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OVERVIEW OF ARKANSAS WARRANTLESS SEARCH AND SEIZURE LAW

David J. Sachar

I. INTRODUCTION

The evolution of the law of search and seizure presents great challenges to prosecutors, defense attorneys, and judges. The suppression hearing on Fourth Amendment issues often proves to be the linchpin in criminal cases. The purpose of this article is to serve as a general reference tool to aid attorneys practicing in Arkansas courts by providing practitioners with an easy point from which to begin research on a particular subject.

The scope of this article is broad. Comprehensive coverage of each topic within would be impossible in an article of this type; however, the major issues that arise from warrantless searches will be discussed as well as new or particularly relevant decisions of the United States Supreme Court, the United States Court of Appeals for the Eighth Circuit, the Arkansas Supreme Court, and the Arkansas Court of Appeals. While one should not rely on this article without supplementation of updated research, it can provide a starting point for general principles and pivotal cases.

This article opens by addressing the most basic issues and principles of search and seizure litigation, including definitions and the relevant burdens of proof that arise in challenging actions as violative...
of the Fourth Amendment. Section Three discusses situations where the Fourth Amendment does not apply, such as abandoned property, open fields, and plain view. Various exceptions to the warrant requirement will be addressed in section four. In conclusion, the article briefly explores suppression appeals within the criminal justice system.

II. DEFINITIONS AND BURDENS OF PROOF

The process of suppression litigation may be seen as a trial within a trial. However, because it is a trial on essentially legal issues conducted by the trial court and not a jury sitting as fact-finder, it is essential to consider the terms of art and legal burden imposed in the context of this more limited proceeding.

A. What Is a Search?

The Fourth Amendment protects people against unreasonable searches by providing that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." This seemingly simple language of the Fourth Amendment has been the subject of much litigation. The United States Supreme Court has defined a search as an intrusion into an area where an individual has a reasonable expectation of privacy. The Court has also held that several sorts of intrusions do not rise to the level of a search and are thus constitutionally permissible. Included in activities that do not amount to searches are the use of flashlights or searchlights, binoculars or magnifying equipment,

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1. U.S. Const. amend. IV.
3. See Arizona v. Hicks, 480 U.S. 321, 324-26 (1987). In Hicks, the police lawfully entered Hicks' apartment to search for a gunman who fired a shot into the apartment and injured a man. See id. at 323. While inside Hicks' apartment, the police observed stereo equipment in plain view. See id. An officer moved the equipment to record the equipment's serial numbers in order to ascertain if the equipment had been stolen. See id. According to the Court, the moving of the equipment was in violation of Hicks' Fourth Amendment rights. See id. at 325.
trained dogs,\(^6\) unaided vision for items in plain view,\(^7\) and other non-invasive discoveries.

Rule 10.1 of the Arkansas Rules of Criminal Procedure sets out the Arkansas definition of "search,"\(^8\) which the Supreme Court of Arkansas has adopted.\(^9\) Generally, courts consider situations involving intrusions upon a citizen's right to privacy to be searches.\(^10\) Today, courts measure an individual's expectation of privacy by that which society recognizes as reasonable to determine whether situations give rise to Fourth Amendment problems.\(^11\)

B. What Is a Seizure?

Under Fourth Amendment jurisprudence, an individual is seized when one submits to the command of an officer, or one acting under color of law, or is restrained by physical force, however slight, which facilitated submission.\(^12\) Courts categorize police-citizen encounters into three categories.\(^13\) The least intrusive category encompasses an officer approaching an individual in public and requesting that the individual answer questions. This encounter is not a seizure because the confrontation is in a public place and is consensual.\(^14\) The second type of police encounter occurs when an officer justifiably detains an individual because the officer has an "articulable suspicion" that the person has been involved in or is about to be involved in criminal activity.\(^15\) The encounter is initially consensual but becomes a seizure

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8. A search is:
   [A]ny intrusion other than an arrest, by an officer under color of authority, upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or sufficient consent, would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States or this state. ARK. R. CRIM. P. 10.1(a).
10. See ARK. R. CRIM. P. 10.1 (commentary to Art. IV).
14. See id., 797 S.W.2d at 451.
15. See id., 797 S.W.2d at 451.
at the time when a reasonable person would believe that he is not free to leave.  

The third category is the full-scale arrest based upon the requisite probable cause.  

The Arkansas Rules of Criminal Procedure define a seizure as “the taking of any person or thing or the obtaining of information by an officer pursuant to a search or under other color of authority.”  

Obviously, the physical seizure of a person or property constitutes a seizure for Fourth Amendment purposes.  

In addition, seizure of property also occurs when there is meaningful interference with one’s possessory interest in the property.  

Determining when a person is seized can be the key issue in cases involving physical searches as well as verbal statements. While litigation ensues over the questioning of a suspect pursuant to the Fifth Amendment, defendants and defense counsel often overlook that a Fourth Amendment violation can result in the suppression of a verbal statement.  

The Arkansas Supreme Court has explained that statements made following an illegal arrest or seizure are admissible only under certain conditions. First, the statement must be voluntary. In addition, there must be no causal connection between the statement and the illegal arrest.  

C. Expectation of Privacy  

The Fourth Amendment protects a person only in situations where citizens have a reasonable expectation of privacy in the area searched. The test for whether a reasonable or legitimate expectation of privacy exists is twofold. First, the defendant must demonstrate an actual subjective expectation of privacy in that which is searched.  

16. See id., 797 S.W.2d at 451-52. See also United States v. Mendenhall, 446 U.S. 544, 554 (1980).  
17. See Thompson, 303 Ark. at 409, 797 S.W.2d at 452.  
18. ARK. R. CRIM. P. 10.1(b).  
19. See California v. Hodari D., 499 U.S. 621, 626 (1991) (determining that seizure occurred when officers applied physical force or when suspect submitted to the officer’s show of authority); see also United States v. Jackson, 175 F.3d 600, 601 (8th Cir. 1999) (concluding seizure occurred when officers tackled Jackson).  
25. See id.
society must recognize as reasonable the defendant's subjective expectation of privacy. In determining whether an expectation of privacy is reasonable, the United States Supreme Court has analyzed several factors. The Court has looked to the intent of the Framers of the Fourth Amendment. In addition, the Court considers the individual's possessory interest in the place searched as well as the particular uses to which the property is put. For example, the home has traditionally enjoyed the highest amount of protection from governmental invasion. Indeed, a fundamental presumption of Fourth Amendment law is that a warrantless search of a home is unreasonable.

Courts have, however, held that it is as unreasonable for any citizen to expect Fourth Amendment protection in certain situations. These include a prison inmate's cell, open fields, and publicly displayed vehicle tags and vehicle identification numbers. Society also acknowledges that school buildings are subject to a reduced expectation of privacy. However, a student's person remains protected, and a search of a student's person will raise Fourth Amendment concerns. On the other hand, it is less clear whether a search of school-owned lockers and desks intrudes on students' Fourth Amendment rights.

D. Probable Cause and Reasonable Cause

The Fourth Amendment requires that an officer have enough information to constitute probable cause before the officer arrests or seizes protected citizens or their property. Probable cause is defined as all the facts and circumstances within an officer's knowledge acquired through reasonably trustworthy information, and sufficient to

26. See id.
28. See Jones v. United States, 362 U.S. 257, 265 (1960), overruled by United States v. Salvucci, 448 U.S. 83 (1980) (holding that expectation of privacy was also an appropriate factor to consider in addition to possession).
30. See id. at 586 (relying on Coolidge v. New Hampshire, 403 U.S. 443, 474-75, 477-78 (1971)).
35. See id. at 375-76 (Stevens, J., concurring in part and dissenting in part).
36. See id. at 339-40.
37. U.S. CONST. amend. IV.
warrant a prudent officer’s belief that the arrestee had committed or was committing a crime.\textsuperscript{38} This definition hinges on probabilities rather than certainties.\textsuperscript{39} The result is a compromise between the protection guaranteed by the Constitution and the interest of law enforcement in protecting society.\textsuperscript{40} Probable cause is not a technical determination; it is the factual and practical considerations of everyday life that determine probable cause.\textsuperscript{41}

Probable cause can exist even when there is a reasonable mistake of fact upon which the police based part of the determination.\textsuperscript{42} Information considered in determining whether probable cause exists includes, among other factors, credible hearsay in the form of an informant’s tip,\textsuperscript{43} prior arrests and convictions,\textsuperscript{44} presence at places associated with criminal activity,\textsuperscript{45} furtive gestures or flight,\textsuperscript{46} responses to police questioning,\textsuperscript{47} and information from citizens,\textsuperscript{48} among other factors. Courts weigh each factor on a case-by-case basis by looking at the case law on each subject. Probable cause must be based on facts and not mere conclusions by law enforcement.\textsuperscript{49} Moreover, stale knowledge cannot provide the basis for probable cause; rather, only information in existence at the time of the search or seizure can support probable cause.\textsuperscript{50}

\textsuperscript{38} See Beck v. Ohio, 379 U.S. 89, 91 (1964) (relying on Brinegar v. United States, 338 U.S. 160, 175-76 (1949)).
\textsuperscript{40} See Brinegar v. United States, 338 U.S. 160, 176 (1949).
\textsuperscript{41} See id. at 175-76.
\textsuperscript{42} See id. at 176.
\textsuperscript{43} See Illinois v. Gates, 462 U.S. 213, 228-30 (1983) (clarifying that the appropriate test to be applied in analyzing an informant’s tip is to look at the totality of the circumstances in the context of the two-prong test set out in Spinelli v. United States, 393 U.S. 410, 414-16 (1969), where the tip, first, must reveal the basis of the informant’s knowledge and, second, must illustrate the veracity or reliability of the informant; however, under Gates, a court may look at the totality of the circumstances outside of Spinelli’s two prongs).
\textsuperscript{44} See Brinegar, 338 U.S. at 172-73.
\textsuperscript{45} See Delaware v. Prouse, 440 U.S. 648, 663 (1979); see also Brown v. Texas, 443 U.S. 47, 51-52 (1979) (emphasizing that association with criminal activity alone does not rise to the level of probable cause, but analyzed under totality of the circumstances, the presence of another factor does give rise to probable cause).
\textsuperscript{47} See United States v. Ortiz, 422 U.S. 891, 897 (1975).
Arkansas uses the term "reasonable cause" synonymously with the term "probable cause." The Arkansas Supreme Court has explained that the Arkansas Rules of Criminal Procedure pertaining to arrest, search, and seizure, use the term "reasonable cause" in preference to "probable cause," out of fear that the term "probable cause" might imply that the existence of facts must be "more-probable-than-not." The Arkansas Rules of Criminal Procedure define reasonable cause as the "basis for belief in the existence of facts which, in view of the circumstances under and purposes for which the standard is applied, is substantial, objective, and sufficient to satisfy applicable constitutional requirements." Arkansas recognizes no substantive difference between the two terms. The standard for reasonable cause is an objective standard; thus, an officer's subjective belief that reasonable cause was or was not present is not determinative.

E. Burdens in Suppression Hearings and the Exclusionary Rule

The Fourth Amendment requires that the government have a warrant based on probable cause to search or seize private citizens and their property. Searches are unreasonable in the absence of a valid warrant or a recognized exception. While exceptions exist, the government bears the burden to justify a search without a warrant. The government must prove the reasonableness of a warrantless search by a preponderance of the evidence. The court makes this determination based on the totality of the circumstances. The government, however, may prove the justification for the warrantless search on grounds other than the particular ones that the officer thought existed at the time of the

53. ARK. R. CRIM. P. 10.1(h).
54. See Johnson, 21 Ark. App. at 213-14, 730 S.W.2d at 519.
55. See ARK. R. CRIM. P. 10.1(h).
56. See U.S. CONST. amend. IV.
Fourth Amendment rights are personal in nature, hence, a defendant must have standing to challenge a search on Fourth Amendment grounds. The defendant must illustrate that he has standing by proving he had a legitimate expectation of privacy in that which is the subject of the search. The pertinent inquiry regarding standing to challenge a search is whether the defendant "manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as reasonable." The defendant, as the proponent of a motion to suppress, bears the burden of proving that his Fourth Amendment rights have been violated.

In specific situations, the government bears the burden of proving that the defendant freely and voluntarily consented to the search. The government must prove those elements by clear and positive testimony. Clear and positive testimony is evidence that clears the preponderance hurdle but falls short of proof beyond a reasonable doubt. In a stop and frisk situation, the government bears the burden of establishing that the officer had a reasonable belief that the suspect was armed. If the government does not meet its burden of proof at the suppression hearing, the court will exclude the illegally obtained evidence. Federal courts began applying the exclusionary rule in 1914 in order to prevent police misconduct. The Fourteenth Amendment makes the exclusionary rule applicable to the individual states; however, the application extends only to constitutional violations. The so-called "fruit of the poisoned tree" doctrine also provides that any evidence derived from illegal police activity will likely be excluded. While an illegal arrest or search can taint an otherwise voluntary

66. See Littlepage, 314 Ark. at 368, 863 S.W.2d at 280.
confession, the taint is often cured by evidence of attenuating circumstances. Attenuation is established when the confession or statement would have ultimately been obtained despite illegal conduct or technical violation on the part of officers making the arrest or conducting the search.75

The Arkansas Supreme Court applies the totality of the circumstances analysis to resolve issues concerning whether reasonable cause exists to support a warrantless search.76 While the rule can result in exclusion of the evidence against the defendant, it does not provide that the government must return seized contraband simply because the court ruled it inadmissible.77 Additionally, the Fourth Amendment's exclusionary rule does not apply to parole revocation hearings.78 Furthermore, before the evidence will be suppressed, Arkansas Rule of Criminal Procedure 16.2 (e) requires the moving party to prove that the constitutional violation was substantial.79

75. See Brown v. Illinois, 422 U.S. 590, 601-04 (1975) (identifying several factors courts consider in determining whether a confession has been purged of the taint of the illegal arrest: "The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct"); Taylor v. Alabama, 457 U.S. 687, 689-92 (1982) (holding that a confession given after an illegal arrest will be suppressed when no intervening events could break the causal connection between the arrest and the confession; the six hour lapse between the arrest and the confession was not enough to cure the taint, likewise the visit between defendant and his girlfriend did not cure the taint and neither did the fact that the police later obtained an arrest warrant when that warrant was based on information gathered from the illegal arrest).


79. See Lipovich v. State, 265 Ark. 55, 57, 576 S.W.2d 720, 721 (1979); ARK. R. CRIM. P. 16.2 (e). The rule provides that courts shall consider:

(i) the importance of the particular interest violated;
(ii) the extent of deviation from lawful conduct;
(iii) the extent to which the violation was willful;
(iv) the extent to which privacy was invaded;
(v) the extent to which exclusion will tend to prevent violations of these rules;
(vi) whether, but for the violation, such evidence would have been discovered; and
(vii) the extent to which the violation prejudiced moving party's ability to support his motion, or to defend himself in the proceedings in which such evidence is sought to be offered in evidence against him.

ARK. R. CRIM. P. 16.2(e)(i)-(vii).
III. SITUATIONS WHERE THE FOURTH AMENDMENT DOES NOT APPLY

This section addresses searches or seizures of areas or items that are not protected by the Fourth Amendment. Specifically, this portion of the article addresses the issues of standing, abandonment, open fields, voluntary encounters, private searches, pretext, and the plain view doctrine.

A. Standing

To challenge the legality of a search, a defendant must first establish that he has standing to assert a Fourth Amendment violation. In 1980, the United States Supreme Court overruled the notion that a defendant had "automatic standing" to assert a Fourth Amendment violation when charged with a crime of possession. Today, the crux of Fourth Amendment standing focuses on whether the defendant has a reasonable expectation of privacy in the area searched or property seized and whether society recognizes the expectation as reasonable. Standing problems commonly arise in matters involving guests and passengers and searches of third parties.

1. Guests and Passengers

Both individuals and society as a whole recognize the expectation of privacy in quarters where one sleeps either as a guest or a host. In Minnesota v. Olson, the United States Supreme Court determined that a defendant had standing because, as an overnight guest in an upstairs duplex, he had a reasonable expectation of privacy in the premises which was protected by the Fourth Amendment. However, in Minnesota v. Carter, the Court denied standing to two visitors who were in another's apartment but who were not overnight guests. In Carter, the defendants occupied another person's apartment for a short time solely for the purpose of packaging cocaine. The Court held that because they were using the apartment not as a dwelling but as a place

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84. See id. at 95-100.
wherein to conduct commerce, they had no legitimate expectation of privacy in the apartment. Generally, "[p]roperty used for commercial purposes is treated differently for Fourth Amendment purposes than residential property. 'An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home.'"

Similarly, one must illustrate a sufficient and legitimate expectation of privacy in order to have standing to challenge a search of a motel room registered to another person. For example, in *Kimble v. State*, the Arkansas Supreme Court held that the defendant lacked standing to claim a reasonable expectation of privacy in items located inside a motel room registered to his girlfriend, absent proof that the defendant was boarding in the room.

Many states, perhaps including Arkansas, have extended their own constitutional provisions beyond that which the federal rules provide. Arkansas courts, however, generally follow the reasoning of the United States Supreme Court's reasoning when analyzing issues concerning Fourth Amendment standing. For example, the Arkansas approach for vehicle passenger standing is more or less the basic federal rule. In Arkansas, a passenger in a car who has no possessory interest in the items searched may still have standing to object to an illegal stop. Arkansas courts have noted situations where the defendants were more than "passengers qua passengers" or mere passengers without a reasonable expectation of privacy in the car in which they were riding. Specifically, a passenger who places his personal belongings in the trunk of a car and establishes a joint agreement with the owner to share driving responsibilities over the course of a trip shares joint possession over the car for the duration of the trip. In that case, the Court reasoned that the passenger was more than a "mere passenger" for he "had a sufficient possessory interest to exclude anyone who tried to interfere with the car or their luggage."

86. See id.
87. See id. at 90 (quoting New York v. Burger, 482 U.S. 691, 700 (1987)).
89. See id., 959 S.W.2d at 46.
90. See *California v. Greenwood*, 486 U.S. 35, 43 (1988) (explaining that "[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution").
94. See id. at 111, 937 S.W.2d at 645 (quoting *Villines*, 304 Ark. at 131, 801 S.W.2d
2. Searches of a Third Party

Fourth Amendment standing is questionable when a search is executed on a third party. The introduction of damaging evidence secured by a search of a third person’s premises or property does not necessarily violate a person’s Fourth Amendment rights. For example, a search of another’s pocketbook or purse that contains items owned by the defendant does not confer standing upon the defendant because there can be no subjective expectation of privacy in another’s belongings. Similarly, even where a defendant frequently stayed overnight at his mother’s home, the court has held that this alone did not give him a reasonable expectation of privacy in the premises. The defendant failed to show that he owned, leased, or maintained control over the house, thus, he had no legitimate expectation of privacy in his mother’s home or the contents within it.

B. Abandoned Property

Courts have consistently held that abandoning property destroys all legitimate expectation of privacy in the property abandoned. The most common type of case on abandoned property involves a defendant, whether fleeing or not, throwing down drugs as officers approach. If an item is disposed of before a seizure occurs then it is not a product of the seizure. The legality of the seizure becomes irrelevant, and there is no expectation of privacy in the discarded evidence. There are many factors the court may consider to determine if the defendant actually abandoned the property. Whether abandonment has occurred is determined on the basis of the objective facts available to the investigating officers, not the subjective intent of the owner. A defendant who left a jacket and a pistol at a friend’s house the morning after a crime

at 31).

98. See id., 823 S.W.2d at 868.
100. See id.
102. See United States v. Liu, 180 F.3d 957 (8th Cir. 1999) (including an excellent treatment of abandonment issues with many factual scenarios and citations to various cases).
103. See Tugwell v. United States, 125 F.3d 600 (8th Cir. 1997).
had effectively abandoned the property and had not retained a recognized interest in the property. A place may also be abandoned and therefore subject to a loss of Fourth Amendment protection. In State v. Tucker, the defendant moved from an apartment and incriminating evidence was found during a subsequent warrantless search. The court determined that abandonment of property did not turn on analysis in the property-right sense, but rather whether the person discarded, relinquished, or left behind any privacy interest in the property seized.

Likewise, a vehicle can be abandoned. This typically takes place when police pursue and the defendant bails out of a car, fleeing on foot. The Arkansas Supreme Court has held that in these situations the defendant has "clearly abandoned every expectation of privacy he might have had in the vehicle and its contents." A person does not have a reasonable expectation of privacy in garbage placed in bags at the curb of their house for collection. While steps may be taken to preserve any expectation of privacy that exists, simply placing garbage by the curbside will not suffice.

Abandonment is primarily an issue of intent. Such intent can be inferred from words or action or other objective facts. A verbal disclaimer of ownership is not necessary for a finding of abandonment. To the contrary, if an item is abandoned based on the surrounding facts, a subsequent claim of ownership may not be sufficient to object to the search. Physical relinquishment, even with a claim of ownership, may be held to amount to abandonment and standing may be denied on that basis. However, a verbal denial is strong evidence of lack of standing. A verbal denial may make subsequent standing arguments by the prosecution difficult to overcome.

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105. 268 Ark. 427, 597 S.W.2d 584 (1980).
106. See id. at 428.
111. See United States v. Liu, 180 F.3d 957 (8th Cir. 1999).
112. See id.
113. See Koonce v. State, 269 Ark. 96, 598 S.W.2d 741 (1980).
C. Open Field and Curtilage

Fourth Amendment protection applies to those private interests specifically listed in the text of the Fourth Amendment. Therefore, protection would not seem to extend to the areas outside the home or land immediately adjacent to the home. However, Fourth Amendment protection often applies to curtilage—the area immediately surrounding the home.

Curtilage has been defined as the "space necessary and convenient, habitually used for family purposes and for the carrying on of domestic employment." The four factors courts use to determine if an area qualifies as curtilage are the proximity to the residence, whether the area and home are enclosed, the use to which the property is put, and any measure taken to protect the area from the public. Clearly, no person can have a reasonable expectation of privacy in open fields; thus, the Fourth Amendment does not protect open fields. Nonetheless, merely erecting a fence around an open area does not delineate a curtilage. Areas that do not fit within the definition of curtilage are "open fields" and, therefore, subject to warrantless searches with no requisite probable cause. An open field need not be a field, just an area outside of the

114. See U.S. Const. amend. IV. These interests include a citizen's person, house, papers, and effects. See id.
116. Gaylord, 1 Ark. App. at 109, 613 S.W.2d at 441.
117. See Dunn, 480 U.S. at 301; Sanders v. State, 264 Ark. 433, 436-37, 572 S.W.2d 397, 398-99 (1978). In Sanders, the questionable area was a garden located 100 to 200 yards behind a house. See id. Vegetables were growing in the area along with a crop of marijuana. See id. In finding that the area was protected curtilage, the court considered the fact that there was a fence between the residence and the garden and there were hoses stretching from the house to the garden area. See id. But see Brown v. State, 5 Ark. App. 181, 185-86, 636 S.W.2d 286, 288-89 (1982) (holding that a marijuana patch found in a garden 100 to 150 yards behind a house that was within a national forest was not protected curtilage).
118. See Oliver v. United States, 466 U.S. 170, 180 (1984). The United States Supreme Court, in 1924, held that the protection of the Fourth Amendment does not extend to open fields. See Hester v. United States, 265 U.S. 57, 59 (1924). An individual has no legitimate expectation of privacy in public areas, except those areas immediately surrounding the individual's home. Consequently, any expectation of privacy that an owner might have with respect to his open field is not, as a matter of law, an expectation that society is prepared to recognize as reasonable. See Oliver, 466 U.S. at 180.
119. See United States v. Dunn, 480 U.S. 294, 300-05 (1987). An "open field need be neither 'open' nor a 'field' as those terms are used in common speech." Id. (citing Oliver v. United States, 466 U.S. 170, 180 n.11 (1984)).
120. See id. at 181. The Arkansas Rules of Criminal Procedure make it clear that "[a]n officer may, without a search warrant, search open lands and seize things which
While a private citizen may be liable for trespass, the Fourth Amendment does not prohibit an officer from entering a private, yet open, field. However, crossing through protected curtilage of a residence to access a separate unprotected area is impermissible and usually results in the suppression of any evidence found in the unprotected area.

The Arkansas Supreme Court has held that a defendant did not have a reasonable expectation of privacy in a deer stand though it consisted of a covered metal container with several openings and was located a quarter of a mile from the defendant's temporary residence. The deer stand did not fall within the curtilage of the defendant's temporary residence and thus the Fourth Amendment did not preclude a game officer's search of the deer stand.

Although law enforcement officers may search open fields without a search warrant, a court will suppress evidence found in a open field if the officers entered the field through a protected area such as curtilage, especially when information found in the curtilage leads the officer to the contraband located in the open field. The Arkansas Supreme Court declared that when an officer located marijuana growing in a field fifty to sixty yards away from a residence that was located within a wooded area, the area was considered an open field and not curtilage, because there was no evidence of family use or domestic employment. Furthermore, the court found a field to be open and subject to warrantless searches and seizures even when the field was fenced, locked, and posted. Additionally, where marijuana was growing in an open field, in plain view, and accessible to the public, the court held that no search warrant was necessary to seize the plants.

Common law property rights have little or no significance in a Fourth Amendment analysis. Therefore, an officer's entry into an open field does not necessarily constitute a search in the constitutional

he reasonably believes subject to seizure." ARK. R. CRIM. P. 14.2.

121. See Oliver, 466 U.S. at 181 n.11.
122. See id. at 179 n.10.
125. See id. at 301-02, 5 S.W.3d at 416-17.
126. See Dever, 14 Ark. App. at 109, 685 S.W.2d at 519 (1985).
127. See id. at 109-10, 685 S.W.2d at 519-20.
128. See Gaylord, 1 Ark. App. at 108-10, 613 S.W.2d at 411 (1981).
sense simply because the intrusion would amount to a trespass at common law.\textsuperscript{132} Though the Fourth Amendment protects curtilage, observations of activities within the curtilage but made from a lawful vantage point outside the curtilage are usually constitutionally permissible.\textsuperscript{133} For example, where officers entered an area of heavy woods owned by the defendant’s neighbor, scaled the defendant’s fence and entered an open area without scaling the fence surrounding the marijuana, the court held that the Fourth Amendment allowed the warrantless observation of the defendant’s curtilage from the adjacent field.\textsuperscript{134} Moreover, warrantless aerial observations are not a per se violation of the Fourth Amendment, even when the observed objects are not visible from legal vantage points on the ground.\textsuperscript{135}

D. Voluntary Encounters

Just as not all intrusions are searches, not all contact between law enforcement officers and citizens are necessarily seizures.\textsuperscript{136} A street encounter in which a police officer questions a citizen will not, in and of itself, be considered a seizure.\textsuperscript{137} Without such encounters, the lack of the useful tool of police questioning would result in many miscarriages of justice.\textsuperscript{138} A voluntary encounter only becomes a seizure if, in light of all the circumstances, a reasonable person would believe she was not free to leave.\textsuperscript{139} The Arkansas Rules of Criminal Procedure authorize an officer to request information or cooperation from citizens, provided the encounter does not rise to the level of a seizure and the encounter is prompted to aid an investigation or prevent a crime.\textsuperscript{140} The

\begin{itemize}
\item \textsuperscript{132} See id., 751 S.W.2d at 366.
\item \textsuperscript{133} See id. at 43, 751 S.W.2d at 367.
\item \textsuperscript{134} See id. at 39, 751 S.W.2d at 366.
\item \textsuperscript{136} See United States v. Mendenhall, 446 U.S. 544, 552 (1980).
\item \textsuperscript{137} See Terry v. Ohio, 392 U.S. 1, 34 (1968).
\item \textsuperscript{138} See Mendenhall, 446 U.S. at 554.
\item \textsuperscript{139} See id.
\item \textsuperscript{140} See ARK. R. CRIM. P. 2.2. The rule states that:
\begin{enumerate}
\item A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.
\item In making a request pursuant to this rule, no law enforcement officer shall indicate that a person is legally obligated to furnish information or to otherwise cooperate if no such legal obligation exists. Compliance with the request for information or other cooperation hereunder shall not be regarded as involuntary or coerced solely on the ground that such a request was made
\end{enumerate}
court interprets this rule to allow an officer to approach a citizen in the same way as a citizen would approach another citizen to gather information or help. Furthermore, the court has declared that "[n]ot all personal intercourse between policemen and citizens involves 'seizures' of persons under the fourth amendment." A seizure occurs at the point when the officer, by using physical force or show of authority, restrains the liberty of a citizen.

The procedural rules, however, require a law enforcement officer to take reasonable steps to make clear that there is no legal obligation to comply with the request to come to or remain at a police station, prosecuting attorney's office or other similar place. Once a police officer has probable cause to arrest, however, failure to give such notice is irrelevant. Furthermore, the Arkansas Supreme Court explained that the rule requiring a verbal warning of freedom to leave will not be interpreted as a bright-line rule for determining when a seizure has occurred in violation of the Fourth Amendment. The court has also stated that the notice of freedom to leave would be but one factor to be considered along with the totality of the circumstances surrounding compliance with the rules of criminal procedure.

E. Private Searches

Constitutional protection against unreasonable searches is a guarantee against government action. The Fourth Amendment does not prohibit a search or seizure conducted by a private party, regardless of motive or lawfulness. Therefore, a private actor not under the direction of the government, can take actions that do not violate the Fourth Amendment even though they would if taken by a governmental

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by a law enforcement officer.

ARK. R. CRIM. P. 2.2.


142. See Thompson, 303 Ark. at 407, 797 S.W.2d at 451.

143. See id., 797 S.W.2d at 451.

144. ARK. R. CRIM. P. 2.3.


146. See id. at 431, 948 S.W.2d at 562.

147. See id., 948 S.W.2d at 562.

148. See United States v. Jacobson, 466 U.S. 109, 113 (1984). The United States Supreme Court has repeatedly stated that when there is no government action there is no violation of the Fourth Amendment. See id.
official. The private actor may commit a trespass or another crime or tort without triggering Fourth Amendment protections.

A private company, such as a package carrier, may inspect items in their possession without any Fourth Amendment concerns. For instance, where the agent of a private carrier independently opened a package and examined it, an illegal search did not occur even though such a search might have been impermissible for a government agent to perform. Whether those types of private invasions are accidental or deliberate and regardless of whether they were reasonable or not, the invasions do not implicate the Fourth Amendment because of their private character. In fact, surgery performed by medical personnel without prompting by the police is a private search. Similarly, samples of blood taken by a private lab technician also would not constitute an unreasonable search and seizure. Stated in the simplest terms, without prompting from or direction by a governmental actor, a private search will not result in suppression.

F. Pretext

The concept of "pretext" largely disappeared as a basis for Fourth Amendment suppression when the United States Supreme Court ruled that an officer's subjective reasoning for an intrusion would not result in suppression as long as there was an actual legal basis justifying his actions. A court may find pretext, however, when an officer's actions are inconsistent with his usual standard of behavior under similar

150. See Irvine, 347 U.S. at 135-36.
151. See id. at 114-15.
153. See Jacobsen, 466 U.S. at 113-14.
155. See Walker v. State, 244 Ark. 1150, 1151, 429 S.W.2d 121, 121-22 (1968).
156. But see Wilson v. Layne, 526 U.S. 603, 613-14 (1999) (holding that a homeowner's Fourth Amendment rights were violated when police brought a member of the media or other third party into the home during a warrant execution). While not a suppression issue, Wilson illustrates that Fourth Amendment issues may arise in certain private search situations, such as where a privacy violation may be actionable in civil proceedings. Typically, searches and seizures made by private individuals do not constitute "state action."
facts.\textsuperscript{158} For instance, where an officer who would normally write a
citation instead arrests the defendant because the officer believes the
defendant possesses contraband, the officer might have arrested the
defendant as a pretext so that the officer could search the vehicle as a
search incident to an arrest.\textsuperscript{159} In such claims of pretext, courts must
examine the facts surrounding the search and seizure and determine
whether the government has met its burden to justify the action.\textsuperscript{160}

G. Plain View

The plain view doctrine allows police to seize items that are in plain
view without a warrant.\textsuperscript{161} In order for police to invoke the plain view
doctrine, the officers must lawfully be at the point where they observe
the items, the discovery of the items must be inadvertent, and the items
must be readily known to be contraband.\textsuperscript{162} However, if the initial
intrusion or detention is illegal, the fruits of that action, whether in plain
view or not, are inadmissible against the defendant.\textsuperscript{163} The plain view
doctrine also extends to the other senses of touch, smell, and hearing.\textsuperscript{164}
Moreover, the object of the search must be in plain view meaning that
its illegal nature was readily apparent and it did not have to be inspected
or moved to make the determination.\textsuperscript{165}

Courts may consider an officer's knowledge and experience in
determining if the requirement that the item was immediately known to
be contraband is satisfied. For example, a court can consider an
officer's knowledge of the packaging and transportation of narcotics.\textsuperscript{166}
The discovery of contraband must be inadvertent; however, that

\textsuperscript{158} \textit{See} State v. Sullivan, 340 Ark. 315, 11 S.W.3d 526, 528 (2000). As discussed
in \textit{Sullivan} and its supplemental opinion, courts are unclear about the extent to which
\textit{Whren} allows pretextual stops and arrests. Arkansas, at least at this time, subscribes to
the notion that \textit{Whren} does not allow pretextual arrests for the purpose of searching,
perhaps providing less protection for Arkansas citizens than that based strictly on the
Fourth Amendment and the Court's decision in \textit{Whren}. \textit{See} State v. Sullivan, 16 S.W.3d
551, 552 (2000).

\textsuperscript{159} \textit{See} Sullivan, 11 S.W.3d at 527-28.

\textsuperscript{160} \textit{See} id.


\textsuperscript{162} \textit{See} id. at 465-73.


\textsuperscript{165} \textit{See} Arizona v. Hicks, 480 U.S. 321, 325-29 (1987) (holding that observing
stereo equipment in plain view is not a search in violation of the Fourth Amendment
but moving the equipment to observe the serial numbers constitutes an additional
search that is prohibited by the Fourth Amendment).

\textsuperscript{166} \textit{See} Brown, 460 U.S. 741-43.
requirement does not mean that officers must have no suspicion about
the items that were found. In fact, it does not matter whether officers
have probable cause to obtain a warrant immediately prior to the
discovery of an item in plain view.

In 1990, the United States Supreme Court held that it was no longer
necessary that the discovery of contraband be inadvertent. Recently,
the Arkansas Supreme Court clarified whether the inadvertence
requirement of the plain view doctrine still exists under Arkansas law
when it held that the Arkansas Constitution permits officers to seize
evidence in plain view even if the discovery of the evidence was not
inadvertent. For example, the court held that when a defendant
confessed to officers that he had purchased his automobile with drug
money and used it to transport methamphetamine, the subsequent
discovery of drugs was admissible even though not completely
inadvertent.

The plain view doctrine requires that the incriminating nature of the
evidence must be readily known. Consequently, even if a container
is in plain view, the doctrine prohibits seizure if the contents are
unknown. However, if the identity of the container's contents is clear
enough from the circumstances and the officer's knowledge, then the
officer may open the container and seize the contraband under the plain
view doctrine. For example, the Arkansas Court of Appeals held that
when officers observed a defendant discard a film canister and
matchbox and had knowledge of his furtive conduct and drug activity,
the contents of the canister and matchbox may be "inferred from their

168. See Coolidge, 403 U.S. at 469-71.
(1993).
172. See id. at 591-92, 972 S.W.2d at 223. Generally, the inadvertence requirement
of the plain view doctrine means that immediately prior to discovery, the police lacked
information sufficient to establish probable cause to obtain a search warrant. See
Johnson, 291 Ark. at 263, 724 S.W.2d at 162. The inadvertence requirement does not
involve an unexpected discovery or a total surprise. See id. For example, an officer's
receipt of an informant's tip that marijuana was present does not make viewing the
illegal crop advertent. See id.
173. See Coolidge, 403 U.S. at 465-73.
174. See Kirk v. State, 38 Ark. App. 159, 164-65, 832 S.W.2d 271, 275 (1992); see
also State v. Risinger, 297 Ark. 405, 408-09, 762 S.W.2d 787, 789-90 (1989).
175. See Washington, 42 Ark. App. at 197, 856 S.W.2d at 636.
outward appearance." In contrast, the Arkansas Supreme Court held that officers could not lawfully seize illegal drugs located in a closed pillbox on a coffee table because the officers could not know the contents of the pillbox without opening it.  

Under the plain view doctrine, officers lawfully seized marijuana located in the back of a defendant's pickup truck parked on his father's land when the father had given written permission to search the outbuildings, residence, and the area around the residence including the barn and vehicles. Likewise, officers rightfully seized under the plain view doctrine a small pipe and marijuana roach located inside the defendant's car but viewed by officers from outside the vehicle. In fact, where an initial stop is legal, officers may look into the vehicle and use the plain view doctrine to rightfully seize contraband. Moreover, the Arkansas Supreme Court held that when an officer approached a vehicle, smelled a strong odor of alcohol and a slight odor of what she thought was marijuana, and noticed a brass pipe next to the passenger's leg, the officer acted properly in seizing the pipe pursuant to the plain view doctrine.

When police enter a crime scene under exigent circumstances, such as the scene of a homicide, they "can seize any evidence that is in plain view in the course of their legitimate emergency activities." Also the court has held that when an officer stops a vehicle and notices a strap coming from underneath the front seat which the officer recognizes as a gun holster, the officer may lawfully seize the gun under the plain view doctrine. Likewise, in a case where an officer discovered a large sum of cash in the defendant's room and the officer was aware that a large sum of money had been stolen, the court held that the incriminating nature of the cash was immediately apparent and the officer rightfully seized the cash under the plain view doctrine. On the other hand, unless the items are in plain view and immediately known to be contraband, seizing the items will be in violation of the Fourth Amend-

177. See Risinger, 297 Ark. at 409, 762 S.W.2d at 789-90 (1989).
180. See id., 751 S.W.2d at 334-35.
ment. For example, the Arkansas Supreme Court held that the Fourth
Amendment prohibited further manipulation of a bulge in a defendant’s
pocket to determine if contraband is present when a justified pat down
yielded no weapon. 185

Police, noticing marijuana residue on the floorboard of a defen-
dant’s car, may conduct a search of the automobile, because under the
plain view doctrine the officers have probable cause to believe the
vehicle contains contraband. 186 Additionally, when officers noticed an
ill-fitting door panel, they were within the scope of the permissible
search to remove the panel and search behind the recesses of the interior
panels for concealed illegal drugs. 187 Likewise, an officer who stops a
defendant and requests to see the vehicle’s registration may lawfully
seize drug paraphernalia made visible when the defendant opens the
glove box. 188 An officer may perform a warrantless search and seize
items within the plain view doctrine, regardless of the existence of
probable cause, so long as the defendant gives valid consent for the
officers to search. 189 Even when one officer stops the defendant and
another officer actually sees the evidence in plain view on the floor-
board of a defendant’s car, the plain view doctrine permits the seizure
of the items. 190 In addition, officers on premises to serve an arrest
warrant may lawfully seize items in plain view from their lawful
vantage point. 191 For instance, the plain view doctrine permitted the
seizure of a hypodermic needle and drug paraphernalia where a
defendant invited two officers into the residence but it was another
officer who was stationed at the back exit of the house—without
defendant’s knowledge—who viewed the contraband 192

Additionally, courts apply “plain feel” in the same manner as plain
view. An officer who is conducting an otherwise legal frisk is not
required to ignore the feel of objects that he reasonably believes are
contraband. 193 However, manipulation of items in a defendants clothing
goes beyond the legal scope of a weapons frisk and is an impermissible

187. See id., 737 S.W.2d at 660.
188. See Pruett, 282 Ark. at 310, 669 S.W.2d at 963.
192. See id., 762 S.W.2d at 789-90.
193. See Dickerson, 508 U.S. at 375-77.
Fourth Amendment violation. The Arkansas Supreme Court recently upheld the search of a passenger whom the officer knew to be carrying a weapon, who was acting nervous and evasive, and whose pockets were so full that the officer could not tell if there was a weapon present. The officer removed the contents from the passenger’s pocket to determine if a weapon was present and in the process discovered methamphetamine; the court subsequently upheld the search as reasonable.

“Plain smell” discovery can also amount to probable cause to search. Officers can conduct legal searches via smell when the contraband has an odor, for example, of marijuana. However, the incriminating nature of smells must be readily apparent; for example, the smell of ether, a legal substance which is a reagent in methamphetamine production, is not itself incriminating as contraband.

Courts have determined that simply using a flashlight to aid in viewing an area or object from a lawful position is a legal intrusion and does not violate the Fourth Amendment. The Arkansas Rules of Criminal Procedure provide that “[a]n officer who, in the course of otherwise lawful activity, observes the nature and location of things which he reasonably believes to be subject to seizure, may seize such things.” However, when the officer’s initial intrusion is unlawful, any evidence in plain view is inadmissible.

194. See id.
196. See id.
198. See id.
201. ARK. R. CRIM. P. 14.4.
IV. EXCEPTIONS TO THE WARRANT REQUIREMENT

There are many situations where Fourth Amendment protection would exist but for an applicable exception. Herein lies the subject of most warrantless search litigation. This section covers the major exceptions to the Fourth Amendment’s warrant requirement: consent searches, investigative or Terry stops, vehicle searches, searches incident to arrest, searches made under exigent circumstances, searches made in hot pursuit, and other miscellaneous exceptions.

A. Consent Searches

"An officer may conduct searches and seizures without a search warrant . . . if consent is given to the search or seizure."203 The consent to search must be voluntary, the search must not exceed the scope of the consent,204 and the one giving consent must have authority to do so.205 Furthermore, the searching officer must comply with limitations on the scope of consent or request of withdrawal of the search.206

While the rules of criminal procedure allow a person to consent if fourteen years of age or older, courts will take the vulnerability of the subject into consideration.207 Courts may consider factors such as an officer’s demeanor, dress, and physical stature, as well as the age and

204. Rule 11.3 states that “[a] search based on consent shall not exceed, in duration or physical scope, the limits of the consent given.” Ark. R. Crim. P. 11.3.
205. The rule covering persons from whom effective consent may be obtained states:
   The consent justifying a search and seizure can only be given, in the case of:
   (a) search of an individual’s person, by the individual in question or, if the
   person is under fourteen (14) years of age, by both the individual and his
   parent, guardian, or a person in loco parentis; (b) search of a vehicle, by the
   person registered as its owner or in apparent control of its operation or
   contents at the time consent is given; and (c) search of premises, by a person
   who, by ownership or otherwise, is apparently entitled to give or withhold
   consent.
206. The rule concerning withdrawal and limitations of consent to search states:
   A consent given may be withdrawn or limited at any time prior to the
   completion of the search, and if so withdrawn or limited, the search under
   authority of the consent shall cease, or be restricted to the new limits, as the
   case may be. Things discovered and subject to seizure prior to such
   withdrawal or limitation of consent shall remain subject to seizure despite
   such change or termination of the consent.
Ark. R. Crim. P. 11.5.
207. See Ark. R. Crim. P. 11.2(a).
sex of the subject. In addition, the court may consider factors such as the defendant's age, education, intelligence, as well as any advice given to the defendant, the length of the defendant's detention, any repeated or prolonged lines of questioning, and the use of physical punishment such as food deprivation. A court must examine the totality of the circumstances in order to find that consent to a search was voluntary. An important factor in determining the voluntariness of a consent, though not determinative in and of itself, is the written consent form commonly used by the police. Written consent forms are not required by the law, but the forms often prove to be the difference in suppression or admission of evidence found pursuant to the consensual search.

The United States Supreme Court has determined that the burden is on the prosecution to prove that the defendant voluntarily consented to the search and was not under duress or coerced, either expressly or impliedly. There are two competing concerns that influence consent searches: the legitimate need for the searches and the need for consent to be free from undue influence. Often police have some evidence of illegal activity but do not have probable cause to arrest or search, and in these situations the consent to search may be the only way the police can obtain important and reliable evidence. Moreover, an officer may request consent to search even without reasonable suspicion. When a police officer has obtained valid consent from a defendant to search, any contraband in plain view can be lawfully seized under the plain view doctrine.

1. Voluntariness

The prosecution has the burden of proving by clear and positive evidence that the defendant freely and voluntarily gave consent and that

208. See United States v. Sanchez, 156 F.3d 875, 878 (8th Cir. 1998).
212. See id.
there was no actual or implied duress or coercion. On appeal, the court reviews the evidence in the light most favorable to the prosecution and considers the totality of the circumstances in determining whether the prosecution has met its burden of proving that the defendant gave consent voluntarily. The appellate court will affirm the finding of voluntariness unless that finding is clearly against the preponderance of the evidence. Courts will often consider whether a defendant knew he had the right to refuse consent in assessing voluntariness; however, this knowledge alone is neither determinative nor required. Furthermore, mere acquiescence to a search cannot overcome the prosecution's burden of proving that the consent was voluntarily. In examining the totality of the circumstances, the court will consider the subtly coercive nature of police questioning and the possibly vulnerable defendant who consents to the search.

Although police often use consent forms to record the permission given by the defendant to search the area, a court can find voluntary consent without the form. For example, where three officers' uncontradicted testimony confirmed that the defendant had signed a consent form, the Arkansas Court of Appeals held that the prosecution had met its burden of proving by clear and positive testimony that the defendant voluntarily gave consent even though the form could not be located at trial.

A defendant's conduct can convey to officers that he has voluntarily consented to a search. For instance, where a defendant assumed the frisk position in response to the officer's request to talk to him and there was nothing indicating that the defendant was involved in any criminal activity, the act of assuming the position was held to indicate the defendant's voluntary consent to a search. Furthermore, where a defendant requested the officer's presence, clearly allowed the officer to enter the residence, and assisted the officer in finding weapons even after a murder had been discovered, the court inferred the defendant's

219. See id., 803 S.W.2d at 943.
220. See id., 803 S.W.2d at 943.
225. See id., 682 S.W.2d at 774.
227. See id., 853 S.W.2d at 261.
voluntary consent from his actions. Likewise, the court found that another defendant consented to the search of his truck and toolbox when he showed the officer the key that unlocked them. Even when the defendant put the key into the truck lock but removed it before unlocking the truck, telling the officer that it was the wrong key, and the officer asked if he could try to open the lock and the defendant responded by handing the officer the key, the court found that the defendant’s actions in handing the officer the key showed his voluntary consent.

The court refused to find consent and excluded evidence discovered during a search when officers requested permission to search defendant’s home only after illegally entering the dwelling and observing contraband. The court declared the evidence to be the fruits of an illegal intrusion regardless of the subsequent consent. An officer can, however, obtain valid consent to search when he stops a defendant’s vehicle, explains that he has information that the defendant was possibly transporting illegal drugs, requests permission to search the vehicle, and the defendant gives consent freely and voluntarily. On the other hand, the court held that when officers confront a defendant with incriminating evidence and threaten that if the defendant refused to consent to a search, the officers would be able to obtain a search warrant, the defendant did not voluntarily and freely give consent. The court explained that “intimidation that a warrant will automatically issue, as though it is merely ministerial, is as inherently coercive as the announcement of an invalid warrant.” The court did not find voluntary consent when the defendant spoke only Spanish and gave consent to his interpreter, and even accompanied officers during the search because the interpreter did not have a strong enough command of the English language to effectively communicate the officer’s request to search.

The prosecution, however, does not have to prove that the defendant knew and understood that he had the right to refuse consent to

232. See id., 804 S.W.2d at 734.
235. See id., 804 S.W.2d at 734.
search in order to prove that the consent was given voluntarily. The United States Supreme Court held that the standard for measuring the scope of a suspect’s consent under the Fourth Amendment is one of “objective” reasonableness—what the typical reasonable person would have understood by the exchange between the officer and the suspect. In *Florida v. Jimeno*, the Court held that once the respondent gave the officer consent to search his vehicle, it was objectively reasonable for the officer to believe that such permission extended to opening containers within the vehicle. There is no Miranda warning required before officers can perform a consensual search.

2. *Scope of Consent*

When one gives consent for the police to search his property, one may legitimately limit the scope of that search and the police may not, without another legal basis, exceed the scope of the consent search. For example, where officers stopped a defendant with expired car tags and the defendant initially consented to a search of his vehicle, but withdrew his consent, and the officer allowed the defendant to continue, but subsequently stopped the vehicle for a second time, the officer lacked probable cause to perform a warrantless search and, therefore, could not continue to search the vehicle. However, the scope of the defendant’s consent to search his car has been held to include consent to search the trunk of the car as well as the passenger compartment.

3. *Who May Consent*

Third parties who possess common authority over premises or items or have an otherwise sufficient relationship to the item searched can consent to a search. In determining the validity of a third party consent to search, courts use an objective standard of whether the facts

241. See *Ark. R. Crim. P.* 11.3.
available to the officer created a reasonable belief that the consenting party had authority over the premises or items searched.245 Where people have joint possession or equal authority over a premises or item, either one may consent to a search of the property.246 For example, a live-in girlfriend that had common authority over an apartment gave valid consent to search the home.247 The girlfriend gave unqualified and unlimited consent to search the entire apartment, and that the defendant boyfriend did not consent to the search of his possession did not matter.248 Also, where officers knew that the utilities were registered to defendant's wife, her clothes were at the residence, she was present at the residence and claimed that she lived there, the Arkansas Supreme Court found that the officers acted reasonably in believing that she had authority to consent to a search of the residence.249

A third party's authority over an area or item may be based on the shared authority, access, or mutual use of the area or item to be searched with the defendant.250 For consent by a third party to be valid, it must be reasonable to believe that the third party has apparent authority to allow inspection of the area or item, and that the absent defendant assumed the risk that the third party may consent to a search of the area or item.251 A spouse's consent to the search of a vehicle and motel room does not violate the Fourth Amendment.252 A registered owner or one in apparent control of the operation of a vehicle may give consent to search the vehicle.253 Where the driver of a vehicle consents to its search, but the passenger is the actual owner of the car and does not protest the search, but rather abandons the car, leaving the vehicle with the officers, the officers act reasonably in believing that the driver is giving valid consent.254

When one abandons property, he loses the right to refuse consent to the search of that property.255 For example, the court deemed a rented

245. See id., 900 S.W.2d at 169.
248. See id., 900 S.W.2d at 169-70.
249. See Hamm, 296 Ark. at 390, 757 S.W.2d at 934-35.
251. See id., 680 S.W.2d at 731.
253. See Ferrell v. State, 7 Ark. App. 36, 37, 644 S.W.2d 302, 303 (1982); see also ARK. R. CRIM. P. 11.2(b).
254. See Ferrell, 7 Ark. App. at 37, 644 S.W.2d at 303.
255. See, e.g., Harris v. Johnson, 12 Ark. App. 181, 188-89, 672 S.W.2d 905, 910
storage unit abandoned when the renter abandoned it under the terms of the rental contract. The defendant failed to pay the rent for six months and failed to leave an address and telephone number with the owner of the rental storage unit. When the owner noticed a strong odor of chemicals emanating from the storage unit, he was justified in calling the police to remove the lock and providing consent to search the van located inside the storage unit.

Similarly, any one of the lessees of a motor home can give valid consent to search the home. Though another lessee had standing to challenge the consent given, the officer’s testimony that the consent was voluntarily given, the signed consent form and the videotape of the exchange between the officer and the lessee who gave consent led the court to determine that the consent was voluntary.

On the other hand, a landlord cannot give consent to search his tenant’s home or apartment. The tenant may voluntarily consent to the search by allowing an officer to come into the home and agreeing to allow the officer to look through the home. For example, the court has held that a defendant freely and voluntarily consented to a search when an officer, who accompanied the defendant home from the hospital, asked if he could look through the house and the defendant agreed.

In determining that an agent could consent to the search of the owner’s property so long as the agent in doing so is acting within the bounds of his delegate authority in consenting to the search, the Arkansas Court of Appeals found that an assistant plant manager who was the highest ranking person at the scene was able to consent to a search of the owner’s property. Likewise, a parent may consent to a search of the child’s room within the house; a child, regardless of age or emancipation, does not have an equal expectation of privacy or right in the home as the child would have in his own apartment or even in a rented hotel room.

(1984) (reversed on other grounds by Harris v. State, 284 Ark. 247, 681 S.W.2d 354 (1984)).

256. See id., 672 S.W.2d at 910.
257. See id., 672 S.W.2d at 910.
258. See id., 672 S.W.2d at 910; see also Ark. R. CRIM. P. 11.2(c).
259. See Mings v. State, 318 Ark. 201, 211, 884 S.W.2d 596, 602-03 (1994).
262. See id., 770 S.W.2d at 164.
Finally, a parolee who signs a form indicating his consent to warrantless searches of his person or the property under his control by a parole officer whenever the officer has reasonable grounds for investigating whether the parolee is violating the terms of his parol or participating in criminal activity has validly consented to a search, because supervising the parolee is considered a special need of the state. 265

B. Investigative or Terry Stops

Law enforcement officers regularly utilize the investigative stop, or Terry 266 stop, exception to the warrant requirement. In Terry v. Ohio, the United States Supreme Court held that the police can briefly detain a person for investigative purposes if the officers have a reasonable suspicion supported by articulable facts that criminal activity may be afoot. 267 The Court has recognized the legitimate need for law enforcement to conduct temporary stops of people and vehicles when they have reason to suspect that criminal activity has been, is, or will be occurring. 268 The Fourth Amendment does not require a trained officer to ignore possibly illegal behavior because the officer does not have probable cause to arrest the suspect. 269 In fact, Terry allows officers to lawfully detain suspects in situations where probable cause cannot yet be determined, but reasonable suspicion exists. 270

267. See id. at 30.

A law enforcement officer lawfully present in any place may, in performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.

1. **Reasonable Suspicion**

Officers must entertain only reasonable suspicion to stop an individual.\(^{271}\) Reasonable suspicion is a lower standard than probable cause.\(^{272}\) Reasonable suspicion is a suspicion that is "based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion."\(^{273}\) Furthermore, courts judge the existence of reasonable suspicion by looking at the totality of the circumstances\(^{274}\) and can assess the collective, rather than the individual, knowledge of the officers involved in order to determine whether reasonable suspicion existed.\(^{275}\) In addition, police officers must make reasonable suspicion determinations based on commonsense decisions and inferences about human behavior.\(^{276}\)

When determining whether an officer acted reasonably in performing a stop and frisk, courts must give weight not to an officer's

\(^{271}\) See Reid v. Georgia, 448 U.S. 438, 440 (1980) ("Any curtailment of a person's liberty by the police must be supported at least be a reasonable and articulable suspicion that the person seized is engaged in criminal activity.").

\(^{272}\) See Tillman, 275 Ark. at 278, 630 S.W.2d at 7.

\(^{273}\) Ark. R. Crim. P. 2.1. The comment to Rule 2.1 lists several factors to be considered in making a reasonable suspicion determination. Those factors are:

(a) The conduct and demeanor of a person.
(b) The gait and manner of a person.
(c) Any knowledge the officer may have of a person's background or character.
(d) Whether a person is carrying anything, and what he is carrying.
(e) The manner of a person's dress, including bulges in his clothing, when considered in light of all the other factors.
(f) The time of the day or night.
(g) Any overheard conversation of a person.
(h) The particular streets and areas involved.
(i) Any information received from a third person, whether he is known or unknown.
(j) Whether a person is consorting with others whose conduct is "reasonably suspect."
(k) A person's proximity to known criminal conduct.
(l) Incidence of crime in the immediate neighborhood.
(m) A person's apparent effort to conceal an article.
(n) Apparent effort of a person to avoid identification or confrontation by the police.


unparticularized suspicions or hunches, but to the specific reasonable inferences an officer is allowed to draw from the facts in light of his training and experience. 277 Courts apply an objective standard to determine the existence of reasonable suspicion. 278

2. Frisk for Weapons

The Arkansas Rules of Criminal Procedure allow officers who briefly detain a suspect under Rule 3.1 to perform limited searches of the suspect’s person and surroundings for a weapon that the suspect could use against the officers or others. 279 Officers may frisk a suspect’s clothing when additional reasonable suspicion indicates that weapons may be involved. 280 However, the officer must articulate reasons why the frisk was necessary based on the specific facts of the incident. 281 This type of frisk protects officers by allowing them to check for weapons. 282 Upon identifying a weapon, an officer may seize the weapon from the suspect’s possession and may admit the weapon into evidence at trial against the suspect. 283

The Arkansas Court of Appeals has limited the Terry search to only the shape and feel of weapons. 284 In Stewart v. State, 285 the court relied on Jackson v. State 286 where an officer discovered a matchbox containing

278. See Terry, 392 U.S. at 21; see also Ark. R. Crim. P. 3.1.
279. See Ark. R. Crim. P. 3.4.
282. See Leopold v. State, 15 Ark. App. 292, 297, 692 S.W.2d 780, 784 (1985) (stating that “[a] frisk is only justified when the officer has a reasonable suspicion that the detainee is armed; the frisk must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault on the police officers”) (internal citations omitted).
285. Id.
crack cocaine during a *Terry* frisk. An equally divided court declared that the search of the matchbox should be permissible because a weapon such as a razor blade could have been hidden inside the box. Because this decision was affirmed by an equally divided court, the case has little precedential value. The *Stewart* court aligned with the reasoning advocated by the dissenting judges in *Jackson* and held that the officer acted unreasonably in opening the small container.

Similarly, when an officer manipulates the contents of a suspect’s clothing, it is likely that the intrusion will be deemed unreasonable. However, the Arkansas Supreme Court has held that an officer who observed either a towel or a shirt covering a passenger’s lap after the defendant “bowed up” during the frisk, where the officer was unable to verify the nature of a bulge in defendant’s pocket, was justified in conducting a limited search of the defendant’s pocket, to determine if the bulge was a weapon. On the other hand, an officer, after observing beer containers and other alcoholic beverages, was not justified in ordering all occupants out of the car so that he could perform a *Terry* frisk, because the officer did not have a reasonable suspicion that the occupants might be armed.

The Arkansas Court of Appeals has held that an officer was justified in performing a weapons pat-down search of a defendant, because he repeatedly attempted to reach for something in his pocket which caused the officer to restrain him. Similarly, officers may require a suspect to exit a vehicle when the officers have received reports that the suspect is armed and dangerous; the officers then are allowed to perform a *Terry* frisk on the individual.

Courts, however, have determined that if an officer has the reasonable suspicion to perform a *Terry* frisk of the individual, the officer may also “frisk” the immediate area around the individual, including his vehicle. The officer may lawfully search the area comprising the vehicle’s passenger compartment that could contain

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287. See *Stewart*, 59 Ark. App. at 85, 953 S.W.2d at 603.
288. See *id.*, 953 S.W.2d at 603.
289. See *id.*, 953 S.W.2d at 603 (relying on *France v. Nelson*, 292 Ark. 219, 221, 729 S.W.2d 161, 163 (1987)).
290. See *Stewart*, 59 Ark. App. at 85, 953 S.W.2d at 603.
weapons so long as he has a reasonable belief that the suspect is armed and dangerous and may have immediate control of a weapon.\textsuperscript{297} The United States Court of Appeals for the Eighth Circuit has declared that even a locked glove compartment could be searched under this rationale.\textsuperscript{298} Moreover, during a legitimate \textit{Terry} search of the interior of a vehicle, an officer can seize any contraband he discovers.\textsuperscript{299}

3. \textit{Grounds for an Investigative Stop}

The factual bases for reasonable suspicion often arise from similar situations. \textit{Terry} stops or investigative stops may be the best-developed exception to the warrant requirement in Arkansas appellate decisions. Case law on these scenarios provides a roadmap of arguments concerning adequate facts to support a detention.

a. Unprovoked Flight Coupled with a Known High Crime Area

The United States Supreme Court has determined that presence in a high crime area coupled with the suspect's unprovoked flight is enough to support a finding of reasonable suspicion for a \textit{Terry} stop.\textsuperscript{300} Arkansas has recently followed that precedent in a case where a defendant, who was in possession of methamphetamine, fled at the sight of the approaching police officers.\textsuperscript{301} The Arkansas Rules of Criminal Procedure do not, however, authorize an officer to stop individuals just because they looked back and quickened their pace as the officer followed them.\textsuperscript{302}

b. Avoiding or Evading the Police

In determining whether reasonable suspicion exists, courts may consider a person's apparent effort to avoid identification by or confrontation with the police.\textsuperscript{303} In \textit{Dickerson}, the suspect remained in

\begin{itemize}
  \item \textsuperscript{297} \textit{See Leopold}, 15 Ark. App. at 297, 692 S.W.2d at 784.
  \item \textsuperscript{299} \textit{See Leopold}, 15 Ark. App. at 297-98, 692 S.W.2d at 784.
  \item \textsuperscript{300} \textit{See Illinois v. Wardlow}, 120 S. Ct. 673, 676 (2000).
  \item \textsuperscript{301} \textit{See Holland v. State}, 71 Ark. App. 84, 86, 27 S.W.2d 753, 755 (2000).
  \item \textsuperscript{302} \textit{See Meadows v. State}, 269 Ark. 380, 382-83, 602 S.W.2d 636, 638 (1980).
\end{itemize}
the vehicle, refusing to open the window or the door when the officer approached. When the suspect eventually exited the vehicle, he repeatedly put his hand into his pockets, giving the officer reasonable suspicion that he may be involved in criminal activity.

Likewise, officers had reasonable suspicion that the defendant was involved in criminal activity when he attempted to avoid a roadblock clearly made visible by police vehicles with flashing blue lights. Additionally, the Arkansas Court of Appeals held that an officer had reasonable suspicion to justify an investigative stop of a defendant when he was attempting to evade the officer, and the vehicle he was driving had a broken window—a common characteristic of stolen vehicles. Similarly, officers have reasonable suspicion to stop a vehicle with suspicious out-of-state handwritten car tags where the driver is attempting to evade the officers.

c. Anonymous Tips

An anonymous tip that someone is armed, without more, is insufficient to justify a stop and frisk of the person. While an anonymous tip alone cannot justify a Terry stop; it can be a factor to consider. On the other hand, a tip from an identified citizen can provide the basis for a Terry stop because the identified informant is subject to criminal and civil liability for proving false information.

The Arkansas Supreme Court has deemed an anonymous tip of drug dealing by an informant with a known history of drug convictions amounted to reasonable suspicion on which to base an investigative

304. See id., 909 S.W.2d at 655.
305. See id., 909 S.W.2d at 655.
310. See Alabama v. White, 496 U.S. 325, 328-29 (1990) (finding that reasonable suspicion existed because by the time the officer made the stop, the officer had sufficiently corroborated the tip).
311. See Frette v. City of Springdale, 331 Ark. 103, 121, 959 S.W.2d 734, 743 (1998). In this case the Arkansas Supreme Court applied a three factor test utilized by the Oregon Court of Appeals where the determination of reasonable suspicion based solely on an anonymous tip had to contain some indicia of reliability by (1) exposing the informant to possible criminal or civil prosecution if the report is false; (2) the report being based on the personal observations of the informant; and (3) the officer's personal observations corroborating the informant's observations. See id. at 118, 959 S.W.2d at 741.
Likewise, the court reasoned that an officer had reasonable suspicion to perform an investigatory stop when a citizen informed the officer that he had seen criminal activity occur, described the vehicle and its occupants, gave the license number, and pointed out the defendant's vehicle as it passed by the officer and the citizen. An anonymous tip accompanied by evidence of the informant's reliability, the accuracy of the information, and the reputation of the area for drug trafficking amounted to reasonable suspicion to justify the officer's investigatory stop. Additionally, officers had reasonable suspicion to stop and detain the defendant based on the smell of marijuana emanating from the car as the defendant rolled down his window. Furthermore, officers had reasonable suspicion to stop and detain the defendant because he matched the description of the rapist given to the police, he was found in the same general area shortly after the rapes occurred with no identification on his person.

However, an anonymous tip corroborated only by a Woodline Motor Freight truck being on the highway between Hot Springs and Little Rock at about the time the caller said the truck would be there was insufficient under the totality of the circumstances to amount to reasonable suspicion to justify an investigative stop. Also, an anonymous tip was insufficient to justify an investigative stop when the tip gave general information about a loud party and a brown jeep, especially when the officer failed to confirm the complaint before stopping the defendant. Along the same lines, an officer is allowed to stop a car based on information from another police department, so long as the dispatching department has developed sufficient reasonable suspicion to believe that defendant was committing or about to commit a crime. When a citizen informant is identified properly, the information provided by that informant is high on the reliability scale. This situation is significantly different from an anonymous tip.


d. Illegal Acts or Violations

An officer's observing certain types of illegal or suspected illegal activity can result in a factual finding of reasonable suspicion. These situations will depend in great part on the individual facts of the case and the knowledge that the officer had prior to the detention. Officers justifiably performed an investigative stop based solely upon the defendant's parked car on the paved or main traveled part of the road because such an act is in violation of Arkansas law. In addition, an officer that feels a bag of cocaine that he can ascertain as such based on his experience as a law enforcement officer may justifiably seize the illegal drugs. However, the Eighth Circuit refused to find reasonable suspicion when a package merely had characteristics of the "Express Mail/Narcotics profile." The label on the package was handwritten and the return address was the same as the shipping address with the exception of the zip code. However, the court explained that even though the characteristics were consistent with packages of contraband, there was no particularized and objective basis for suspecting criminal activity.

The court has even held that an officer who had reason to suspect the defendant was driving without a license and had committed or was about to commit terroristic threatening justifiably stopped the individual under Rule 3.1. Similarly, the court held the officers to be justified in performing an investigative stop when they knew that a murder had occurred, that defendant's voice was heard at the time of the murder, and that the defendant was a felon. Officers also had reasonable suspicion to stop a defendant because they knew that the defendant's roommate was missing, the roommate's employer had reported seeing blood on defendant's porch that was gone the next day, the officers had seen blood at the scene, and the defendant and another roommate moved residences shortly after the roommate's disappearance.

322. See id., 909 S.W.2d at 656 (relying on Minnesota v. Dickerson, 508 U.S. 366, 375-76 (1993)).
323. See United States v. Johnson, 171 F.3d 601, 604 (8th Cir. 1999).
324. See id.
325. See id.
The Arkansas Court of Appeals declared that an officer had reasonable suspicion to approach a suspect when the officer observed him put a loose off-white substance in his mouth that the officer believed might be an illegal drug.\(^3\) An officer seeing a motorcycle weave across the highway at a late hour was also justified in performing an investigative stop to determine if the driver was intoxicated.\(^3\)

Likewise, upon noticing an odor of alcohol after a defendant admitted to having been at a club, the officer had reasonable suspicion to believe that he was committing or about to commit a DWI.\(^3\) Also, when an officer received information that a driver was possibly intoxicated, discovered the defendant asleep in his parked but still running car which matched the description given, found the car parked in an out-of-the-way location, and observed that the defendant had a beer balanced between his legs, and when the defendant did not wake to the officer's knocks on the window, the officer had reasonable suspicion.\(^3\)

The Arkansas Supreme Court has held that an officer, stopping the defendant on the officer's belief that the defendant committed a traffic violation—even though he did not actually commit an offense—may still justifiably make the stop because all that is needed is a reasonable suspicion and not the actual guilt of committing a violation.\(^3\) Recently, the Arkansas Court of Appeals reviewed a situation where an officer initially stopped the defendant and another person because she recognized the other person.\(^3\) The officer stopped the individuals in an area with posted signs prohibiting loitering; the area was also known to the associated with illegal drugs.\(^3\) The Court explained that there was no indication that the individuals were involved in any criminal activity which would allow a detention under Rule 3.1. Since loitering was not a "felony or misdemeanor involving danger of forcible injury to others or of appropriation of or damage to property," the detention was

\(^{332}\) See Nottingham v. State, 29 Ark. App. 95, 97, 778 S.W.2d 629, 630 (1989).
\(^{333}\) See Travis v. State, 331 Ark. 7, 10-11, 959 S.W.2d 32, 34-35 (1998). Here the officer mistakenly believed that Texas law, like Arkansas law, required all license plates to display an expiration sticker. See id.
\(^{335}\) See id., 10 S.W.3d at 107.
illegal. Because the initial encounter was unconstitutional, the motion to suppress should have been granted by the trial court.

4. Duration of the Investigative Stop

The Arkansas Rules of Criminal Procedure explain that an officer may justifiably detain a person under Rule 3.1 for not more than fifteen minutes or for a reasonable amount of time. If the defendant's actions or omissions cause the detention to exceed fifteen minutes, courts will not consider the officers to be in violation of the Fourth Amendment. Moreover, courts will not consider whether officers could have employed a less intrusive means of detention when assessing the reasonableness of a delay. Instead, courts will look to whether the officers acted unreasonably in failing to pursue any alternatives.

C. Vehicle Exception Searches

The United States Supreme Court, in 1925, first recognized the vehicular exception allowing warrantless searches and seizures of vehicles when officers have probable cause to search the vehicle. The search of a vehicle under this exception must be based on probable cause. Mere reasonable suspicion that the vehicle may contain contraband is insufficient to warrant a search. The rationale for doing

336. Id. at 54, 10 S.W.3d at 109.
337. See id. at 54-55, 10 S.W.3d at 108-09.
341. See id. at 687.
343. See United States v. Ross, 456 U.S. 798, 799-800 (1982); see also Ark. R. Crim. P. 14., which states as follows:

(a) An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is:

(i) on a public way or waters or other area open to the public;
(ii) in a private area unlawfully entered by the vehicle; or
(iii) in a private area lawfully entered by the vehicle, provided that exigent circumstances require immediate detention, search, and seizure to prevent destruction or removal of the things subject to seizure.

(b) If the officer does not find the things subject to seizure by his search of
away with the warrant requirement for vehicles where probable cause exists is twofold. First, the inherent mobility of vehicles is troublesome in this context. It is overly burdensome to require officers to obtain a warrant after they determine that probable cause exists. The warrant would be nearly impossible to serve as the vehicle moves from place to place. Second, people have a lower expectation of privacy in a vehicle because a vehicle travels on public streets, the passengers and contents are in plain view, and a vehicle rarely serves as a residence or as a repository for personal effects.

Moreover, the scope of the search extends to anywhere within the vehicle that the contraband might be concealed. Basically, the same scope and burden are required by the exception as are required to obtain a warrant to search the vehicle. The authority to search any locked containers, the trunk area, and any other area or container exists as long as officers have probable cause to support their belief.

1. Readily Mobile

The actual driver of the vehicle or who may be capable of driving the vehicle has no impact on the vehicle exception to the warrant requirement; all that is required is that the vehicle is readily mobile. To be “readily mobile,” the vehicle can be movable by any person and not just the defendant. The Arkansas Supreme Court has construed the vehicle, and if:

(i) the things subject to seizure are of such a size and nature that they could be concealed on the person; and if
(ii) the officer has reason to suspect that one (1) or more of the occupants of the vehicle may have the things subject to seizure so concealed; the officer may search the suspected occupants; provided that this subsection shall not apply to individuals traveling as passengers in a vehicle operating as a common carrier.

(c) This rule shall not be construed to limit the authority of an officer under Rules 2 and 3 hereof.

Id.  
347. See id.
349. See Green v. State, 334 Ark. 484, 978 S.W.2d 300 (1998) (applying the vehicle exception to a commercial bus driven by licensed bus driver).
"readily mobile" to include a vehicle with a flat tire under the rationale that a flat tire could be repaired quickly and easily thereby making the vehicle completely mobile.351

2. **No Exigency Requirement**

The automobile exception does not entail a separate exigency requirement. The United States Supreme Court reiterated this point by explaining that when there is probable cause to search a readily mobile vehicle, there is no need to obtain a warrant even if time permits.352 Under this exception, a routine traffic stop or an investigative stop can turn into a full scale search of the vehicle once probable cause is found.353 For example, in *McDaniel v. State*,354 an officer legally stopped the defendant's vehicle and upon approaching the car, he smelled marijuana which, by itself, amounted to probable cause to search the entire vehicle and any containers, locked or unlocked, that could contain the illegal drugs.355 Additionally, an officer had probable cause to search a vehicle and did so under the vehicle exception without a warrant when he smelled a commonly known masking agent emanating from a particular bag that also smelled of marijuana.356

3. **Probable Cause Must Be Present**

The probable cause requirement must be met before a vehicle can be searched under the vehicular exception.357 For example, an officer, who had no probable cause to search a stopped car could not justify a search of the vehicle under this exception when he stuck his head into the car and smelled marijuana because the initial intrusion was unjustified. Thus, he had insufficient probable cause to support the search.358 Similarly, officers did not have probable cause where their search warrant was merely for the defendant's house, even though they felt it was possible that he could have taken some or all of the drugs with him in his car.359 The officers had only a mere suspicion that the

354. 337 Ark. 431, 990 S.W.2d 300 (1998).
355. See *id.*, 990 S.W.2d at 303.
defendant possessed drugs when they stopped him in his car; thus, they did not have probable cause to search the vehicle under the vehicular exception.  

On the other hand, an officer who saw illegal drugs in plain view inside the defendant's vehicle was justified in searching the entire vehicle for any other illegal drugs. Additionally, officers justifiably searched defendant's car under the vehicular exception because they had sufficient probable cause to believe that the defendant was committing a felony and that his vehicle contained contraband subject to seizure. The officers were warned by two informants that defendant had been selling drugs in a particular area, that on the day of the arrest he could be found at another house preparing and packaging drugs, that he had cocaine in his possession and that he was traveling in a 1977 Buick Electra with an identified license plate number. All of these facts amounted to probable cause that supported the search of the vehicle under the warrant exception of Rule 14.1.  

In another case, officers received information from several sources—some of which were not known to be reliable—that the defendants were dealing cocaine, that they made weekly trips to pick up the cocaine and then sell it, and that they would be driving a specific vehicle that they kept at a named location. Further, the informants stated that any extra drugs left after the initial sale would be kept in a toolbox at a repair shop, that the defendants were leaving at a particular time to make a trip to pick up more cocaine, and that they usually carried handguns when making these trips for the drugs. Though these tips were not sufficient to amount to probable cause, the officers' suspicions allowed them to set up surveillance and further investigate the defendants, and the officers' suspicions rose to the level of probable cause before they stopped the defendants.  

D. Search Incident to Arrest  

Courts have settled that a search incident to a lawful arrest is an historical exception to the warrant requirement of the Fourth Amend-
This exception rests on two grounds: first, it protects the officer's safety and second, it protects possible evidence from being concealed or destroyed. Based on these two justifications for this exception, upon validly arresting a defendant, officers may search the area within the arrestee's immediate control into which he can reach to retrieve a weapon or destroy evidence. A search under this exception must take place substantially contemporaneous to the arrest. This exception to the warrant requirement is codified in the Arkansas Rules of Criminal Procedure.

1. **Lawful Custodial Arrest**

Once an officer makes a lawful custodial arrest, based on probable cause, she needs no additional justification to support a search incident to the arrest, because the officer's authority to search stems from the lawful arrest.

However, even when a valid arrest occurs, unless one of the justifications for the rule exists—the need to protect the officer or the need to protect evidence from destruction—the officer may not conduct a search incident to the arrest. In *Knowles*, the State of Iowa enacted a statute allowing a full search of an automobile when the driver received a citation for speeding. The United States Supreme Court struck down the Iowa statute as unconstitutional as it did not serve either of the two goals of the search incident to an arrest exception. The Court reasoned that the officer was not taking the defendant into custody therefore, the officer was in no danger of being surprised by the

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368. *See id.*
370. *See* ARK. R. CRIM. P. 12.1:
   An officer who is making a lawful arrest may, without a search warrant, conduct a search of the person or property of the accused for the following purposes only:
   (a) to protect the officer, the accused, or others;
   (b) to prevent the escape of the accused;
   (c) to furnish appropriate custodial care if the accused is jailed; or
   (d) to obtain evidence of the commission of the offense for which the accused has been arrested or to seize contraband, the fruits of crime, or other things criminally possessed or used in conjunction with the offense.
373. *See id.*
defendant pulling out a weapon, and the defendant could do nothing to destroy any evidence of speeding.\textsuperscript{374}

However, the Arkansas Supreme Court has reviewed a similar situation but reached the opposite result.\textsuperscript{375} In \textit{State v. Earl}, the Arkansas Supreme Court relied on Rule 5.5 of the Arkansas Rules of Criminal Procure, which allows officers to issue a citation in lieu of making a custodial arrest.\textsuperscript{376} Because the officer had such discretion, the court held that the officer could perform a search incident to an arrest when the violation demanded \textit{either} a citation or an arrest.\textsuperscript{377}

Clearly, an invalid arrest cannot support a search incident to the arrest.\textsuperscript{378} Where the arrest warrant is invalid, the Arkansas Supreme Court has held that any evidence discovered through the search incident to the arrest is inadmissible against the defendant.\textsuperscript{379} Similarly, an arrest may not serve as a pretext for a search.\textsuperscript{380} In fact, when the officer’s true purpose is to search for evidence and he does so utilizing the search incident to an arrest exception, the search will be deemed unreasonable and in violation of the Fourth Amendment.\textsuperscript{381}

2. \textit{Substantially Contemporaneous}

The United States Supreme Court has stated that where “a formal arrest followed quickly on the heels of the challenged search of petitioner’s person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.”\textsuperscript{382} The Arkansas Court of Appeals has held that officers properly searched the defendant

\textsuperscript{374} See id.


\textsuperscript{376} See \textit{Earl}, 333 Ark. at 493-94, 970 S.W.2d at 791-92.

\textsuperscript{377} See id., 970 S.W.2d at 791-92. Though the defendant requested that the Arkansas Supreme Court recall its mandate in light of the \textit{Knowles} decision, the court declined based on the defendant’s failure to raise the question of the constitutionality of Rule 5.5 before the court. See \textit{State v. Earl}, 336 Ark. 271 (1999) (per curiam).


\textsuperscript{381} See id., 706 S.W.2d at 365-66.

\textsuperscript{382} \textit{Rawlings v. Kentucky}, 448 U.S. 98, 110 (1980); see also \textit{Johnson v. State}, 21 Ark. App. 211, 214, 730 S.W.2d 517, 520 (1987) (upholding a search incident to an arrest when the officer stopped the defendant, discovered outstanding arrest warrants for him, and conducted the search prior to arresting the defendant or even notifying him of his impending arrest).
an incident to arrest notwithstanding the fact that the search preceded the arrest, because probable cause to arrest was present prior to the search and the search and the arrest were substantially contemporaneous.383

In another Arkansas case, officers lawfully arrested the defendant, saw contraband including a bank bag, cash, a stolen check, and three shotgun shells, and properly seized the evidence under the search incident to an arrest exception. The court reasoned that even though the officers found the evidence plain view prior to the physical arrest of defendant, they found it substantially contemporaneous to the arrest.384

The Arkansas Court of Appeals explained that the search was unreasonable when no exigent circumstances justified the search incident to the arrest, i.e., the officers were in no danger that the arrestee would destroy evidence or present them any harm.385 In this case the officers arrested the defendant at 1:00 a.m. in Fort Smith, Arkansas, and searched his home in Paris, Arkansas at 5:00 a.m. under the guise of a search incident to his arrest; the search was in violation of the Fourth Amendment since it could not be justified under the warrant exception.386

3. The Arrestee’s Immediate Control

The scope of the search incident to an arrest includes all areas where the arrestee could hide fruits of a crime, means of an escape, or weapons that could endanger the arresting officer or others on the scene.387 The United States Supreme Court has explained that the interior passenger compartment of a vehicle is considered to be the area within the immediate control of the arrestee and includes any containers, opened or closed, within the passenger compartment.388 The United

386. See id., 668 S.W.2d at 35.
(a) If, at the time of the arrest, the accused is in a vehicle or in the immediate vicinity of a vehicle of which he is in apparent control, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are connected with the offense for which the arrest is made, the arresting officer may search the vehicle for such things and seize any things subject to seizure and discovered
States Court of Appeals for the Eighth Circuit has gone as far as to include a locked glove compartment in the permissible area to be search incident to an arrest. The area within the immediate control of the arrestee does not include the trunk, the hatchback portion of a vehicle is not a truck and is subject to search under this exception.

Recently, the United States Supreme Court extended the scope of a search incident to an arrest to include not only the arrestee's belongings located within the passenger compartment but also the passenger's belongings inside the passenger compartment. The Court explained that vehicle passengers have a lower expectation of privacy in their belongings and if there is probable cause to search the vehicle based on another occupant in the car, then officers may search all passengers' belongings that are within the passenger compartment.

The Arkansas Court of Appeals upheld a search of an arrestee's purse when she did not have the purse in her possession upon the arrest, but her young child brought it to her after she was in custody. The defendant had locked her keys in her car and when the officer arrived he recognized the defendant, knew of her arrest record, discovered that the license plate on her car was registered to another vehicle, and learned that she had outstanding arrest warrants for writing hot checks. When the officer arrested the defendant, her nine year old daughter brought her

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2001] SEARCH AND SEIZURE LAW 469

in the course of the search.

(b) The search of a vehicle pursuant to this rule shall only be made contemporaneously with the arrest or as soon thereafter as is reasonably practicable.

Id.; see also ARK. R. CRIM. P. 12.2:

An officer making an arrest and the authorized officials at the police station or other place of detention to which the accused is brought may conduct a search of the accused's garments and personal effects ready to hand, the surface of his body, and the area within his immediate control.

Id.

389. See United States v. McCrady, 774 F.2d 868, 871-72 (8th Cir. 1985) (explaining that an officer who took the keys from the ignition of the vehicle and asked the passenger to unlock the glove compartment where the officer found additional contraband, acted properly and within the confines of the search incident to an arrest exception).

390. See id., 453 U.S. at 460-61 n.4.


392. See Wyoming v. Houghton, 526 U.S. 295, 303 (1999) (holding that the officer who saw a hypodermic needle in the driver's pocket in plain view had probable cause to search the entire passenger compartment, including the belongings of the other occupant).

393. See id. at 306-07.


395. See id. at 82, 911 S.W.2d at 262.
purse to her and when the officer checked the bag for weapons, he found illegal drugs inside.  

Similarly, officers permissibly seized a diary from the defendant’s table because it was within her immediate control. Even though the defendant was in the hospital, she could leave her bed and her diary was only five to six feet away from her bed, bringing it clearly within her immediate control and subject to seizure incident to a lawful arrest.

E. Inventory Searches

Inventory searches are a well-established exception to the Fourth Amendment’s warrant requirement. Law enforcement officers may secure and inventory the contents of automobiles that have been impounded or otherwise taken into police custody without violating the Fourth Amendment. Officers may conduct a permissible inventory search without the existence of exigent circumstances and without a showing of probable cause or even reasonable suspicion. However, the search must be reasonable under the Fourth Amendment; the underlying arrest must be lawful and there must be standard police policies outlining such a search. Officers must also perform an inventory search in a timely manner. This exception to the warrant requirement developed in response to three potential problems; first, it protects the owner’s property while in police custody, second, it protects the police against claims or disputes over lost or stolen property, and third, it protects the police from potential danger. Also, police often

396. See id., 911 S.W.2d at 262.
398. See id., 814 S.W.2d at 911-12.
401. See id; see also Henderson v. State, 16 Ark. App. 225, 227, 699 S.W.2d 419, 420 (1985) (en banc) (stating that “inventory searches do not rest upon findings of probable cause and, in light of their noninvestigatory nature, do not implicate the warrant requirement”) (internal citation omitted).
402. See Florida v. Wells, 495 U.S. 1, 4-5 (1990) (holding that absent a policy governing the opening of closed containers during an inventory search, the search of a closed container did not satisfy the Fourth Amendment as it was not regulated by such a policy).
403. See Folly v. State, 28 Ark. App. 98, 107-08, 771 S.W.2d 306, 311-12 (1989) (en banc) (explaining that the requirement that a vehicle be inventoried after it is taken into police custody does not mean that the vehicle cannot be searched prior to being towed).
404. See Opperman, 428 U.S. at 369.
discover that no one claims impounded vehicles that were stolen.\textsuperscript{405} As long as circumstances permit an inventory search, any police suspicion that contraband may be found is of no consequence.\textsuperscript{406} The Arkansas Rules of Criminal Procedure specifically address the inventory search of a person as well as a vehicle.\textsuperscript{407}

1. \textit{The Scope of an Inventory Search}

Officers may not use a search justified under the inventory exception for "general rummaging" through the arrestee's personal effects.\textsuperscript{408} Police may inventory the contents of an impounded vehicle if they do so in good faith and in accordance with standard policies and procedures.\textsuperscript{409} There is no requirement that only one inventory search be conducted on each vehicle.\textsuperscript{410} The Supreme Court of Arkansas held that even though a city ordinance required wrecker drivers to inventory the contents of a vehicle in the presence of an investigating officer before towing it, the search did not preclude the police from conducting an additional inventory search when the circumstances warrant such action.\textsuperscript{411}

a. Containers Within Vehicles

An inventory search of a vehicle can include opening any closed containers within the vehicle, such as a backpack, because the same

\textsuperscript{405} See \textit{id.}.
\textsuperscript{407} See \textit{Ark. R. Crim. P.} 12.6.

(a) Things not subject to seizure which are found in the course of a search of the person of an accused may be taken from his possession if reasonably necessary for custodial purposes. Documents or other records may be read or otherwise examined only to the extent necessary for such purposes, including identity checking and ensuring the physical well being of the person arrested. Disposition of things so taken shall be made in accordance with Rule 15 hereof.

(b) A vehicle in consequence of an arrest, or retained in official custody for other good cause, may be searched at such times and to such extent is reasonable necessary for safekeeping of the vehicle and its contents.

\textit{Id.}

\textsuperscript{408} See \textit{Thompson v. State}, 333 Ark. 92, 97, 966 S.W.2d 901, 904 (1998).
\textsuperscript{409} See \textit{id.}, 966 S.W.2d at 904.
\textsuperscript{411} See \textit{id.}, 795 S.W.2d at 918-19.
justifications apply to those areas as to the rest of the vehicle.\textsuperscript{412} Police properly searched an unlocked and unlatched briefcase in the back seat of a car as part of their inventory search.\textsuperscript{413} Safeguarding the property, protecting officers safety and minimizing disputes over lost or stolen property justified the officer’s search of the briefcase.\textsuperscript{414} Likewise, officers in good faith inventoried an unlocked toolbox in the defendant’s vehicle pursuant to standard police policy, and in doing so did not violate the Fourth Amendment.\textsuperscript{415}

b. The Person of the Arrestee

Police may also search the person of the arrestee under the inventory search exception.\textsuperscript{416} In fact, the Arkansas Court of Appeals has held that a strip search of the defendant conducted at the jail does not violate the Fourth Amendment because the defendant’s arrest was lawful, and the search was a lawful inventory search of his personal effects prior to police placing him in a jail cell.\textsuperscript{417}

2. Lawful Arrest

Only a lawful arrest can form the foundation of an inventory search. The Arkansas Court of Appeals made this point clear by holding that police who impounded and inventoried defendant’s vehicle without probable cause supporting the owner’s arrest, performed an illegal search of the vehicle.\textsuperscript{418} Likewise, any evidence seized during an inventory search conducted at a jail pursuant to an unlawful arrest is in violation of the Fourth Amendment and is inadmissible.\textsuperscript{419} But officers conducted a lawful inventory search after arresting a defendant and impounding his vehicle because he had no license plate on the vehicle, he was stopped in the middle of an intersection, he could not dislodge his car from the mud, he was intoxicated, and he was a self-proclaimed

\begin{itemize}
  \item \textsuperscript{413} See Henderson v. State, 16 Ark. App. 225, 230, 699 S.W.2d 419, 421 (1985) (en banc).
  \item \textsuperscript{414} See id., 699 S.W.2d at 421.
  \item \textsuperscript{416} See McDaniell v. State, 20 Ark. App. 201, 208, 726 S.W.2d 688, 692 (1987).
  \item \textsuperscript{417} See id., 726 S.W.2d at 692.
  \item \textsuperscript{418} See Mounts v. State, 48 Ark. App. 1, 6, 888 S.W.2d 321, 325 (1994) (en banc).
  \item \textsuperscript{419} See Richardson v. State, 288 Ark. 407, 414, 706 S.W.2d 363, 367-78 (1986).
\end{itemize}
transient with no one to contact to take his vehicle. The court reasoned that the officers were duty-bound to keep the intoxicated individual from driving and to provide for the removal of his vehicle from the street as well as the storage of it until the defendant’s release.

Similarly, the court has upheld an inventory search where the police learned, prior to conducting the search, that the defendant was not the person wanted for escaping, but the officers still had reasonable grounds to suspect that the defendant’s vehicle was stolen because there was no vehicle identification number, no registration, and the defendant had no driver’s license.

Interestingly, officers may perform an inventory search without a precedent lawful arrest so long as the officer is carrying out community caretaking functions. In Lipovich v. State, the Arkansas Supreme Court held that a warrantless inventory search of an abandoned vehicle did not implicate the Fourth Amendment because the officers were performing part of their community caretaking functions by securing and protecting the vehicle, its contents, and the public.

3. Police Policy and Procedure

The reasonableness of a particular police intrusion, such as an inventory search, does not rest on whether an alternative “less intrusive” means existed. Instead, the crux of the analysis is whether the initial arrest was lawful and whether the search was conducted pursuant to a standard policy. There is, however, no requirement that the policy pertaining to inventory searches be written.

Police must perform inventory searches under an established policy and must follow regular procedure in order to prove that they did not conduct the search under a pretext. In fact, the policy endorsed by the

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421. See id., 652 S.W.2d at 648.
423. See Lipovich v. State, 265 Ark. 55, 56, 576 S.W.2d 720, 721 (1979) (holding that where officers received complaints of an abandoned U-Haul truck creating a traffic hazard, and the rightful owner broke the lock and opened the trunk, the officers conducted a permissible inventory search of the truck’s contents).
424. See id., 576 S.W.2d at 721.
police department may allow for the opening of certain containers. The Arkansas Supreme Court has upheld an inventory search of an impounded vehicle, including the search of an unlocked container that revealed a pistol, because the officer followed standard procedure in conducting the inventory search. For example, following the standard department policies by attempting, albeit unsuccessfully, to contact any of the defendant's acquaintances, officers lawfully impounded and inventoried a vehicle where the defendant had no proof of liability insurance, no working taillights, and no driver's license. All the fruits of the search were legally obtained and admissible because the officers performed a valid inventory search.

F. Exigent Circumstance Searches

In certain emergency situations where evidence may be lost or destroyed before a warrant can be issued, an officer may conduct a warrantless search and seizure under the exigent circumstances exception. The warrantless entry into a suspect's home without exigent circumstances is prohibited. Officers may not circumvent the warrant requirement by knocking on the defendant's door, asking him to step outside, and then arresting him without a warrant. The Arkansas Rules of Criminal Procedure set out the standard for an emergency search.

429. See id., 721 S.W.2d at 633.
431. See id., 966 S.W.2d at 904.
433. See Minnesota v. Olsen, 495 U.S. 91, 100-01 (1990); see also Payton v. New York, 445 U.S. 573, 583 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 447-75 (1971); Haynes v. State, 269 Ark. 506, 511, 602 S.W.2d 599, 601 (1980); Mincey v. Arizona, 437 U.S. 385, 393 (1978) (holding that because officers knew the locations of all persons in the apartment prior to the search and the officers conducted a four-day search of the apartment, including searching the dresser drawers and ripping up carpet, exigent circumstances did not exist and the officers conducted the search in violation of the Fourth Amendment.)

An officer who has reasonable cause to believe that premises or a vehicle contain:

(a) individuals in imminent danger of death or serious bodily harm; or
(b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or
(c) things subject to seizure which will cause or be used to cause death
Exigent circumstances are circumstance necessarily involving immediate aid or action, and although there is no precise list of those circumstance falling into the category of exigent, courts have established several examples. These include the risk of destroying or concealing evidence and the risk of death or serious injury to officers and others.\textsuperscript{436} Other examples are the belief that the suspect is armed, probable cause to believe that the suspect committed a crime, a reasonable belief that the suspect is in the dwelling being entered, and the reasonable belief that the suspect will escape if not promptly captured.\textsuperscript{437} Exigent circumstances may arise at any time. They can support a warrantless search and seizure even when the officers could have obtained a warrant prior to the exigencies.\textsuperscript{438}

The government bears the burden of proving that exigent circumstances were present and sufficient to overcome the presumption that warrantless searches are unreasonable.\textsuperscript{439} In a hearing to determine the existence of exigent circumstances, the arresting officer may testify about statements made by others upon which he relied in determining that exigent circumstance justified his actions.\textsuperscript{440}

The exigent circumstances exception justifies warrantless searches when there is a risk of death or severe bodily injury.\textsuperscript{441} A dead body will not justify a warrantless search under the exigent circumstances exception because there is no impending threat of death or bodily injury.\textsuperscript{442} However, upon arriving at the scene of a homicide, officers may conduct a prompt warrantless search of the area to find any other victims or to locate the killer. The officers may seize any evidence in

or serious bodily harm if their seizure is delayed; may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent reasonably necessary for the prevention of such death, bodily harm or destruction.

\textit{Id.}


\textsuperscript{442} See Mitchell v. State, 294 Ark. 264, 271-72, 742 S.W.2d 895, 899 (1988) (holding that because the anonymous caller emphasized that the decedent was shot and dead for some time, the officer did not justifiably perform a warrantless search since he could not have reasonably believed that anyone was in danger or in need of medical attention, or that the body might be removed or destroyed).
The need to investigate the scene of an accident, without more, is not a justifiable exigent circumstance for eliminating the warrant requirement.\(^{444}\)

It is necessary to consider the gravity of the offense forming the basis of the arrest when ascertaining whether exigent circumstances exist.\(^{445}\) A warrantless intrusion based on a minor offense does not justify a search based on exigent circumstances.\(^{446}\) In addition, the Arkansas Court of Appeals has held that exigent circumstances did not exist when all that was lacking was the formality of obtaining a warrant and there was sufficient time to do so.\(^{447}\)

G. Hot Pursuit

Police pursuing a dangerous suspect may apprehend and perform a warrantless search and seize any evidence or contraband pursuant to the "hot pursuit" doctrine.\(^{448}\) Police may enter and search a private residence without a warrant if the circumstances justify application of the hot pursuit doctrine.\(^{449}\) Such an intrusion is lawful upon a showing that the exigent circumstances are of sufficient magnitude.\(^{450}\) The permissible scope of a search pursuant to this doctrine includes areas reasonably necessary to prevent the suspect from escaping and to prevent the suspect from harming others.\(^{451}\)

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443. See McCambridge v. City of Little Rock, 298 Ark. 219, 227, 766 S.W.2d 909, 912-13 (1989) (holding that the officer performed a proper warrantless search after the deceased's attorney invited the officer to accompany him to his client's house because the attorney feared that the family was in possible danger based on a telephone call from his client, and upon entering the home the officer found the deceased in a pool of blood).

444. See Evans v. State, 65 Ark. App. 232, 236-37, 987 S.W.2d 741, 743-44 (1999) (holding that exigent circumstances did not warrant a search of the defendant's purse because paramedics were on the scene and administering aid to the defendant and officers were given the purse by a paramedic at the scene but did not search the purse until the officers returned to the police station).


446. See id. at 217, 829 S.W.2d at 415 (holding that where an officer followed the defendant into his home to arrest him for disorderly conduct, the officer actions were in violation of the Fourth Amendment as no exigent circumstances justified the intrusion).


450. See id.

Courts consider many factors in determining whether hot pursuit justifies a warrantless entry into a private area. These factors include the seriousness of the crime the suspect allegedly committed, the proof that the suspect committed the crime, whether the suspect is armed, how likely it is that the suspect is on the premises, the likelihood that the suspect would escape if not captured, any chance the officers gave the suspect to surrender, whether the officers entered the premises reasonably peacefully, when the officers facilitated the entry, and whether efforts to obtain a warrant would have caused great delay.

Arkansas uses the term “fresh pursuit” rather than hot pursuit. The language used in Arkansas fresh pursuit statute is broad enough to encompass misdemeanors. Additionally, officers may justifiably search or seize under the fresh pursuit doctrine when the pursuit ends outside the officer’s territorial jurisdiction as long as the officer began his pursuit within his jurisdiction.

The Arkansas Supreme Court has made it clear that officers cannot enter a residence in hot pursuit of a suspect pursuant to the fresh pursuit doctrine on the ground that the suspect might destroy the evidence—that is, his blood alcohol level—by simply allowing time to pass. Though the court found that driving while intoxicated is a serious offense, it noted that the first offense is, nonetheless, treated as a misdemeanor.

The United States Supreme Court had held that the officers were not justified in entering a residence without a warrant to arrest the suspect for a

453. See ARK. CODE ANN. § 16-81-301 (Michie Repl. 1994). The fresh pursuit doctrine is codified at Arkansas Code Annotated section 16-81-301 which states: Any peace officer of this state in fresh pursuit of a person who is reasonably believed to have committed a felony in this state or has committed, or attempted to commit, any criminal offense in this state in the presence of such officer, or for whom the officer holds a warrant of arrest for a criminal offense, shall have the authority to arrest and hold in custody such person anywhere in this state.
455. See Brown v. State, 38 Ark. App. 18, 21-22, 827 S.W.2d 174, 177 (1992) (en banc) (explaining that officers may act outside their jurisdiction under four circumstances: (1) when the officer is in fresh pursuit; (2) the officer has an arrest warrant; (3) the department has a policy regulating officers acting outside its jurisdiction; and (4) a county sheriff requests that the officer come into the county).
457. See id. at 403, 993 S.W.2d at 922.
458. See id., 993 S.W.2d at 922.
In addition, the Eighth Circuit had held that the government's interest in preventing drunk driving did not override the protections afforded by the Fourth Amendment. The Arkansas Supreme Court declared that once inside the residence, the suspect no longer posed a threat to the public. Therefore, the court held that the warrantless entry and seizure did not comply with the Fourth Amendment even though the evidence of the suspect's blood alcohol level might dissipate while the officer obtained a warrant.

H. Other Exceptions

1. Inevitable Discovery Doctrine

The United States Supreme Court first adopted the inevitable discovery doctrine in 1984. The Court explained that the purpose of the doctrine was to "block setting aside convictions that would have been obtained without police misconduct." Arkansas has also adopted the inevitable discovery doctrine. In Brunson, the Arkansas Supreme Court explained that an officer no longer had to prove that he acted in good faith before being able to take advantage of this warrant exception. The court further explained that the inevitable discovery doctrine advanced the goals of the exclusionary rule while ensuring that the police were not in a worse position then they would have been had no unlawful conduct occurred.

Under the inevitable discovery doctrine, evidence may be admissible even though illegal police conduct occurred so long as the prosecution can prove by a preponderance of the evidence that the police would have discovered the evidence by lawful means. The Eighth Circuit has explained that the prosecution:

[M]ust prove by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct, and (2)

459. See id., 993 S.W.2d at 922.
460. See id., 993 S.W.2d at 922.
461. See Norris, 338 Ark. at 406, 993 S.W.2d at 924.
463. See id. at 444 n.4.
465. See id., 753 S.W.2d at 861-62.
466. See id., 753 S.W.2d at 861 (relying on Nix v. Williams, 467 U.S. 431, 443 (1984)).
that the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation.\textsuperscript{468}

2. \textit{Roadblocks}

It is well known that when officers stop a vehicle at a roadblock or checkpoint, they implicate the Fourth Amendment.\textsuperscript{469} Once an officer stops a vehicle at a roadblock, the appropriate inquiry is whether the seizure is reasonable under the Fourth Amendment.\textsuperscript{470} The United States Supreme Court set forth a three-pronged balancing test to determine the lawfulness of a vehicle stop made on less than a reasonable suspicion of criminal activity.\textsuperscript{471} The Court articulated the test as follows: "Consideration of the constitutionality of such seizures 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."\textsuperscript{472} Utilizing the three-pronged test as set out in \textit{Brown}, the Arkansas Supreme Court has upheld roadblocks for the purpose of checking drivers' license and vehicle registrations\textsuperscript{473} as well as checking for driver sobriety.\textsuperscript{474}

3. \textit{Canine Sniffs as Searches}

The United States Supreme Court has held that a dog sniff does not constitute a search in derogation of the Fourth Amendment.\textsuperscript{475} The Court explained that the sniff of a trained police dog is quick, the dog's reaction can signal the presence or absence of contraband while revealing nothing about any non-contraband items, and the dog sniff does not generally intrude into a person's reasonable expectation of

\textsuperscript{468} United States v. Madrid, 152 F.3d 1034, 1038 (8th Cir. 1998) (internal citations omitted).
\textsuperscript{469} See Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990) (relying on United States v. Martinez-Fuerte, 428 U.S. 543, 556-59 (1976)).
\textsuperscript{470} See Sitz, 496 U.S. at 450.
\textsuperscript{472} See \textit{id}. Interestingly, the United States Supreme Court recently held that certain types of drug interdiction checkpoints are unconstitutional under the Fourth Amendment. \textit{See} City of Indianapolis v. Edmond, 121 S. Ct. 447, 453 (2000).
\textsuperscript{473} See Stobaugh v. State, 298 Ark. 577, 580, 769 S.W.2d 26, 28 (1989).
\textsuperscript{474} See Mullinax v. State, 327 Ark. 41, 48, 938 S.W.2d 801, 805 (1997).
\textsuperscript{475} See United States v. Place, 462 U.S. 696, 706-07 (1983) (explaining that "the canine sniff is sui generis ... [and] we are aware of no other investigative procedure that is so limited in the manner in which the information is obtained and in the content of the information revealed by the procedure").
privacy. The United States Court of Appeals for the Eighth Circuit has held that both a canine sniff of a common corridor in a hotel and a canine sniff of a vehicle parked in a public alley did not violate the Fourth Amendment.

A dog’s sniff, though much more powerful and precise than a human sniff, is no different from a human sniff in that neither one implicate the Fourth Amendment when performed from a lawful vantage point. Clearly, a canine sniff of the exterior of personal property in a public location is limited both in the “manner in which the information is obtained and in the content of the information revealed by the procedure,” so that it does not constitute a search within the meaning of the Fourth Amendment. The key issue, then, in most dog sniff litigation is not whether the sniff was a search but whether the officer justifiably detained the suspect prior to and until the dog could perform the sniff. Moreover, the dog sniff can serve as the basis for probable cause to obtain a warrant or to search pursuant to the vehicle exception or other warrant requirement exceptions.

In Vega, a State trooper stopped the defendant and subsequently required him to post a bond for a speeding violation. When the defendant arrived at the detention center, a police dog sniffed the exterior of his car and detected a controlled substance within. The court explained that the sniff of an automobile parked in a public place or in police custody is so limited an intrusion that it does not amount to a Fourth Amendment search.

4. Protective Sweeps

The United States Supreme Court has allowed a cursory sweep, or a protective sweep, of the general area of an arrest. This exception is closely akin to search incident to arrest. An arresting officer is

476. See id.
477. See United States v. Roby, 122 F.3d 1120, 1124-25 (8th Cir. 1997).
479. See Roby, 122 F.3d at 1124-25.
481. See United States v. Beck, 140 F.3d 1129, 1134 (8th Cir. 1998).
483. See id., 939 S.W.2d at 324.
484. See id., 939 S.W.2d at 324.
485. See id., 939 S.W.2d at 324.
permitted to search in closets and other spaces immediately abutting the location of arrest from where an attack could be instigated.\textsuperscript{487} However, the officer must have a reasonable belief that the area to be searched harbors an individual who may pose a threat to those present and the search must end when the possibility of danger passes.\textsuperscript{488}

XII. APPEALS

A defendant may appeal an adverse ruling on a motion to suppress in one of two ways. First, the defendant can allow the case to go to trial on the merits of the case, where the defendant will need to file a pre-trial motion to suppress in order to preserve the issue for appeal.\textsuperscript{489} After the conclusion of the trial, the defendant can appeal to the appellate court which will make an "independent determination based on the totality of the circumstances, . . . view the evidence in the light most favorable to the appellee, and . . . reverse only if the ruling is clearly erroneous or against the preponderance of the evidence."\textsuperscript{490} "All presumptions are favorable to the trial court's ruling on the legality of an arrest, and the burden of demonstrating error is on the appellant."\textsuperscript{491}

Even if an error is determined to have occurred, the error may be harmless. The Arkansas Supreme Court has recognized that while "some constitutional rights are so fundamental that their violation can never be deemed harmless error, others are subject to the harmless-error analysis."\textsuperscript{492} The appellate court must determine beyond a reasonable doubt that the error had no bearing on the verdict in order to conclude that a constitutional error is harmless and does not mandate reversal.\textsuperscript{493}

The defendant's second appeal option is to enter a conditional plea. However, this option may only be pursued with the consent of the court and of the prosecutor.\textsuperscript{494} A defendant may retain the right to appeal an adverse suppression ruling by entering a conditional plea of guilt

\textsuperscript{487} See id.; United States v. Clayton, 210 F.3d 841 (8th Cir. 2000).
\textsuperscript{488} See id. at 334-35; United States v. Jones, 193 F.3d 948, 950 (8th Cir. 1999).
\textsuperscript{490} Fouse v. State, 337 Ark. 13, 17, 989 S.W.2d 146, 147 (1999); see also Langford v. State, 332 Ark. 54, 59, 962 S.W.2d 358, 361 (1998).
\textsuperscript{491} Efurd v. State, 334 Ark. 596, 600, 976 S.W.2d 928, 931 (1998); see also Humphrey v. State, 327 Ark. 753, 763, 904 S.W.2d 860, 865 (1997).
\textsuperscript{493} See id., 984 S.W.2d at 440.
pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure.\textsuperscript{495} Other than an appeal from a sentence imposed by a jury after a guilty plea, Rule 24.3(b) provides the only procedure for an appeal from a plea of guilty.\textsuperscript{496} The Arkansas Supreme Court interprets Rule 24.3(b) strictly with the requirement that the right to appeal be received in writing; otherwise, the appellate court does not obtain jurisdiction.\textsuperscript{497} The court will not have jurisdiction even when there has been an attempt to enter a conditional plea below.\textsuperscript{498} The court has further interpreted Rule 24.3(b) to require that there be a contemporaneous writing by the defendant reserving his or her right to appeal.\textsuperscript{499} There must also be an indication that the defendant entered the conditional guilty plea with the approval of the trial court and the consent of the prosecuting attorney.\textsuperscript{500} Failure to strictly comply with these rules will result in a procedural bar to the appeal.\textsuperscript{501}

Finally, the prosecution may appeal from an adverse ruling by using Rule 3 of the Arkansas Rules of Appellate Procedure.\textsuperscript{502} Obviously, in

\begin{itemize}
\item \textsuperscript{495} See Ark. R. Crim. P. 24.3(b).
\item With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.
\item Id.
\item Ray v. State, 328 Ark. 176, 177, 941 S.W.2d 427, 428 (1997).
\item See id., 930 S.W.2d at 321-22 (1996).
\item See Ark. R. App. P. — Crim 3:
\item (a) An interlocutory appeal on behalf of the state may be taken only from a pretrial order in a felony prosecution which (1) grants a motion under Ark. R. Crim. P. 16.2 to suppress seized evidence, (2) suppresses a defendant's confession, or (3) grants a motion under Ark. Code Ann. § 16-42-101(c) to allow evidence of the victim's prior sexual conduct. The prosecuting attorney shall file, within ten (10) days after the entering of the order, a notice of appeal together with a certificate that the appeal is not taken for the purposes of delay and that the order substantially prejudices the prosecution of the case. Further proceedings in the trial court shall be stayed pending determination of the appeal.
\item (b) Where an appeal, other than an interlocutory appeal, is desired on behalf of the state following either misdemeanor or felony prosecution, the
these cases, the state would be the appellee and, thus, subject to the same standards as the defendant in an appeal on suppression issues.503

XIV. CONCLUSION

A majority of criminal cases involve either a statement obtained or physical evidence seized pursuant to warrantless encounters between citizens and police. The Fourth Amendment protects citizens from unreasonable searches and seizures, but not from necessary and proper investigations of illegal conduct.504 A simple formula runs through all of search and seizure analysis: The greater the intrusion, the greater the justification required to uphold the intrusion as a reasonable search.505 If a citizen has no interest, standing, or expectation of privacy in an area then the government need not show any justification to support that intrusion.506 The standard increases from there, and to detain a citizen, reasonable suspicion is needed.507 To search a vehicle, probable cause is needed.508 And at the paramount, the United States Supreme Court has confirmed that illegal entry into one’s home is the chief evil guarded against by the Fourth Amendment.509 The interests of society will always be weighed against the protection given to individuals. Due to

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prosecuting attorney shall file a notice of appeal within thirty (30) days after entry of a final order by the trial judge.

(c) When a notice of appeal is filed pursuant to either subsection (a) or (b) of this rule, the clerk of the court in which the prosecution sought to be appealed took place shall immediately cause a transcript of the trial record to be made and transmitted to the attorney general, or delivered to the prosecuting attorney, to be by him delivered to the attorney general. If the attorney general, on inspecting the trial record, is satisfied that error has been committed to the prejudice of the state, and that the correct and uniform administration of the criminal law requires review by the Supreme Court, he may take the appeal by filing the transcript of the trial record with the clerk of the Supreme Court within sixty (60) days after the filing of the notice of appeal.

(d) A decision by the Arkansas Supreme Court sustaining in its entirety an order appealed under subsection (a) hereof shall bar further proceedings against the defendant on the charge.

504. U.S. CONST. amend. IV.
506. See supra Part. II.
507. See supra Part. IV.
508. See supra Part. V.
the constant balance between those important interests, the law of Fourth Amendment search and seizure is in an eternal state of flux.