforce forest products regulations because state did not establish the forest products industry was closely regulated). Whether the Fourth Amendment permits random inspections of commercial vehicles without probable cause or reasonable articulable suspicion is not clearly established. *See* LAFAVE *supra* note 4, at § 10(c), 686-87.

[108] 94 F.3d 1420, at 1428. *Cf.* U.S. v. V-1 Oil Co., 63 F.3d 909 (9th Cir. 1995) (Injunction granted to Federal Railroad Admin. to allow warrantless, unannounced inspections under Hazardous Materials Transportation Act, because statute satisfies all standards under Burger, constituting "a well-recognized exception to the warrant requirement for administrative searches of commercial premises employed in a 'closely regulated' industry."

[109] 153 F.3d 1140 (10th Cir. 1998)

[110] *Id.* at 1142–43.

E. The Investigatory Stop Exception

Law enforcement officers must have a reasonable suspicion to justify an investigatory traffic stop. Officers cannot randomly stop motorists to check a driver's license or registration without reasonable suspicion.[111]

Reasonable suspicion is based upon various objective observations and conclusions of a law enforcement officer, resulting from the officer's training and experience. This information must raise a reasonable suspicion that a particular individual is engaged in wrongdoing. Reasonable suspicion is less than probable cause.

An anonymous telephone tip, corroborated by independent police investigation, is sufficiently reliable to provide reasonable suspicion for law enforcement officers to make an investigatory stop of a vehicle.

Reasonable suspicion is a particularized and objective basis for suspecting the person stopped of criminal activity. The principal components of a determination of reasonable suspicion or probable cause will be the events that occurred leading up to the stop or search, and then the decision as to whether these historical facts, viewed from the standpoint of the objectively reasonable police officer, amount to reasonable suspicion or to probable cause.

The stopping of a motor vehicle and detaining of its occupants constitutes a "seizure" within the meaning of the Fourth and Fourteenth Amendments, even though the purpose of the stop is limited and the resulting detention is brief.[112]

As previously noted, the essential purpose of the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order "to safeguard the privacy and security of individuals against arbitrary invasions...."[113] Therefore, "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[114] The reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard" (*Terry v. Ohio,* supra), or a less stringent test. *Delaware,* supra, at 654-655.

In *Delaware,* the Supreme Court considered the question of whether it is an unreasonable seizure for an officer to randomly stop an automobile for the sole purpose of checking the driving license of the operator and the registration of the car. The Court had previously found random stops by border patrols to be unreasonable, *United States v. Brignoni-Ponce*, supra, but had sustained the constitutionality of the Border Patrol checkpoint operations. *United States v. Martinez-Fuerte,* supra. The Court, while agreeing that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles and that those vehicles be safe and properly licensed, concluded that the contribution to highway safety made by discretionary stops selected from among drivers generally will be marginal at best, and cannot justify subjecting every occupant of every vehicle to the "unbridled discretion" of law enforcement officials. Accordingly, the Court, in an opinion by Justice White, held that law enforcement officers must have *reasonable suspicion* to justify an investigatory traffic stop:

> [W]e hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the...States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.[116]

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[111] *See generally*, FRIESEN *supra* note 4, § 11.10(b), at 658–61; LAFAVE *supra* note 4, § 10.8, at 666-85. Friesen notes that

> [w]hatever their definition of "seizure," states commonly require "reasonable suspicion" for stops and weapons searches when applying state and federal constitutional provisions. *E.g.*, State v. Kearns, 867 P.2d 903 (Haw. 1994); State v. Ryland, 486 N.W.2d 210 (Neb. 1992); State v. White, 640 P.2d 1061 (Wash. 1982); *cf.* State v. Matthews, 884 P.2d 1224 (Or. 1994). However, state tests may be stricter in application, and therefore limit police more.

E.g., Coleman v. State, 553 P.2d 40, 46 (Alaska 1976) (interpreting Alaska Const. art. I, § 14, to permit temporary detention for questioning only when (1) the police officer has an actual suspicion that "imminent public danger exists or serious harm to persons or property has recently occurred," and (2) this suspicion is reasonable); People v. Carillo-Montes, 796 P.2d 970 (Colo. 1990) (reasonable suspicion required even before police requested identification of persons seated in a parked car outside of a house where officers suspected that illegal drug sales were taking place); Holt v. State, 487 S.E.2d 629 (Ga. Ct. App. 1997) (officer not justified in asking passengers for proof of identity and birth date, when purpose of stopping car was to cite driver for cracked windshield); *cf.* State v. Reynolds, 890 P.2d 1315 (N.M. 1995) (asking for identification documents from driver and passengers of vehicle stopped for safety violations was not a search because state law created obligation to have these items, and temporary "seizure" of documents was deemed de minimis intrusion.); State v. Webber, 694 A.2d 970, 972 (N.H. 1997) (invalidating warrantless search arising from "frisk" of detainee's wallet following speeding stop.). FRIESEN *supra* note 4, at 658-59, nn.302–305.

[112] Delaware v. Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396 (1979). *Citing*: United States v. Martinez-Fuerte, 428 U.S. 543, 556–558, (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 878, (1975); Terry v. Ohio, 392 U.S. 1, 16, (U.S. 1, 16 (1968)).

[113] Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978), quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

[114] Delaware v. Prouse, 440 U.S. 648, 654 (1979).

[116] 440 U.S. 648, 663.

In a footnote, the Court stated, in dicta, that the holding was not intended to cast doubt on the permissibility of roadside truck weigh stations and inspection checkpoints, "at which some vehicles may be subject to further detention for safety and regulatory inspection than are others."[116]

In determining whether the standard of "reasonable suspicion" has been met, "the totality of the circumstances—the whole picture—must be taken into account," and based upon this whole picture, "the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity."[117] "The officer, of course, must be able to articulate something more than an 'inchoate and unparticularized suspicion or hunch.'" [118] "A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent."[119] The process does not deal with hard certainties, but with probabilities, and the Court in *Cortez* recognized that when used by trained law enforcement officers, "objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion." [120] For example, an anonymous telephone tip that included details of the suspect's address, description of her car and location of drugs in the car, and her destination and time of departure, corroborated by independent police investigation, was sufficiently reliable to provide reasonable suspicion for law enforcement officers to make an investigatory stop of a vehicle.[121]

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.[122]

The Supreme Court recently determined that it should resolve a conflict among the Circuit courts over the applicable standard of appellate review relative to cases involving reasonable suspicion and probable cause. In *Ornelas v. U.S.*,[123] the Court held that appeals courts should now review determinations of reasonable suspicion and probable cause de novo on appeal. The Court concluded that independent review is necessary if appellate courts are to maintain control of, and to clarify, the legal principles.[124] It reasoned that de novo review tends to unify precedent and will come closer to providing law enforcement officers with a defined "set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." [125] The Court held:

> We therefore hold that as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.[126]

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[116] 440 U.S. 663, n.26: "Nor does our holding today cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others." *See also* Dominguez v. State, 290 Ark. 428, 720 S.W.2d 703 (1986), where the court indicated that vehicles covered by the Motor Carrier Act could be stopped at random for equipment inspections.

[117] United States v. Cortez, 449 U.S. 411, 418 (1981).

[118] United States v. Sokolow, 490 U.S. 1, 7 (1989).

[119] United States v. Sokolow, 490 U.S. 1, 10 (1989).

[120] United States v. Cortez, 449 U.S. 411, 419 (1981).

[121] *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d (1990). Friesen notes that "Wisconsin appears fully to adopt the fourth amendment rule, upholding a stop of a car based on an anonymous caller's description of a car, its occupants, and the location of a supposed drug transaction, even though the police could personally corroborate only the innocent aspects described by the caller. State v. Richardson, 456 N.W.2d 830 (Wis. 1990). *See also* State v. Verimuele, 453 N.W.2d 441 (Neb. 1990) (anonymous "crime stoppers" tip provided probable cause for arrest of defendant while driving and for search of his car for cocaine; art. I, § 7 provided no greater rights than the Fourth Amendment); Davis v. State, 794 S.W.2d 123 (Tex. Ct. App. 1990). States that have rejected "totality of the circumstances" for measuring the probable cause needed to secure issuance of a warrant may likewise opt for a stricter test in evaluating reasonable suspicion. *See, e.g.*, Commonwealth v. Lyons, 564 N.E.2d 390, 391 (Mass. 1990) (requiring proof of tipsters' reliability and basis for knowledge); State v. Coleman, 791 S.W.2d 504, 506–07 (Tenn. Crim. App. 1989) (same). *See also* Allen v. State, 781 P.2d 992 (Alaska Ct. App. 1989); State v. Conner, 791 P.2d 261 (Wash. Ct. App. 1990)...State v. Black, 721 P.2d 842 (Or. Ct. App. 1986) (anonymous tip that motorist had been driving erratically and speeding had to have some indicia of reliability; there were no indicia of reliability where tipster did not state how she had obtained her information and officer's observation did not corroborate the tip). It is sometimes difficult to determine whether state courts are adopting independent standards in this area, or only distinguishing federal rulings, given the heavily fact-based nature of the Court's opinions sustaining searches and seizures. *See, e.g.*, People v. Garcia, 789 P.2d 190 (Colo. 1990) (arguably giving the reasonable suspicion standard a more restrictive scope than the United States Supreme Court, and finding violation of the state constitution in police stop based on insufficiently detailed tip.) FRIESEN *supra* note 4, at 660-61, n.311-14.

[122] Alabama v. White, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L. Ed. 2d (1990).

[123] 517 U.S. 690, 134 L. Ed. 2d 911 (1996).

[124] *See* Miller v. Fenton, 474 U.S. 104, 114–15 (1985).

[125] Quoting New York v. Belton, 453 U.S. 454, 458 (1981).

[126] Ornelas, *supra*, at 699.

F. The Search Incident to Arrest Exception

During a lawful custodial arrest of the occupant of an automobile, law enforcement officers may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile, including the contents of any containers found within the passenger compartment. The search is restricted to the area of the suspect's custody and control. The purpose of this exception is to ensure the safety of the searching officer, prevent escape, and prevent the destruction or concealment of evidence.

It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. The search may be for weapons or for seizure of any evidence to prevent its concealment or destruction, but it is restricted to the arrestee's person and the area within his immediate control, as that is the area from within which he might gain possession of a weapon or destructible evidence. The purpose of this exception is to ensure the safety of the searching officer, prevent escape, and prevent the destruction or concealment of evidence.[127] During a lawful custodial arrest of the occupant of an automobile, law enforcement officers may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile, including the contents of any containers found within the passenger compartment.[128]

The general exception of search incident to lawful arrest has historically been formulated into two distinct propositions: (1) that a search may be made of the person of the arrestee by virtue of lawful arrest, and (2) that a search may be made of the area within the control of the arrestee. The Supreme Court's decisions demonstrate different treatment for these two propositions, with the first being well settled from the beginning, but the second being subject to differing interpretations as to the extent of the area that may be searched.[129]

The "modern odyssey" of doctrine in this field was detailed in the majority opinion by Justice Stewart in Chimel.[130] Justice White, in his dissent, noted that "[f]ew areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the search "incident to an arrest."[130] The case raised basic questions concerning the permissible scope under the Fourth Amendment of proposition (2), supra. Operating under a lawful arrest warrant for burglary of a coin shop, and under protest from the arrestee, the officers searched an entire three-bedroom house, including the attic, the garage, a small workshop, and even the drawers in the master bedroom and sewing room. The Court overruled its earlier decisions in *Harris v. United States*,[131] and *United States v. Rabinowitz*,[132] as permitting too extensive an area of search, and held:

> Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area.[133]

The Court had occasion in *United States v. Robinson*, supra, to examine the scope of permissible search of the *person*. The defendant, Robinson, in full-custody arrest on probable cause for operating a motor vehicle after revocation of his operator's permit, was subjected to a patdown, during which the arresting officer felt an object in the left breast pocket of Robinson's heavy coat. Upon examination, the object turned out to be a rumpled cigarette package found to contain 14 gelatin capsules, later proved to be heroin, resulting in Robinson's conviction for possession. The Court of Appeals reversed the conviction, holding on the basis of *Terry v. Ohio*[134] that the officer's search went too far and should have been a limited frisk of the outer clothing only for weapons. The Supreme Court disagreed, holding that *Terry* "affords no basis to carry over to a probable-cause arrest the limitations this Court placed on a stop-and-frisk search..."[135] The majority opinion by Justice Rehnquist provides the parameters of the reasonable scope of search of the person when based upon probable cause:

> Terry v. Ohio...did not involve an arrest for probable cause, and it made quite clear that the "protective frisk" for weapons which it approved might be conducted without probable cause...This Court's opinion explicitly recognized that there is a "distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons." The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon [citations omitted] is also justified on other grounds...and can therefore involve a relatively extensive exploration of the person...Nor are we inclined...to qualify the breadth of the general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes....A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification...[w]e hold that...a full search of the person is not only an exception to the warrant requirement...but is also a "reasonable search" under [the

[127] Chimel v. California, 395 U.S. 752, 763.

[128] New York v. Belton, 453 U.S. 454, 460 (1981).

[129] United States v. Robinson, 414 U.S. 218, 225 (1973).

[130] 395 U.S. 752, 770.

[131] 331 U.S. 145 (1947).

[132] 339 U.S. 56 (1950).

[133] *Id.* at 768.

[134] 392 U.S. 1 (1968).

[135] 414 U.S. 218, 228.

Fourth] Amendment...Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed. Having in the course of a lawful search come upon the crumpled package of cigarettes, he was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as "fruits, instrumentalities, or contraband" probative of criminal conduct [citations omitted].[136]

[136] *Id.* at 227, 234–35, and 236. Latzer notes that

> [t]he states are sharply divided over the wisdom of *Robinson*. The score is five in favor (*Illinois, Michigan, Montana, New Hampshire and Texas*) and six against (*Alaska, California, Hawaii, New York, Oregon, and West Virginia*). The rejectionists are one in their agreement that the mere fact of arrest is insufficient to justify a search of the arrestee: there must be some additional reason. The state of *Washington* did not reject *Robinson* on state constitutional grounds but barred as a matter of public policy full arrest for "minor traffic violations," thus removing the predicate for any searches incident to such offenses.

State v. Hehman, 90 Wash. 2d 45, 578 P.2d 527 (1978). LATZER *supra* note 4, at 64, and n.108. *Citing, in accord*: People v. Hoskins, 101 Ill. 2d 209, 461 N.E.2d 941 (1984); People v. Chapman, 425 Mich. 245, 387 N.W.2d 835 (1986) (relying on proviso mandating conformity with Fourth Amendment in drug cases); State v. Holzapfel, 230 Mont. 105, 748 P.2d 953 (1988) (upholding search of items immediately associated with person of arrestee); State v. Farnsworth, 126 N.H. 656, 497 A.2d 835 (1985); State v. Cimino, 126 N.H. 570, 493 A.2d 1197 (1985); Snyder v. State, 629 S.W.2d 930 (Tex. Crim. App. 1982) (upholding wallet search-incident without indicating legal basis for rule). Latzer *supra* note 4 at 64, n.106. *Citing as contra*: Zehrung v. State, 569 P.2d 189 (Alaska 1977) (barring search for evidence unless charge indicates presence thereof); People v. Norman, 14 Cal. 3d 929, 538 P.2d 237, 123 Cal. Rptr. 109 (1975) (requiring probable cause to believe that instruments/fruits of crime, contraband, or weapons will be found) (before Proposition 8); State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974) (search unreasonable when circumstances surrounding arrest did not generate authority for warrantless search), *but see* State v. Barrett, 67 Haw. 650, 701 P.2d 1277 (1985) (upholding seizure of purse incident to arrest); People v. Gokey, 60 N.Y.2d 309, 457 N.E.2d 723, 469 N.Y.S.2d 618 (1983) (requiring exigency for search-incident); People v. Smith, 59 N.Y.2d 454, 452 N.E.2d 1224, 465 N.Y.S.2d 896 (1983) (upholding search-incident for weapon where reasonable); State v. Caraher, 293 Or. 741, 653 P.2d 942 (1982) (search-incident must be related to crime of arrest and reasonable under facts) (overruling State v. Florance, 270 Or. 169, 527 P.2d 1202 (1974)); State v. Muegge, 360 S.E.2d 216 (W. Va. 1987) (state must show necessity of search to uncover weapons or preserve evidence). LATZER *supra* note 4 at 64, n.107.

Friesen notes that "State courts have not in the main differed from the rule that a warrant is not required prior to a search of one placed in custodial arrest...[but]...have, however, disagreed with the extreme latitude allowed the police under the *Robinson* and *Belton* rules." *See, e.g.*, Jackson v. State, 791 P.2d 1023 (Alaska Ct. App. 1990) (search, incident to arrest, of smaller containers that could only contain atypical weapons, such as a razor blade or a small knife, must be supported by specific and articulable facts which would lead a reasonable person to believe that such an atypical weapon was in the small container; search for weapons that uncovered a package of cocaine was unreasonable, and evidence must be suppressed); State v. Lowry, 667 P.2d 996 (Or. 1983) (a search incident to arrest does not justify an "exploratory seizure" of "everything in [the arrestee's] immediate possession and control upon the prospect that upon further investigation some of it might prove to have been stolen or to be contraband"); *Cf.* State v. Ranson, 511 N.W.2d 97 (Neb. 1994) (no violation of Neb. Const. art. I, § 7 in search of defendant's shirt pocket, revealing cocaine, after his arrest for littering sidewalk in officer's presence). *See also* State v. Dukes, 547 A.2d 10 (Conn. 1988) (endorsing Robinson for purposes of state constitution's search and seizure clause). FRIESEN *supra* note 4, at 639.

The decision in *New York v. Belton,* supra, considered the scope of the search of the passenger compartment of an automobile incident to a lawful custodial arrest of a passenger. Belton was one of the occupants of an automobile stopped by a police officer for traveling at an excessive rate of speed. The officer, while determining that none of the occupants owned the car, smelled burnt marijuana and spotted an envelope suspected of containing marijuana on the car floor. After ordering the occupants out of the car, arresting and searching them, he found a black leather jacket belonging to Belton on the back seat of the car. Unzipping one of the pockets of the jacket he discovered cocaine. The Court, noting that no straightforward rule had emerged from the litigated cases respecting the question of the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants, held as follows:

> While the *Chimel* case established that search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of "the area within the immediate control of the arrestee" when that area arguably includes the interior of an automobile and the arrestee is its recent occupant...[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. [Citations omitted] Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.[137]

The cases reviewed above all involved evidence produced during a lawful arrest, either by warrant or

[137] 453 U.S. 454, 460–61. *Accord:* Stout v. State, 898 S.W. 2d 457 (Ark. 1995) (construing Ark. Const. art. II, § 15 same as Fourth Amendment); People v. Savedra, 907 P.2d 596 (Colo. 1995) (adopting Belton rule for purposes of state constitution, allowing full search of defendant's truck passenger compartment after arrest on outstanding traffic warrant); *Contra*: State v. Sterndale, 656 A.2d 409 (N.H. 1995) (driver arrested for speeding restrained and unable to access vehicle, making drug search of car unjustified as search incident to arrest under N.H. Constitution).

upon probable cause. The decision in *Arizona v. Evans*[138] considered application of the exclusionary rule to evidence produced incident to an arrest on a warrant which, unknown to the officer, had been quashed. Phoenix officer Sargent observed Evans driving the wrong way on a one-way street, stopped him, and upon checking his computer, learned his license had been suspended and that there was an outstanding misdemeanor warrant for his arrest. Based on the warrant, Sargent placed Evans under arrest, and while being handcuffed, Evans dropped a marijuana cigarette. Search of his automobile uncovered a bag of marijuana under the passenger seat. The clerical error failing to show that the warrant had been quashed was made by court personnel, not the police, so that the arresting officer was acting in good faith. The Court held that the facts and case law justified a conclusion that the good faith exception to the exclusionary rule should be applied:

> We have recognized...that the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands. See *United States v. Leon*, 468 U.S. 897, 906, 104 S. Ct. 3405, 3411-3412, 82 L. Ed. 2d 677 (1984)...The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth amendment rights through the rule's general deterrent effect. *Leon, supra*...[A]s noted in *Leon*, the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees...there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed...Application of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees....[139]

The Supreme Court, in *Knowles v. Iowa*, [140] refused to extend the search incident to arrest exception to warrantless searches of an automobile pursuant to issuance of a citation for speeding, where the officer had exercised his discretion to issue such a citation *in lieu of arrest*.[141] The Court reversed the Iowa Supreme Court, which had upheld the constitutionality of the search under a bright-line "search incident to citation" exception to the Fourth Amendment's warrant requirement, "reasoning that so long as the arresting officer had probable cause to make a custodial arrest, there need not in fact have been custodial arrest."[142] The Court found that neither of the two historical rationales for the search incident to arrest exception ((1) the need to disarm the suspect in order to take him into custody, or (2) the need to preserve evidence for later use at trial "is sufficient to justify the search in the present case."[143]

G. The Stop and Frisk Exception

Stop and frisk means a brief, temporary, investigative stop in a public place, based on reasonable suspicion. In addition to conducting an investigative stop, law enforcement officers may pat down the suspect for weapons. In a routine traffic stop, an officer may pat down the driver or other occupants of the vehicle to search for weapons, if there is a reasonable suspicion that such persons may be armed. Law enforcement officers may, as a matter of course, order the driver and the passengers of a lawfully stopped vehicle to exit the vehicle.

An officer's reasonable suspicion must be based on specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant that intrusion. The test is objective and the determination of reasonableness is made in light of the totality of the circumstances known to the searching officer. An officer making an investigative stop need not reasonably believe that an individual is armed. The test is whether the officer has a reasonable suspicion that a suspect may be armed.

The seminal case, *Terry v. State of Ohio*,[144] involved the question of suppression of evidence in a prosecution for carrying a concealed weapon uncovered in a "frisk" of Terry by a plain clothes Cleveland police officer during a routine street patrol. Officer McFadden observed defendant Terry and another man, Chilton, repeatedly walking back-and-forth in front of a retail store, peering into the store window, and then conferring. Officer McFadden became suspicious of the two men, suspecting that they were "casing a job, a stick-up," [145] and concluded that it was his duty to investigate. He approached the two men, and a third man who had joined them, and asked for their names. Their evasive answers did nothing to dispel his suspicion and he seized defendant Terry in order to search him for weapons by patting down his outer clothing. He discovered a revolver in Terry's inside overcoat pocket, and found another revolver in the outer pocket of Chilton's overcoat, and arrested them both for carrying concealed weapons.

The Court's majority opinion, by Chief Justice Warren, summarily dismisses the suggestion that a "stop" and "frisk" constitutes police conduct outside the purview of the Fourth Amendment:

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[138] 115 S. Ct. 1185 (1995).

[139] 115 S. Ct. 1185, 1191–94.

[140] 119 S. Ct. 484 (1998).

[141] 119 S. Ct. 484, 486–87 (1998). Iowa Code Ann. 321.485(1)(a) (West 1997) provides that Iowa peace officers having cause to believe that a person has violated any traffic or motor vehicle equipment law may arrest the person. Iowa Code Ann 805.1(1) (West Supp. 1997) permits the issuance of a citation in lieu of arrest for most offenses for which an accused person would be "eligible for bail," including traffic and motor vehicle equipment violations. The Court noted in footnote 1 that this practice "is consistent with law reform efforts," citing LAFAVE *supra* note 4, at 99, n.151.

[142] *Id.* at 487.

[143] *Id.* at 487.

[144] 392 U.S. 1 (1968).

> It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search"...It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search." In this case there can be no question, then, that Officer McFadden "seized" petitioner and subjected him to a "search" when he took hold of him and patted down the outer surfaces of his clothing....[146]

The Court then focused on the primary issues of whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances that justified the interference in the first place. The Court did not retreat from its holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, or "that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances," but concluded that "the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."[146]

The Court stressed that the "notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context."[147] The Court said:

> And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion...[I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?...And simple "good faith" on the part of the arresting officer is not enough.[148]

The Court identified the crux of the case as being not the steps to investigate Terry's suspicious behavior, but rather whether there was justification for Officer McFadden's invasion of Terry's personal security by searching him for weapons in the course of the investigation. The Court recognized that it could not be blind to the need for law enforcement officers to protect themselves and others in situations "where they may lack probable cause for an arrest," believing that "it would appear to be clearly unreasonable to deny [officers] the power to take necessary measures to determine whether the [suspicious] person is in fact carrying a weapon and to neutralize the threat of physical harm."[149] But the search "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion."[150] However, "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[151]

The Court summarized all of these principles and rationale in the following holding:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.[152]

In *Adams v. Williams*, [153] the Court rejected the argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, but held that such reasonable cause could be based upon an informant's tip that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist, holding that "[s]o long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose."[154]

The per curiam decision in *Pennsylvania v. Mimms*[155] resolved the narrow question of whether the order to get out of the car, issued after the driver was lawfully detained for an expired license plate, was reasonable, and thus permissible, under the Fourth Amendment. Unless this order was permissible, the frisk of the driver, which followed, and the arrest for possession of a .38-caliber revolver, could not be sustained. It was the officer's practice to order all drivers

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[146] 392 U.S. 1, 16–17, 19.

[146] *Id.* at 20.

[147] *Id.* at 20.

[148] *Id.* at 21–22.

[149] *Id.* at 24.

[150] *Id.* at 26.

[151] *Id.* at 27.

[152] *Id.* at 30-31.

[153] 407 U.S. 143 (1972).

[154] 407 U.S. 143, 146. *Cf.* State v. Kim, 711 P.2d 1291 (Haw. 1985) (reasonable suspicion required to order motorist to exit car; court rejected Mimms on basis of state constitution.).

[155] 434 U.S. 106 (1977).

States v. Mitchell,[178] (2) the protection of the police against claims or disputes over lost or stolen property, *United States v. Kelehar*,[179] and (3) the protection of police from potential danger, *Cooper*, supra.[180] Further noting that these

> caretaking procedures have almost uniformly been upheld by the state courts...overwhelmingly conclud[ing] that, even if an inventory is characterized as a 'search,' the intrusion is constitutionally permissible [citations omitted],...and that the majority of the Federal Courts of Appeals have likewise sustained inventory procedures as reasonable police intrusions. [citations omitted]"[181]

Upholding the inventory search, the Court held:

> The inventory itself was prompted by the presence in plain view of a number of valuables inside the car. As in *Cady*, there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive....On this record we conclude that in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not "unreasonable" under the Fourth Amendment.[182]

Upon remand the South Dakota Supreme Court, relying upon the search and seizure provisions of the South Dakota Constitution,[183] reaffirmed its earlier decision limiting inventory searches to items in plain view.[184] Twelve years later it revised the rule, abandoning the "plain view" limitation. *State v. Flittie*.[185]

The principles adopted in *Opperman*, supra, and *Illinois v. Lafayette*, [186] (upholding the inventory search of personal effects of an arrestee at a police station), were reaffirmed and extended by the Court in *Colorado v. Bertine*,[187] to sustain not only the inventory of a van's contents, but also the opening and inventory of a closed backpack found in the van. The Court was not deterred in finding the search to be reasonable under the Fourth Amendment by the fact that the police regulation gave the police officers discretion to choose between impounding the van and parking and locking it. However, the concurring opinion by three justices considered it "permissible for police officers to open closed containers in an inventory search *only if* they are following standard police procedures that mandate the opening of such containers in every impounded

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[178] 458 F.2d 960, 961 (CA9 1972).

[179] 470 F.2d 176, 178 (CA5 1972).

[180] *Id.* at 367–69.

[181] *Id.* at 369–74.

[182] *Id.* at 375–76. Justice Powell, in his concurring opinion, notes that "[n]one of our prior decisions is dispositive of the issue whether the Amendment permits routine inventory 'searches' of automobiles." *Id.* at 378. He added in a footnote that "...despite their benign purpose when conducted by government officials they constitute 'searches' for purposes of the Fourth Amendment [citations omitted]" n.1, at 378.

[183] The Court said:

> Admittedly the language of Article VI, Sec. 11 is almost identical to that found in the Fourth Amendment; however, we have the right to construe our state constitutional provision in accordance with what we conceive to be its plain meaning. We find that logic and a sound regard for the purposes of the protection afforded by S.D. Const., Art. VI, Sec. 11 warrant a higher standard of protection for the individual in this instance than the United States Supreme Court found necessary under the Fourth Amendment.

247 N.W.2d 673, 674–75.

[184] 247 N.W.2d 673 (S.D. 1976).

[185] 425 N.W.2d 1 (S.D. 1988). Latzer notes that Iowa and Kansas *adopted* Opperman without qualification, citing: State v. Roth, 305 N.W.2d 501 (Iowa), *cert. denied*. 454 U.S. 870 (1981) (admitting marijuana found in locked trunk); State v. Fortune, 236 Kan. 248, 689 P.2d 1196 (1984) (overruling State v. Boster, 217 Kan. 618, 539 P.2d 294 (1975) (limiting inventory to items in plain view)); that Kentucky, Montana, and West Virginia have *rejected it outright, citing*: Wagner v. Commonwealth, 581 S.W.2d 352 (Ky. 1979) (requiring consent or substantial necessities grounded on public safety); State v. Sawyer, 174 Mont. 512, 571 P.2d 1131 (1977) (limited to articles in plain view from outside); State v. Perry, 324 S.E.2d 354 (W.Va. 1984) (reaffirming State v. Goff, 272 S.E.2d 457 (W.Va. 1980) (valuables must be in plain view and owner given opportunity to secure car and valuables)); and that five states, Florida, Massachusetts, Oklahoma, Oregon, and South Dakota, have demanded that inventories be performed only pursuant to certain standard procedures, consistent with Opperman, *citing*: Miller v. State, 403 So. 2d 1307 (Fla. 1981) (also requiring consultation with owner-possessor if reasonably available); *cf.* State v. Wells, 539 So. 2d 464 (Fla. 1989) (upholding inventory search of automobile interior but disapproving seizure of luggage from trunk absent standardized policy for closed containers); Commonwealth v. Ford 394 Mass. 421, 476 N.E.2d 560 (1985); Starks v. State, 696 P.2d 1041 (Okla. Crim. App. 1985); State v. Atkinson, 298 Or. 1, 688 P.2d 832 (1984); State v. Flittie, __S.D.___, 425 N.W. 2d 1 (S.D. 1988) (modifying State v. Opperman, 89 S.D. 25, 247 N.W.2d 673 (1976)). *Cf.* State v. Jewell, 338 So. 2d 633 (La. 1976) (no true inventory because no inventory forms used, defendant present during search, car towed to lot after search); State v. Stockert, 245 N.W.2d 266 (N.D. 1976) (voiding warrantless search of glove compartment of unoccupied car stuck in snowbank on private property) (distinguishing Opperman because car not impounded nor obstructing traffic). LATZER *supra* note 4 at 70, and nn.161–68.

LaFave cites Illinois and New Jersey as illustrative of states "declining to adopt more restrictive standards than in *Opperman* as a matter of state law," *citing* People v. Clark, 65 Ill. 2d 169, 2 Ill. Dec. 578, 357 N.E.2d 798 (1976); State v. Slockbower, 145 N.J. Super. 480, 368 A.2d 388 (1976). LAFAVE *supra* note 4, at 541, n.36.

Friesen notes that New Jersey, "applying N.J. Const. art. 1, sec. 7, [places] burden of establishing necessity to impound and inventory a car...on police." State v. Slockbower, 397 A.2d 1050 N.J. 1979; also pointing out that Massachusetts adheres to the "plain view" limitation, *citing* Commonwealth v. Ford, *supra* (Storage search that revealed a rifle in the locked trunk of an impounded vehicle violated Mass. Const. pt. I, art. 14; seizure of the rifle would have been proper if the police officer had found it in plain view in passenger compartment when he entered to remove the keys.). 476 N.E. 2d 560, 562 n.1 (Mass. 1985). FRIESEN *supra* note 4, at 651, nn.273, 275.

[186] 462 U.S. 640 (1983).

[187] 479 U.S. 367 (1987).

vehicle.(emphasis added)."[188] LaFave concludes "that a *total* absence of police discretion on this aspect of inventory is mandated as a Fourth Amendment matter so that (as the concurrence put it) "inventory searches will not be used as a purposeful and general means of discovering evidence of crime."[189] He goes on to note that while there appears to be a contrary statement in the post-*Bertine* case of *Florida v. Wells*,[190] the language was strongly objected to by four members of the Court and is only dictum.[191] He concludes by noting that "[j]ust what kind of showing is necessary as to the total absence of discretion regarding containers is unclear, though a written policy mandating that the contents of all containers be examined will suffice."[192]

I. The Vehicle Checkpoint Exception

Commercial motor vehicle weigh stations are vehicle checkpoints. Vehicle checkpoints are constitutional if there is an important government interest, minimal intrusion, standard inspection guidelines, and law enforcement officers have no discretion in randomly selecting which vehicles can be stopped and searched. No warrant is required.

Discussed under III.E., The Investigatory Stop Exception, was *Delaware v. Prouse*, supra, where the Supreme Court held unconstitutional, under the Fourth and Fourteenth Amendments, warrantless random stops for checking a driver's license and car registration. Importantly, however, the Court noted in dictum, that the decision was not intended to cast doubt on the permissibility of roadside truck weigh stations and inspection checkpoints, "at which some vehicles may be subject to further detention and regulatory inspection than others."[193] Also discussed was the decision in *United States v. Martinez-Fuerte*, supra, where the Court had sustained the constitutionality of the Border Patrol's checkpoint operations.

Martinez-Fuerte[194] involved criminal prosecutions for illegal transportation of Mexican aliens, resulting from arrests at permanent checkpoints operated by the Border Patrol several miles away from the international border with Mexico. Whether the Fourth Amendment was violated turned primarily on the constitutionality of stopping a vehicle at a fixed checkpoint for brief questioning of its occupants, even though there is no reason to believe the particular vehicle contains illegal aliens.

The Court noted that its previous decisions "have recognized that maintenance of a traffic-checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border," and that "the substantiality of the public interest in the practice of routine stops for inquiry at permanent checkpoints, [is] a practice which the Government identifies as the most important of the traffic-checking operations."[195] The Court recognized that to accommodate public and private interests "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure...[b]ut the Fourth amendment imposes no irreducible requirement of such suspicion."[196] Agreeing that checkpoint stops are "seizures" within the meaning of the Fourth Amendment, the Court reasoned that a requirement that stops on major inland routes always be based on reasonable suspicion would be impractical, due to the heavy flow of traffic, but that subjective intrusion was minimal.[197] The Court found that:

> While the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited. The stop does intrude to a limited extent on motorists right to "free passage without interruption, [citations omitted], and arguably on their right to personal security. But it involves only a brief detention of travelers during which [all] that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States...Neither the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search....[W]e view checkpoint stops in a different light [than roving stops] because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop...The regularized manner in which established checkpoints are operated is visible evidence, reassuring to the law-abiding motorists, that the stops are duly authorized...[and] [t]he

[188] *Id* at 377.

[189] LAFAVE *supra* note 4, at 557, comparing Autran v. State, 887 S.W.2d 31 (Tex. Ct. App. 1994) (state constitution "provides a privacy interest in closed containers which is not overcome by the general policy considerations underlying an inventory"), n.95, and citing State v. Hathman, 65 Ohio St. 3d 403, 604 N.E.2d 743 (1992) ("container may only be opened as part of the inventory process if there is in existence a standardized policy or practice specifically governing the opening of such containers..."); *cf.* State v. Bonin, 591 A.2d 38 (R.I. 1991) (inventory into suitcase found in trunk lawful, as officer testified "it was standard police procedure to open coutainers found within vehicles") p. 558, n.99; also citing, *inter alia*, Commonwealth v. Bishop, 402 Mass. 449, 523 N.E.2d 779 (1988) (inventory into gym bag in car invalid where police regulations silent as to such action); Johnson v. State, 764 P.2d 530 (Okla. Crim. App. 1988) (police regulation barring opening locked containers and requiring that "each item found...be shown on the inventory report" construed to give officers no discretion regarding inventory of unlocked containers); State v. West, 176 Ariz. 432, 862 P.2d 192 (1993) (inventory upheld on officer's testimony of police policy to inventory contents of all property); State v. Wells, 539 So. 2d 464 (Fla. 1989) (fact that police manual directs "inventory of all articles in the vehicle" is not sufficient, as there "is no mention of opening closed containers"), p.558-59, nn.101, 103.

[190] 495 U.S. 1 (1990).

[191] *Id.* at 558.

[192] *Id.*

[193] 440 U.S. 648, 663, n.26.

[194] 428 U.S. 543 (1976).

[195] 428 U.S. 543, 556.

[196] *Id.* at 560-61.

[197] *Id.* at 557-58.

> location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions....[198]

The Court also found the secondary inspection of certain motorists, "for the sole purpose of conducting a routine and limited inquiry into residence status" was an objective intrusion which "remains minimal."[199] The Court summarized its holding as follows:

> In summary, we hold that stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant.(footnote omitted) The principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop. [citations omitted]. We have held that checkpoint searches are constitutional only if justified by consent or probable cause to search. [citation omitted]. And our holding today is limited to the type of stops described in this opinion. "[A]ny further detention...must be based on consent or probable cause."[200]

The Supreme Court's approval of permanent checkpoints in *Martinez-Fuerte* permitted vehicle stops without any individualized suspicion. In contrast, the Court's later decision in *Delaware v. Prouse,* supra, while rejecting random automobile spot checks without articulable and reasonable suspicion, still seemed to invite "inspection checkpoints," stating that its holding "does not preclude the...States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion."[201] In these cases the Court used the balancing test utilized in *Camara v. Municipal Court,*[202] and described in *Brown v. Texas,*[203] which, according to the Court, involves "a weighing of 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."[204]

In the 1980s, because of the significant public concern about drunk driving, police officials mounted major efforts to control the problem by establishing highway sobriety checkpoint programs designed to detect and deter drunk drivers. These were challenged in several states, with a majority of courts sustaining the use of sobriety roadblocks as a proper law enforcement tool.[205] One commentator observes that:

> [A]s a general rule, the constitutionality of traffic checkpoints have been upheld where: (1) the discretion of the officers in the field is carefully circumscribed by clear objective regulations established by high level administrative officials; (2) approaching drivers are given adequate warning that there is a roadblock ahead; (3) the likelihood of apprehension, fear, or surprise is reduced by a display of legitimate police authority at the roadblock; and (4) vehicles are stopped on a systematic, nonrandom basis that shows drivers they are not being singled out for arbitrary reasons.[206]

The Supreme Court addressed sobriety checkpoints for the first time in *Michigan Department of State Police v. Sitz,*[207] considering the question of whether a State's use of highway sobriety checkpoints violated the Fourth and Fourteenth Amendments. The Court addressed only the initial stop of each motorist passing through the checkpoint and the associated preliminary questioning and observation, noting that "[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard."[208] The decision, relying on the balancing analysis of *Martinez-Fuerte* and *Brown v. Texas,* supra, found that the magnitude of the drunken driving problem and the interest of the states in eradicating it was great.[209] By contrast, the Court believed "the weight bearing on the other scale—the measure of intrusion on motorists stopped briefly at sobriety checkpoints is slight," as in *Martinez-Fuerte,* supra.[210] The Court held that there was no violation, finding that "[h]ere, checkpoints are selected pursuant to the

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[198] *Id.* at 557-59.

[199] *Id.* at 560.

[200] *Id.* at 566-67.

[201] 440 U.S. 648, 663 and n.26.

[202] 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

[203] 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

[204] *Id.* at 50-51.

[205] WILLIAM E. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS (2d Edition), at 11-59, n.79.1, citing South Dakota v. Neville, 459 U.S. 553 (1983) ("The carnage caused by drunk drivers is well documented and needs no detailed recitation here."); State v. Superior Court, 691 P.2d 1073 (Ariz. 1984) (drunk driving has become a problem of epidemic proportions not only in Arizona but throughout the country); State v. Deskins, 673 P.2d 1174 (Kan. 1983) ("It is obvious, without resort to the record or otherwise, that the problem of drunk driver is one of enormous magnitude affecting every citizen who ventures forth upon the streets and highways."); State v. Coccomo, 427 A.2d 131 (N.J. 1980) ("No one can deny the State's vital interest in promoting public safety upon our roads by detecting and prosecuting drunk drivers."). *See also* State v. Decamera, 568 A.2d 86 (N.J. 1990) (sobriety checkpoints were valid as long as they adhered to previously established guidelines).

[206] *Id., citing, e.g.*, Stark v. Perpich, 590 F. Supp. 1057 (D. Minn. 1984); State v. Superior Court, *supra*; Ingersoll v. Palmer, 241 Cal. Rptr. 42, 743 P.2d 1299 (Cal. 1987); State v. Deskins, *supra*; State v. Jones, 483 So. 2d 433 (Fla. 1986); People v. Bartley, 486 N.E.2d 880 (Ill. 1985); State v. Coccomo, *supra*; City of Las Cruces v. Betancourt, 735 P.2d 1161 (N.M. App. 1987); State v. Madalena, 908 P.2d 756 (N.M. App. 1995); People v. Scott, 483 N.Y.S.2d 649, 473 N.E.2d 1 (1984); Commonwealth v. Tarbert, 535 A.2d 1035 (Pa. 1987) (plurality of two); Lowe v. Commonwealth, 337 S.E.2d 273 (Va. 1985).

[207] 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990).

[208] 496 U.S. 444, 450-51.

[209] *Id.* at 451. The Court said: "Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage." LAFAVE *supra* note 4, at § 10.8(d), p. 71. (comment omitted).

[210] *Id.*

guidelines, and uniformed police officers stop every approaching vehicle...[t]he intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we upheld in *Martinez-Fuerte*."[211] The Court concluded:

> In sum, the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment.[212]

Friesen makes these observations concerning the constitutionality of sobriety roadblocks under state constitutions:

> State courts remain divided on the constitutionality of sobriety roadblocks when challenged under state constitutions. Some have upheld them applying standards similar to the fourth-amendment minimum.[213] Some have invalidated these programs, applying state search and seizure provisions.[214] The state opinions sometimes apply balancing tests no more satisfactory than the Supreme Court's.[215] In Massachusetts, the constitutionality of a roadblock depends on whether the discretion of the police has been adequately circumscribed.[216]

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[211] *Id.* at 453.

[212] *Id.* at 455. *But see* Sitz v. Department of State Police, 506 N.W.2d 209 (Mich. 1993), where the Michigan Supreme Court, on remand, held that the sobriety checklanes, upheld by the Supreme Court, violate art. 1, § 11 of the Michigan Constitution:

> The Michigan Constitution has historically treated searches and seizures for criminal investigatory purposes differently than those for regulatory or administrative purposes. *Lansing Municipal Judge, supra*, 327 Mich. at 427-429, 42 N.W.2d 120. These administrative or regulatory searches and seizures have traditionally been regarded as "reasonable" in a constitutional sense. *Id.* at 430, 42 N.W.2d 120. However, seizures with the primary goal of enforcing the criminal law have generally required some level of suspicion...Suspicionless criminal investigatory seizures, and extreme deference to the judgments of politically accountable officials is, in this context, contrary to Michigan constitutional precedent.

(At 224-25.)

[213] FRIESEN *supra* note 4, at 652, n.278, *citing, e.g.*, People v. Rister, 803 P.2d 483, 490 (Colo. 1991) (balancing the interests of the state and the motorists, and determining whether the checkpoint stop in question reasonably advances the state's interests, the balance under art. II, § 7, should be struck in favor of the reasonableness of the stops); Commonwealth v. Blouse, 611 A.2d 1177 (Pa. 1992) (court adopted the federal balancing test, articulated in Michigan Dep.'t of State Police v. Sitz, to analyze whether roadblocks set up to check for valid license and registration violated the Pennsylvania Constitution; holding that such roadblock did not violate state search and seizure provision); *see also* Ingersoll v. Palmer, 43 Cal. 3d 1321f, 1329, 743 P.2d 1299, 1304-05, 421 Cal. Rptr. 42, 48 (1987); State v. Lloyd, 530 N.W.2d 708 (Iowa 1995) (convicted driver argued that the purpose of the roadblock was to apprehend drunken drivers, which she claimed was not a statutory permissible purpose; on appeal, the court held that as a matter of law, the purpose of a roadblock was to stop all traffic to check equipment, driver's licenses, registrations and other evident violations, and that these purposes were valid and the roadblock constitutional); State v. Deskins, 673 P.2d 1174, 1177, 1178-81 (Kan. 1983); Little v. State, 479 A.2d 903, 913 (Md. 1984); Chock v. Comm'r of Pub. Safety, 458 N.W.2d 692 (Minn. Ct. App. 1990); Opinion of the Justices, 509 A.2d 744, 745 (N.H. 1986); City of Bismarck v. Uhden, 513 N.W.2d 373 (N.D. 1994) (suspicionless stop at sobriety checkpoint; N.D. Const. art. I, § 8 allowed sobriety checkpoints when governed by carefully tailored guidelines provided by advisory committee); State v. Coccomo, 427 A.2d 131, 135 (N.J. Super. Ct. 1980); People v. Torres, 125 Misc. 2d 78, 79, 81-82, 478 N.Y.S.2d 771, 772, 774 (1984); Lowe v. Commonwealth, 337 S.E.2d 273, 275 n.1, 276 (Va. 1985), *cert denied*, 475 U.S. 1084 (1986).

[214] *Id.* at 652-53, n.279, *citing*: Sitz v. Dep't of State Police, *supra*; Ascher v. Comm'r of Public Safety, 519 N.W.2d 183 (Minn. 1994) (sobriety checkpoint roadblock violated search and seizure provision, Minn. Const. art I, § 10; state failed to persuade the court of need to abandon individualized suspicion); City of Seattle v. Mesiani, 755 P.2d 775 (Wash. 1988) (sobriety checkpoint program stopping all incoming motorists at checkpoints violated Wash. Const. art I, § 7 guarantee against seizure without the authority of law, as stops lacked individualized suspicion of criminal activity); State v. Henderson, 756 P.2d 1057 (Idaho 1988) (same under Idaho Const. art. I, § 17, where police have no probable cause to believe that the driver of an automobile is engaged in a crime, and legislature has not authorized roadblock); State v. Parms, 523 So. 2d 1293 (La. 1988) (same under Louisiana Constitution); Pimental v. Dep't of Transp., 561 A.2d 1348 (R.I. 1989) (sobriety roadblocks violate the R.I. Const. art. I, § 6, even if constitutional under the federal constitution, as they operate without probable cause or reasonable suspicion).

[215] *Id.* at 653, n.280, *see, e.g.*, State v. Koppel, 499 A.2d 977 (N.H. 1985).

[216] *Id.* at n.281, *See* Commonwealth v. Cameron, 553 N.E.2d 898 (Mass. 1990) (roadblock was unreasonable under the state constitution because there were no written plans specifying date, time, and location of roadblocks, and location of roadblock had not been chosen by supervisory administrative officials); Commonwealth v. Anderson, 547 N.E.2d 1134 (Mass. 1989) (failure of police to follow specific guidelines for conducting sobriety roadblock violated state constitution); Commonwealth v. Trumble, 483 N.E.2d 1102 (Mass. 1985) (use of roadblocks to detect drunk drivers would be upheld when conducted according to certain guidelines). *See also*, State v. Fedak, 825 P.2d 1068, 9 Haw. App. 98 (1998) (Once police establish procedures relating to sobriety road blocks, those procedures must be scrupulously followed); State v. Sanchez, 856 S.W.2d 166 (Tex. Ct. App. 1993) (roadblock to check driver's licenses and insurance violated Fourth Amendment in absence of evidence of authoritatively standardized procedures to minimize officers' discretion); State v. Kitchen, 808 P.2d 1127 (Utah App. 1991) (Multipurpose roadblock planned and conducted under direction of highway patrolman violated Fourth Amendment where there were no guidelines to prevent arbitrary invasions of motorists' rights); Carte v. Cline, 194 W. Va. 233, 460 S.E.2d 48 (1995) (sobriety checkpoints are constitutional only "when conducted within predetermined operational guidelines which minimize the intrusion on the individual and mitigate the discretion vested in police officers at the scene."); *Cf.* Sheppard v. Com., 489 S.E.2d 714, 25 Va. App. 527, on rehearing 498 S.E.2d 464, 27 Va. App. 319 (Va. App. 1997) (Selection of license and registration checkpoint site that was not included within list of sites

IV. SEARCHES OF HOMES OR DWELLINGS

There is currently no federal court decision addressing whether the sleeping berth of a commercial motor vehicle may be searched without a warrant. However, closely analogous are sleeping compartments on trains, which lower federal courts have found subject to warrantless search, invoking the rationales underlying the "vehicle exception" to the warrant requirement upheld in *California v. Carney,* supra, (search of mini motor home parked in public parking lot) and cases discussed in III.A, supra.[217] The rationale of the *Whitehead* decision is that the privacy interests of occupants in sleeping compartments on trains are less than privacy interests in homes or hotel rooms. Relying, inter alia, on *Carney* and *Whitehead*, the Supreme Court of Washington upheld the warrantless search, under the Fourth Amendment, of a tractor-trailer sleeping compartment that was readily accessible from the passenger compartment, in *State of Washington v. Johnson,*[218] which is discussed infra.

Despite the precedent of *Johnson*, there may be courts that will consider the sleeping berth of a commercial motor vehicle to be a "temporary" home or dwelling rather than part of a vehicle passenger compartment, and therefore subject to the stricter Fourth Amendment standards applicable to fixed dwellings, particularly where the sleeper compartment is not readily accessible from the passenger compartment. Under this stricter standard, although the warrantless entry of a home or dwelling is generally prohibited, law enforcement officers may make a valid warrantless search in a person's home if there is probable cause and exigent circumstances justify entry, or if they have consent to enter. These factors should be considered when determining whether to search the sleeping berth of a commercial motor vehicle without a warrant.

The Court of Appeals for the Fourth Circuit, in *United States v. Whitehead*, supra, reviewed on appeal the trial court's denial of Whitehead's motion to suppress evidence seized following a dog sniff of his luggage in a passenger-train sleeping compartment, contending that the Fourth Amendment required the government to obtain a search warrant, or at least have probable cause, before bringing narcotics-trained dogs into the compartment. Whitehead contended that his luggage was not located in a "public place," but in a train compartment that was the functional equivalent of a temporary home similar to a hotel room.[219] The Fourth Circuit agreed with the trial court's finding of reasonable suspicion and the use of the rationale underlying the "vehicle exception," rejecting Whitehead's contention that a passenger train sleeping compartment is a "temporary home" for Fourth Amendment purposes. The court held that "[w]hile occupants of train roomettes may properly expect some degree of privacy, it is less than the reasonable expectations that individuals rightfully possess in their homes or their hotel rooms."[220] The court noted that over the course of the 60 years since *Carroll v. United States,* supra, was decided, the Supreme Court has "consistently reaffirmed that the privacy interests of individuals engaged in transit on public thoroughfares are substantially less than those that attach to fixed dwellings."[221] The court went on to hold as follows:

> Unlike the parked motor home in *Carney*, Whitehead's roomette was moving swiftly in interstate transit. Whitehead's status therein was that of a passenger, not a resident... [who] could leave the train at any stop, and unlike a hotel guest, he had no authority to remain on the train once it reached its destination...Given Whitehead's reduced expectation of privacy in the roomette, the importance of the law enforcement interests at stake, and the minimal intrusiveness of the dog sniff, we conclude that probable cause was not a prerequisite for the dog sniff.[222]

As previously noted, the Supreme Court of Washington relied, in part, on the decisions and rationale of *Carney* and *Whitehead,* for its decision in *State v. Johnson,* supra, holding that "[u]nder the Fourth Amendment, case law supports a conclusion that the sleeper in the cab of the tractor-trailer in this case is part of the "passenger compartment."[223] The facts reflect an initial stop of Johnson, who was driving a Peterbilt tractor-trailer rig, for improper lane changes, with issuance of a warning by trooper Berends. After a license check showed an outstanding bench warrant for failure to appear, Johnson was stopped again by trooper Berends, arrested, handcuffed, searched, and placed in the patrol car. Berends then entered the cab through the driver's door and searched the interior, including the sleeping compartment (sleeper) behind the seating area of the cab, where he found drugs in "a leather like, litter bag type pouch" hanging on the wall behind the driver's seat. The following conclusions of law by the court are pertinent:

> The sleeping unit was part of the truck's passenger compartment, because it: (a) was attached to the cab; (b) was connected to the cab by a portal which had no door, only a curtain which may or may not have been drawn shut; and (c) is not analagous [sic] to a locked glove box or trunk but

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in police department roadblock plan was not such a significant deviation from plan as to render checkpoint unconstitutional; site was selected by supervisor and not left to unbridled discretion of field officers.)

[217] United States v. Whitehead, 849 F.2d 849, 855 (4th Cir.), *cert. denied*, 488 U.S. 983, 109 S. Ct. 534, 102 L. Ed. 2d 566 (1988) ("Sleeping compartments simply are not homes on rails."); United States v. Savage, 889 F.2d 1113, 1118 (D.C. Cir. 1989).

[218] 909 P.2d 293, 128 Wash. 2d 431 (Wash. 1996).

[219] *See* Stoner v. Calif., 376 U.S. 483, 490, 84 S. Ct. 889, 893-94, 11 L. Ed. 2d 865 (1964) (according full Fourth Amendment protection to hotel room guests).

[220] 849 F.2d 849, 853.

[221] *Id.* at 854.

[222] *Id.* at 854–55.

[223] 909 P.2d 293, 307.

rather to the back seat of a passenger automobile. The fact that Trooper Berends discovered the methamphetamine in the sleeping unit, as opposed to the cab does not distinguish this case from *State v. Stroud*, 106 Wash. 2d 144, 720 P.2d 436 (1986).[224] Trooper Berends discovered the methamphetamine pursuant to a lawful search because: (a) the search was conducted incident, and immediately subsequent, to Mr. Johnson's arrest when he was still physically at the scene; (b) only the passenger compartment of the truck was searched; (c) the leather pouch was not a locked container in which Mr. Johnson had a reasonable expectation of privacy but rather was analagous [sic] to the purse at issue in *State v. Fladebo*, 113 Wash. 2d 388, 779 P.2d 707 (1989); and (d) Trooper Berends was searching for weapons and destructible evidence of vehicle ownership.[225]

The court's rationale was that "[v]ehicles traveling on public highways are subject to broad regulations not applicable to fixed residences...[T]his broad regulation does not afford Petitioner the same heightened privacy protection in the sleeper that he would have in a fixed residence or home."[226]

It is unlikely that courts will follow the Johnson court ruling if the truck sleeper is not accessible from the passenger compartment, but would follow the rationale of the Supreme Court in *New York v. Belton*, supra, in not extending the warrant exception to the inaccessible trunk of an automobile.[227] For this reason, an examination of some of the Supreme Court decisions relative to warrantless searches of residences is in order.

The Supreme Court in *Payton v. New York*[228] found a long-standing New York statute authorizing police officers to enter private residences without warrant and with force, if necessary to make a routine felony arrest, to be unconstitutional. The Court, following an extensive review of the English common law and circumstances surrounding adoption of the Fourth Amendment, held that the Fourth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest, absent exigent circumstances. However, the Court refused "to consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search."[229]

The Supreme Court granted certiorari in *Welsh v. Wisconsin*,[230] to decide at least one aspect of the unresolved question: whether, and if so under what circumstances, the Fourth Amendment prohibits the police from making a warrantless night entry of a person's home in order to arrest him for a nonjailable traffic offense. The Court noted that:

> Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are "few in number and carefully delineated," *United States v. United States District Court*, 407 U.S., at 318, 92 S. Ct., at 2137, and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Indeed, the Court has recognized only a few such emergency conditions, see, e.g., *United States v. Santana*, 427 U.S. 38, 42-3, 96 S. Ct. 2406, 2409-2410, 49 L. Ed. 2d 300 (1976) (hot pursuit of a fleeing felon); *Warden v. Hayden*, 387 U.S. 294, 298-299, 87 S. Ct. 1642, 1645-1646, 18 L. E. 2d 782 (1967) (same); *Schmerber v. California*, 384 U.S. 757, 770-771, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (destruction of evidence); *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S. Ct. 1942, 1949, 56 L. Ed. 2d 986 (1978) (ongoing fire), and has actually applied only the "hot pursuit" doctrine to arrests in the home, see *Santana, supra*.[231]

The case involved a single car accident from which Welsh, the driver, left and walked home. The police, arriving later and suspecting him to be "very inebriated or very sick", checked the car registration and followed Welsh home, without securing any type of warrant. They gained entry when Welsh's daughter answered the door, then proceeded upstairs to his bedroom, where they found him lying naked in bed. They placed him under arrest for driving or operating a motor vehicle while under the influence of an intoxicant. Welsh was taken to the police station, where he refused to submit to a breath-analysis test. State law provided that a valid arrest is a necessary prerequisite to the imposition of a breath test.[232]

The Court was hesitant to find exigent circumstances, especially when warrantless arrests in the home are at issue and the underlying offense for which there is probable cause to arrest is relatively minor: "When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate."[233] The Court found the State's claim of hot pursuit unconvincing because there was no immediate or continuous pursuit from the scene of the crime. It

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[224] *Id.* at 299. In Stroud, the court announced the following definitive rule for the permissible scope of a warrantless search of an automobile incident to an arrest under Washington Constitution article I, § 7:

> During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.

106 Wash. 2d at 152, 720 P.2d 436, 441.

[225] *Id.* at 299-300.

[226] *Id.* at 303.

[227] 453 U.S. 454, 460–61, n.4.

[228] 445 U.S. 573 (1980).

[229] 445 U.S. 573, 583.

[230] 466 U.S. 740 (1984).

[231] *Id.* at 749–50.

[232] 466 U.S. 740, 742–45.

[233] *Id.* at 750.

also refused to uphold the warrantless arrest simply because evidence of Welsh's blood-alcohol level might have dissipated while the police obtained a warrant. The Court held Welsh's arrest to be invalid under the Fourth Amendment.

The recent Supreme Court decision in *Minnesota v. Carter*[234] dealt with the question of Fourth Amendment protection as applied to individuals who were not overnight guests in an apartment, but were present for a "business transaction", to wit: "bagging cocaine." The facts reflect that a police officer, acting on a confidential tip, observed the defendants through the drawn window blind of an apartment as they were bagging cocaine. The defendants were arrested when they left the apartment in their Cadillac, where incriminating evidence was found. They moved to suppress all evidence obtained from the apartment because the officer's initial observation was an unreasonable search in violation of the Fourth Amendment.[235]

The Supreme Court, in reversing the decision of the Minnesota Supreme Court to suppress the evidence,[236] reviewed its decisions relative to the expectation of privacy in a residence.[237] The Court has held that in some circumstances a person may have a legitimate expectation of privacy in the house of someone else. In *Minnesota v. Olson*,[238] for example, the Court decided that an overnight guest in a house had the sort of expectation of privacy that the Fourth Amendment protects. But while an overnight guest in a home may claim the protection, one who is merely present with the consent of the household may not.[239] Similarly, the Court has held that in some circumstances a worker can claim Fourth Amendment protection over his own workplace.[240] An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. *New York v. Burger*, supra. Chief Justice Rehnquist's opinion for the majority provides the following rationale and holding:

> If we regard the overnight guest in *Minnesota v. Olson* as typifying those who may claim the protection of the Fourth Amendment in the home of another, and one merely "legitimately on the premises" as typifying those who may not do so, the present case is obviously somewhere in between. But the purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder, all lead us to conclude that respondents' situation is closer to that of one simply permitted on the premises. We therefore hold that any search which may have occurred did not violate their Fourth Amendment rights...Because we conclude that respondents had no legitimate expectation of privacy in the apartment, we need not decide whether the police officer's observation constituted a 'search.'[241]

V. THE MOTOR CARRIER SAFETY ASSISTANCE PROGRAM (MCSAP)

The Motor Carrier Safety Assistance Program (MCSAP) was initially authorized by Section 402 of the Surface Transportation Assistance Act (STAA) of 1982, P.L. 97-424, and has been reauthorized several times since then. The intent of Congress in establishing MCSAP was to provide for a national uniform motor carrier safety program. To accomplish this, the states and territories were to enforce the Federal Motor Carrier Safety Regulations and Hazardous Materials Regulations or compatible state regulations. MCSAP is a grant-in-aid program with states providing a 20 percent contribution to match the 80 percent federal contribution. To participate in the program, a state is required to meet certain criteria specified in the STAA and the CMVSA (*see* 49 U.S.C. sections 31101–31162), and certain administrative criteria defined by FHWA, (*see* 49 C.F.R., Parts 350 and 355). Under this program, FHWA provides grants to states and territories to enforce federal and compatible state motor carrier safety and hazardous materials regulations. All fifty states, the District of Columbia, Puerto Rico, and four of the five territories presently operate within MCSAP.

The conditions for basic grant approval, as provided in 49 C.F.R. 350.9, include:

> (a) The State shall agree to adopt, and to assume responsibility for enforcing the Federal Motor Carrier Safety Regulations (FMCSR) (49 C.F.R. parts 390 through 399, except as may be determined by the Administrator to be inapplicable to a State enforcement program) including highway related portions of the Federal Hazardous Materials Regulations (FHMR) (49 C.F.R. parts 107, 171-173, 177, 178 and 180), or compatible State rules, regulations, standards, and orders applicable to motor carrier safety, including highway transportation of hazardous materials.

This has resulted in increased uniformity of state and federal motor carrier safety and hazardous materials transportation laws, regulations,and inspection procedures. Attention is directed to the following provisions of Title 49, U.S.C.:

- Section 31106, Information systems
- Section 31115, Enforcement
- Section 31131, Purposes and findings
- Section 31133, General powers of the Secretary of Transportation
- Section 31135, Duties of employers and employees
- Section 31142, Inspection of vehicles
- Section 31143, Investigating complaints and protecting complainants
- Section 31147, Limitations on authority

[234] ___U.S. ___, ___Sup. Ct._____142 L. Ed. 2d 373 (1998).

[235] *Id.* at 377-78 (1998).

[236] 569 N.W.2d 169 (1997).

[237] *Id.* at 379–81.

[238] 495 U.S. 91, 109 L. Ed. 2d 85, 110 S. Ct. 1684 (1990).

[239] Rakas v. Ill., 439 U.S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978).

[240] *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (1987).

[241] *Id.* at 381.

In addition, the following FHWA administrative rules are noteworthy:

• 49 C.F.R. Part 390—Motor Carrier Safety Regulations; General

• Section 390.15—Assistance in investigations and special studies

• Section 390.31—Copies of records or documents.

• 49 C.F.R. Part 391—Qualifications of Drivers

• Section 391.23—Investigation and inquiries

• 49 C.F.R. Part 392—Driving of Commercial Motor Vehicles

• 49 C.F.R. Part 393—Parts and Accessories Necessary for Safe Operation

These federal laws and regulations, and the state laws and regulations adopting them or compatible with them, meet the requirements for warrantless inspections of a pervasively regulated business, the commercial motor vehicle business, its records, equipment, and drivers: (1) there is a substantial government interest in the safety of the traveling public; (2) warrantless inspection is necessary to further the government interest, i.e., the regulatory scheme, and (3) there is a minimum level of certainty and regularity in conducting inspections to provide an adequate substitute for warrant. In other words, the regulatory scheme advises commercial motor carriers, their employees, and drivers that such inspections will be made pursuant to specific law, which has a properly defined scope, and limits the discretion of the inspecting officers. In addition to such compliance reviews, there is adequate authority by way of regulation and case law to support stops of commercial motor vehicles under the investigatory stop exception, to uphold roadside driver and vehicle safety inspections, and traffic enforcement.

The Transportation Equity Act for the 21st Century (TEA-21 or the Act), enacted June 9, 1998, has significantly strengthened safety enforcement and provides new approaches to compliance. The Act augments the MCSAP by expanding the "toolbox" of enforcement techniques, closing loopholes that permit unsafe practices, and allowing development of innovative approaches to regulations. The Act:

(1) Imposes mandatory shutdown on all unfit carriers, strengthening the authority of the Secretary to order unsafe motor carriers to cease operations;

(2) Requires the Secretary to develop an implementation plan to identify the procedures that would be followed (if Congress subsequently provided authority) to enforce regulations when violated by shippers and others;

(3) Removes barriers to effective application of penalties and establishes a $10,000 maximum penalty for all nonrecordkeeping violations of the safety regulations;

(4) Amends the definition of commercial motor vehicle to reflect the actual gross vehicle weight rather than just the gross vehicle weight rating;

(5) Revises the authority of the Secretary to issue waivers and exemptions from safety regulations and Commercial Drivers License requirements and establishes procedures for exemption pilot programs. Safety prerequisites for exemptions and pilot programs are established.[242]

Another significant provision of TEA-21 was the amendment of 49 U.S.C. Sec. 31106, the commercial motor vehicle information system program, to include the mandatory development and maintenance of data that provides the means to "evaluate the safety fitness of motor carriers and drivers." 49 U.S.C. 31106(a)(3)(B).

VI. SUMMARY OF PRINCIPLES AND GUIDELINES

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. The basic constitutional rule is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable, subject only to a few specifically established and well-defined exceptions. Depending upon the specific circumstances of particular searches, all of these exceptions are potentially applicable to the inspection and search of commercial motor vehicles, to drivers, and in certain instances, to passengers. These warrant exceptions, which will be increasingly relied upon by law enforcement officers because of emerging new enforcement practices and technologies, are summarized below.

The automobile exception, which includes commercial motor vehicles, allows law enforcement officers to stop and search a vehicle if there is probable cause to believe that the vehicle contains evidence of a crime and there are exigent circumstances making it impractical to obtain a warrant before a search. Every part of the vehicle can be searched, including the trunk and closed containers. Probable cause to search exists where the known facts and circumstances are sufficient to warrant an officer of reasonable prudence that contraband or evidence of a crime will be found. Exigent circumstances exist when there is an imminent danger that evidence can be hidden, altered, destroyed, or removed, or when there is a serious and imminent threat to an officer's or the public's safety.

The consent exception is an important and commonly used warrant exception relied upon by officers searching and inspecting a commercial motor vehicle. Law enforcement officers may search a vehicle, including any closed containers in the vehicle, if the owner or driver voluntarily consents to a search. The totality of circumstances test is used in determining whether consent to search is voluntary.

The plain view exception is another important and often-used warrant exception relied upon by officers searching and inspecting commercial motor vehicles. It has long been settled that objects falling in the plain

[242] Publication No. FHWA-PL-98-038, pp. 14–15.

view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. When there is probable cause to believe that a vehicle has been used in a crime, and exigent circumstances exist, an officer may make a limited external examination of a vehicle. The vehicle must be parked on the street or otherwise subject to public view.

The warrant exception known as the pervasively regulated industry exception is not commonly known or generally understood by law enforcement officers, but is a very useful exception because a number of courts have recognized the commercial motor vehicle industry as a pervasively regulated industry. Warrantless inspections of pervasively regulated businesses are authorized if: (1) there is a substantial government interest, (2) warrantless inspection is necessary to further the government interest, and (3) there is a certain minimum level of certainty and regularity in conducting inspections to provide an adequate substitute for a warrant.

Persons have a reduced expectation of privacy in motor vehicles because of the government's pervasive regulation of motor vehicle travel on public highways. Persons have no reasonable expectation of privacy in the vehicle identification number. Law enforcement officers can enter a vehicle to look for a VIN because the VIN plays an important role in the pervasive regulation of motor vehicles.

Under the investigatory stop exception, law enforcement officers must have a reasonable suspicion to justify an investigatory traffic stop. Officers cannot randomly stop motorists to check the driver's license or registration without reasonable suspicion. Reasonable suspicion is based upon various objective observations and conclusions of a law enforcement officer, resulting from the officer's training and experience. This information must raise a reasonable suspicion that a particular individual is engaged in wrongdoing. Reasonable suspicion is less than probable cause. An anonymous telephone tip, corroborated by independent police investigation, is sufficiently reliable to provide reasonable suspicion for law enforcement officers to make an investigatory stop of a vehicle. Reasonable suspicion is a particularized and objective basis for suspecting the person stopped of criminal activity. The principal components of a determination of reasonable suspicion or probable cause will be the events that occurred leading up to the stop or search, and then the decision as to whether these historical facts, viewed from the standpoint of the objectively reasonable police officer, amount to reasonable suspicion or to probable cause.

The search incident to arrest exception permits law enforcement officers, during a lawful custodial arrest of the occupant of an automobile, and as a contemporaneous incident of that arrest, to search the passenger compartment of that automobile, including the contents of any containers found within the passenger compartment. The search is restricted to the area of the suspect's custody and control. The purpose of this exception is to ensure the safety of the searching officer, prevent escape, and prevent the destruction or concealment of evidence.

The stop and frisk exception authorizes a brief, temporary, investigative stop in a public place, based on reasonable suspicion. In addition to conducting an investigative stop, law enforcement officers may pat down the suspect for weapons. In a routine traffic stop, an officer may pat down the driver or other occupants of the vehicle to search for weapons, if there is a reasonable suspicion that such persons may be armed. Law enforcement officers may, as a matter of course, order the driver and the passengers of a lawfully stopped vehicle to exit the vehicle. An officer's reasonable suspicion must be based on specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant that intrusion. The test is objective and the determination of reasonableness is made in light of the totality of the circumstances known to the searching officer. An officer making an investigative stop need not reasonably believe that an individual is armed. The test is whether the officer has a reasonable suspicion that a suspect may be armed.

Under the vehicle inventory exception, a vehicle that has been impounded may be searched to inventory the contents of the vehicle. Reasonable police regulations relating to inventory procedures administered in good faith are necessary to satisfy the requirements for the vehicle inventory exception. Law enforcement officers may seize evidence in "plain view" during an inventory search. If law enforcement officers have reason to believe that there is a gun in a vehicle searched under the vehicle inventory exception, it is also justified because of concern for the safety of the general public.

Vehicle checkpoints or road blocks are constitutional under the vehicle checkpoint or roadblock exception if there is an important government interest, minimal intrusion, standard inspection guidelines, and law enforcement officers have no discretion in randomly selecting which vehicles can be stopped and searched. Commercial motor vehicle weigh stations are vehicle checkpoints. No warrant is required for searches at these facilities.

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