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THE FOURTH AMENDMENT—
SPECIFIC GENERAL SITUATIONS

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INTRODUCTION

Over the years the Courts have recognized numerous search and seizure situations that do not require either an arrest or search warrant. State v. Rome, 2000 WI App 243, ¶ 11, 239 Wis.2d

491, 497, 620 N.W.2d 225; State v. Pallone, 2000 WI 77, ¶ 30, 236 Wis.2d 162, 179, 613 N.W.2d 568. The purpose of this outline is to set forth information about those situations, along with some other situations, in a useful manner. The first part of this outline contains a list/description of numerous exceptions to the warrant requirement (consent, a Terry frisk, etc.). One of the values of this part of the outline is that it is a good checklist of possible legal theories that can be used to justify a specific warrantless search or seizure. The second part addresses the community caretaker function, administrative search situations, special needs situations, and checkpoints. The third part contains a brief discussion of subpoenas for records. The fourth part addresses a seizure of a person and an arrest of a person. The last part addresses the issue of whether a search or seizure is not subject to the Fourth Amendment because it does not involve governmental action. Each part contains a listing of relevant cases, sometimes a summary of one or more cases, and, in a few instances, a summary of the relevant law.

A majority of the search and seizure situations involving a person on probation, parole, or extended supervision are in the **SPECIAL NEEDS** section.

One or more Wisconsin Court of Appeals cases in this outline may contain an incomplete Wisconsin citation such as 2008 WI App ____. Such a citation indicates that on the date of this outline, the case had been recommended for publication in the official reports but it had not yet been ordered published.

I have prepared, or am in the process of preparing, numerous other outlines which extensively discuss various Fourth Amendment areas/issues. Many of these outlines are referenced in this outline when the subject of the outline is addressed. See, for example, the discussion of search warrants and plain view.

In some parts of this outline I refer to “Attachment A” which contains a more detailed discussion of certain cases. Attachment A will be distributed at a later date.

I would appreciate any comments or suggestions concerning the contents of this outline and its format. My work e-mail is Robert.Donohoo@da.wi.gov and my home e-mail is bob-diane@wi.rr.com.

THE CRIME EXCEPTIONS TO THE WARRANT REQUIREMENT

Introduction

The cases in this part of the outline are divided into three categories: (1) Search And/Or Seizure Of An Inanimate Object; (2) Search Of A Person; (3) Seizure Of A Person.

Consent can be used in many different situations to justify a warrantless police action. Rather than divide the consent cases between each type of situation, I have instead placed all of the consent cases under the ***Search And/Or Seizure Of An Inanimate Object*** situation.

The cases under ***Search And/Or Seizure Of An Inanimate Object*** are arranged/divided into these legal theories: (1) consent, (2) automobile exception, (3) forfeiture seizure of a vehicle, (4) search incident to arrest—general law, (5) search incident to arrest—area near the arrestee, (6) search incident to arrest—the arrestee, (7) search incident to arrest—an item carried by or near the arrestee, (8) search incident to arrest—vehicle, (9) search incident to arrest—a delayed search, (10) emergency doctrine—general law, (11) emergency doctrine—animals, (12) vehicle inventory, (13) custodial or inventory search of an arrestee and items associated with the arrestee, (14) a second look search,(15) plain view, feel, hearing, etc., (16) Terry stop identification search, (17) Terry search of a vehicle, (18) exigent circumstances—general law, (19) exigent circumstances—destruction or loss of evidence, (20) exigent circumstances—hot pursuit, (21) exigent circumstances—threat to the safety of officers or others, (22) exigent circumstances—flight of the suspect, (23) exigent circumstances—fire emergency, (24) exigent circumstances—animals, (25) protective sweep—arrest related, (26) protective sweep—other than an arrest, (27) detention of property based on reasonable suspicion, (28) routine border searches and seizures, (29) monitoring the conduct of a person in custody, (30) seizure of a dwelling pending the arrival of a search warrant, (31) entry of back-up officers.

The cases under ***Search Of A Person*** are arranged/divided into these legal theories: (1) consent, (2) implied consent, (3) search incident to arrest—the arrestee and items associated with the arrestee, (4) custodial or inventory search of an arrested person and items associated with that person, (5) Terry stop identification search, (6) Terry frisk, (7) Terry frisk of a person during a search warrant, (8) obtaining blood from a person—OWI incident, (9) obtaining blood from a person—other than an OWI incident, (10) border searches, (11) physically invasive procedures, (12) probation or parole related search, (13) probable cause search.

The cases under ***Seizure Of A Person*** are arranged/divided into these legal theories: (1) consent, (2) Terry seizure, (3) detention of a person during a search warrant, (4) detention of person pending the arrival of a search warrant, (5) detention of a person who approaches a place where a search warrant is being executed (6) protective detention of a person during an arrest of another person, (7) routine border, (8) monitoring the conduct of a person in custody, (9) arrest of a person.

Search And/Or Seizure Of An Inanimate Object

1. The consent exception. State v. St. Germaine, 2007 WI App 214, 305 Wis.2d 511, 740 N.W.2d 148 (the entry into the defendant's rented room was valid based on the third-party apparent authority consent given by the property owner to search the home; the defendant was present when the owner gave consent; an extensive discussion of the apparent authority doctrine; one of the factors used by the Court was the defendant's silence/no objection during the search); State v. Hartwig, 2007 WI App 160, 302 Wis.2d 678, 735 N.W.2d 597(a search of a vehicle while the defendant was seized; the issue was the voluntariness of the consent; statement of voluntariness law; the state's burden of proof is by a preponderance of the evidence; the Court rejected the theory that a person cannot give consent if the person is seized/in custody; the defendant actively assisted in the search; defendant's consent was voluntary—see Attachment A); State v. Bons, 2007 WI App 124,301 Wis.2d 277, 731 N.W.2d 367 (a search of a vehicle during a traffic stop that was extended based on reasonable suspicion; the Court found that the defendant in fact gave consent; the Court found that the consent was voluntary; general statement of voluntariness law including that the state's burden of proof is clear and convincing; one of the voluntariness factors was that the defendant cooperated and even affirmatively assisted with the search by providing the keys to his car and opening the trunk—see Attachment A); State v. Johnson, 2007 WI 32, 299 Wis.2d 675, 729 N.W.2d 182 (a search of a vehicle during a traffic stop situation; statement of general law; defendant's response of "I don't have a problem with that" in response to officer's "due to your movements we were going to search the vehicle" was not a free and voluntarily consent because it was a mere acquiescence—see Attachment A); State v. Kolk, 2006 WI App 261, ¶¶ 20-24, 298 Wis.2d 99, 114-18, 726 N.W.2d 337 (brief statement of general law; defendant's consent to search himself and his car was given while the defendant was illegally seized after a traffic stop had concluded and therefore it was invalid); State v. Giebel, 2006 WI App 239, 297 Wis.2d 446, 724 N.W.2d 402; State v. Luebeck, 2006 WI App 87, 292 Wis.2d 748, 715 N.W.2d 639;

State v. Kelley, 2005 WI App 199, 285 Wis.2d 756, 704 N.W.2d 377; State v. Sykes, 2005 WI 48, ¶ 21 n.7, 279 Wis.2d 742, 755 n.7, 695 N.W.2d 277; State v. Ragsdale, 2004 WI App 178, 276 Wis.2d 52, 687 N.W.2d 785; State v. Knapp, 2003 WI 121, 265 Wis.2d 278, 666 N.W.2d 881, vacated and remanded on other grounds, 542 U.S. 952 (2004), reinstated, 2005 WI 127, ¶ 2, 285 Wis.2d 86, 89, 700 N.W.2d 899; State v. Wintlend, 2002 WI App 314, 258 Wis.2d 875, 655 N.W.2d 745; State v. Williams, 2002 WI App 306, ¶ 24 n.5, 258 Wis.2d 395, 410 n.5, 655 N.W.2d 462; Village of Little Chute v. Walitalo, 2002 WI App 211, 256 Wis.2d 1032, 650 N.W.2d 891; State v. Vorburger, 2002 WI 105, 255 Wis.2d 537, 648 N.W.2d 829; State v. Williams, 2002 WI 94, 255 Wis.2d 1, 646 N.W.2d 834; State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367; State v. Wallace, 2002 WI App 61, 251 Wis.2d 625, 642 N.W.2d 549; State v. Stout, 2002 WI App 41, ¶¶ 1-8, 16-18, 32, 250 Wis.2d 768, 774-77, 781-83, 791, 641 N.W.2d 474; State v. VanLaarhoven, 2001 WI App 275, 248 Wis.2d 881, 637 N.W.2d 411; State v. Trecroci, 2001 WI App 126, 246 Wis.2d 261, 630 N.W.2d 555; State v. Munroe, 2001 WI App 104, 244 Wis.2d 1, 630 N.W.2d 223; State v. Matejka, 2000 WI 5, 241 Wis.2d 52, 621 N.W.2d 891, cert. denied, 532 U.S. 1058 (2001); State v. Richter, 2000 WI 58, 235 Wis.2d 524, 612 N.W.2d 29; State v. Hughes, 2000 WI 24, 233 Wis.2d 280, 607 N.W.2d 621, cert. denied, 531 U.S. 856 (2000); State v. Wilson, 229 Wis.2d 256, 600 N.W.2d 14 (Ct. App. 1999); State v. Bermudez, 221 Wis.2d 338, 585 N.W.2d 628 (Ct. App. 1998); State v. Stankus, 220 Wis.2d 232, 582 N.W.2d 468 (Ct. App. 1998); State v. Phillips, 218 Wis.2d 180, 577 N.W.2d 794 (1998); State v. Kieffer, 217 Wis.2d 531, 577 N.W.2d 352 (1998); State v. Kiekhefer, 212 Wis.2d 460, 569 N.W.2d 316 (Ct. App. 1997); State v. Gaulrapp, 207 Wis.2d 600, 558 N.W.2d 696 (Ct. App. 1996); State v. Garcia, 195 Wis.2d 68, 535 N.W.2d 124 (Ct. App. 1995); State v. Johnson, 187 Wis.2d 237, 522 N.W.2d 588 (Ct. App. 1994); State v. Johnston, 184 Wis.2d 794, 518 N.W.2d 759 (1994), cert. denied, 513 U.S. 1021 (1994); State v. Xiong, 178 Wis.2d 525, 504 N.W.2d 428 (Ct. App. 1993); Callahan v. Millard County, 494 F.3d 891 (10th Cir. 2007), certiorari granted by the United States Supreme Court under Pearson v. Callahan, 07-751, 128 S.Ct. 1702 (2008) (does the consent once removed

doctrine apply when the undercover person is a confidential informant rather than a law enforcement officer); Samson v. California, 547 U.S. 843, 852 n.3, 863 n.4, 126 S.Ct. 2193, 2199 n.3, 2206 n.4 (2006); Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515 (2006); United States v. Drayton, 536 U.S. 194, 122 S.Ct. 2105 (2002); United States v. Knights, 534 U.S. 112, 122 S.Ct. 587 (2001); Ohio v. Robinette, 519 U.S. 33, 117 S.Ct. 417 (1996); Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801 (1991); Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793 (1990); Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973); United States v. Ryerson, 545 F.3d 483 (7th Cir. 2008) (the Court found that the consent to search the garage of the defendant's home, given by Lawicki, who was the defendant's ex-wife and present girlfriend, was valid both as a third party actual authority consent search and as a third party apparent authority consent search. This was so despite the fact that Lawicki had left the home and was staying somewhere else because of a tiff with the defendant); Michael C. v. Gresbach, 526 F.3d 1008, 1015-16 (7th Cir. 2008) (brief statement of scope law; the consent of a private school principal to interview a child did not include a search of the child's body); United States v. Renken, 474 F.3d 984 (7th Cir. 2007) (the defendant's implied consent to enter his home and his actual consent to search his home while he was in custody were both voluntary); United States v. Goins, 437 F.3d 644 (7th Cir. 2006) (the doctrine of apparent authority); United States v. Breit, 429 F.3d 725 (7th Cir. 2005); United States v. Bernitt, 392 F.3d 873 (7th Cir. 2004); Hadley v. Williams, 368 F.3d 747 (7th Cir. 2004); United States v. Melgar, 227 F.3d 1038 (7th Cir. 2000); United States v. Basinski, 226 F.3d 829 (7th Cir. 2000); United States v. Wesela, 223 F.3d 656 (7th Cir. 2000).

2. The automobile/vehicle exception. State v. Sherry, 2004 WI App 207, 277 Wis.2d 194, 690 N.W.2d 435; State v. Miller, 2002 WI App 150, 256 Wis.2d 80, 647 N.W.2d 348; State v. Marquardt, 2001 WI App 219, 247 Wis.2d 765, 635 N.W.2d 188 (an extensive discussion of this exception; the two requirements are that the vehicle is readily mobile and probable cause to search—probable cause to believe the vehicle contains evidence of a crime; there is no "public place" requirement nor is there

an "impracticability of obtaining a search warrant" requirement; the defendant was arrested in his home; at the time of his arrest, the defendant's locked vehicle was parked in his driveway; in the hours after the defendant was arrested, the sheriff's department arranged for the vehicle to be hauled to the department where it was searched; two days later, the vehicle was transported to the State Crime Laboratory in Madison where it was again searched; no warrant was ever obtained for the search and seizure of the vehicle; the Court held that both warrantless searches were justified pursuant to the automobile exception); State v. Matejka, 2000 WI 5, 241 Wis.2d 52, 621 N.W.2d 891, cert. denied, 532 U.S. 1058 (2001); State v. Pallone, 2000 WI 77, 236 Wis.2d 162, 613 N.W.2d 568; State v. Secrist, 224 Wis.2d 201, 210-12, 589 N.W.2d 387, cert. denied, 526 U.S. 1140 (1999); State v. Stankus, 220 Wis.2d 232, 582 N.W.2d 468 (Ct. App. 1998); State v. Caban, 210 Wis.2d 598, 563 N.W.2d 501 (1997); State v. Pozo, 198 Wis.2d 706, 544 N.W.2d 228 (Ct. App. 1995); State v. Gaines, 197 Wis.2d 102, 539 N.W.2d 723 (Ct. App. 1995); State v. Durbin, 170 Wis.2d 475, 489 N.W.2d 655 (Ct. App. 1992) (the Court held that an unhitched camper trailer that was parked in the back yard of the owner's residence was not covered by he automobile exception); State v. Weber, 163 Wis.2d 116, 471 N.W.2d 187 (1991); State v. Thompkins, 144 Wis.2d 116, 423 N.W.2d 823 (1988); Maryland v. Dyson, 527 U.S. 465, 119 S.Ct. 2013 (1999); Florida v. White, 526 U.S 559, 119 S.Ct. 1555 (1999); Wyoming v. Houghton, 526 U.S. 295, 119 S.Ct. 1297 (1999); Pennsylvania v. Labron, 518 U.S. 938, 940-41, 116 S.Ct. 2485 (1996) (*per curiam*); California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982 (1991); California v. Carney, 471 U.S. 386, 105 S.Ct. 2066 (1985) (the Court held that the search of a motor home parked in a public lot was within the automobile exception); Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925); United States v. Hines, 449 F.3d 808 (7th Cir. 2006); United States v. Pittman, 411 F.3d 813 (7th Cir. 2005); United States v. Faison, 195 F.3d 890 (7th Cir. 1999); United States v. Ortiz, 84 F.3d 977, 982-83 (7th Cir. 1996).

3. The seizure of a vehicle pursuant to a forfeiture statute. Florida v. White, 526 U.S. 559, 119 S.Ct. 1555 (1999).

4. The search incident to an arrest exception—general law. State v. Carroll, 2008 WI App 161, ¶ 23, ____ Wis.2d ____, ____ N.W.2d ____; State v. Sanders, 2008 WI 85, ¶¶ 48 and 49, ____ Wis.2d ____, ____, 752 N.W.2d 713; State v. Marten-Hoye, 2008 WI App 19, 307 Wis.2d 671; 746 N.W.2d 498 (the situation where the police tell the person that he or she is under arrest, handcuff the person, tell the person that he or she will receive a municipal ordinance violation ticket, and the person will then be released; what is an arrest sufficient to allow a search under this exception; this situation does not authorize a search under this exception); Virginia v. Moore, ____ U.S. ____, ____, 128 S.Ct. 1598, 1607-08 (2008) (brief statement of the law including that no additional justification is required to perform certain searches; the Court also used the term "custodial" arrest and spoke of taking the arrestee into custody and transporting the person to the police station; the police do not violate the Fourth Amendment when they perform a search incident to an arrest that is based on probable cause but prohibited by state law).

5. The search incident to an arrest exception—the area near the arrestee. State v. Sanders, 2008 WI 85, ¶¶ 1-4, 43-59, ____ Wis.2d ____, ____, 752 N.W.2d 713 (the defendant was arrested in a living room outside of a bedroom that he had just left, the defendant was removed from the home, the bedroom was then entered and searched, the Court assumed that during the search of the bedroom a beef jerky canister that was found under the bed was searched and cocaine was found in it; the Court stated that the bedroom might have been considered within the defendant's immediate presence or control; the search of the bedroom was not authorized under this exception because the defendant had been removed from the home at the time of the search; statement of general law); State v. Sykes, 2005 WI 48, 279 Wis.2d 742, 695 N.W.2d 277; State v. Kiekhefer, 212 Wis.2d 460, 569

N.W.2d 316 (Ct. App. 1997); State v. Angiolo, 186 Wis.2d 488, 520 N.W.2d 923 (Ct. App. 1994); State v. Murdock, 155 Wis.2d 217, 455 N.W.2d 618 (1990); Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2127 (2004); Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969); United States v. Adams, 26 F.3d 702 (7th Cir. 1994).

6. The search incident to an arrest exception—the arrestee. State v. Carroll, 2008 WI App 161, ____ Wis.2d ____, ____ N.W.2d ____ (answering an incoming cell phone call); State v. Sykes, 2005 WI 48, 279 Wis.2d 742, 695 N.W.2d 277; State v. Erickson, 2003 WI App 43, ¶¶ 6-11, 260 Wis.2d 279, 283-86, 659 N.W.2d 407; State v. Hart, 2001 WI App 283, 249 Wis.2d 329, 639 N.W.2d 213; State v. Ritchie, 2000 WI App 136, 237 Wis.2d 664, 614 N.W.2d 837; State v. Ford, 211 Wis.2d 741, 565 N.W.2d 286 (Ct. App. 1997); State v. Gaines, 197 Wis.2d 102, 539 N.W.2d 723 (Ct. App. 1995); State v. Mordeszewski, 68 Wis.2d 649, 229 N.W.2d 642 (1975); United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467 (1973); United States v. Adams, 26 F.3d 702 (7th Cir. 1994).

7. The search incident to an arrest exception—an item being carried by or near the arrestee. State v. Phelps, 73 Wis.2d 313, 243 N.W.2d 213 (1976); United States v. Fleming, 677 F.2d 602, 606-608 (7th Cir. 1982).

8. The search incident to an arrest exception—a vehicle (a Belton search). State v. Dearborn, 2008 WI App 131, ____ Wis.2d ____, ____ N.W.2d ____ (the defendant is stopped for driving with a revoked license, the defendant gets out of his vehicle and locks the vehicle and waits by the vehicle, the defendant is told that he is under arrest, the defendant fights with the officer, the defendant flees to the front door of a nearby house where he is subdued and handcuffed, the defendant is placed in a nearby squad car, the police then enter the defendant's locked vehicle—the opinion does not state how entry was made—and find marijuana in a container in the passenger compartment; the Court found that the search was a valid Belton search based on Littlejohn); State v. Littlejohn, 2008 WI App 45, 307 Wis.2d 477, 747 N.W.2d

712 (the defendant exited his car, locked it, officers made contact with the defendant and arrested the defendant while he was in the immediate area of the car, the passenger compartment was searched immediately after the defendant's arrest while the defendant was handcuffed and secured in a squad car at the scene; the Court found that the search was a valid Belton search; a Belton search can include an entry into a locked vehicle—the opinion does not indicate how the officers entered the locked car; statement and discussion of numerous basic Belton law concepts including that the state is not required to show in each case that the area searched was actually accessible to the arrestee at the time of the search; application of Thornton to the facts of this case; the Court rejected the defendant's contention that the search was invalid because the car was not within the defendant's "immediate control" because of the defendant's position in relation to the car when he was arrested); State v. Nieves, 2007 WI App 189, ¶¶ 15-16, 304 Wis.2d 182, 190-91, 738 N.W.2d 125 (a discussion of the Knowles search incident to a citation situation); State v. Pallone, 2000 WI 77, 236 Wis.2d 162, 613 N.W.2d 568; State v. Thompkins, 144 Wis.2d 116, 423 N.W.2d 823 (1988); State v. Fry, 131 Wis.2d 153, 388 N.W.2d 565 (1986), cert. denied, 479 U.S. 989 (1986); Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2127 (2004); Florida v. Thomas, 532 U.S. 774, 121 S.Ct. 1905 (2001); New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860 (1981); United States v. Powell, 483 F.3d 836 (D.C. App. 2007) (in some cases a Belton search can precede the actual arrest); United States v. Pittman, 411 F.3d 813 (7th Cir. 2005); United States v. Sholola, 124 F.3d 803, 816-18 (7th Cir. 1997); United States v. Richardson, 121 F.3d 1051 (7th Cir. 1997); Arizona v. Gant, 07-542, presently pending before the United States Supreme Court (does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?).

9. The search incident to an arrest exception—a delayed search including a delayed police safety search. State v. Wade, 215 Wis.2d 678, 573 N.W.2d 228 (Ct. App. 1997); People v. Diaz, 165 Cal. App. 4th 732, 81 Cal. Rptr. 3d 215 (2008).

10. The emergency doctrine exception. State v. Larsen, 2007 WI App 147, 302 Wis.2d 718, 736 N.W.2d 211 (statement of general law; in kidnapping cases the emergency doctrine permits a search not only for the kidnap victim but also for evidence that might lead to the victim's location—the emergency doctrine permits officers investigating a kidnapping case to conduct a warrantless search if the officers possess an objectively reasonable belief that the particular search will result in finding the victim or evidence leading to the victim's location; the test is an objective test and therefore an officer's subjective motivations are not relevant—see Attachment A); State v. Leutenegger, 2004 WI App 127, ¶¶ 4-10, 275 Wis.2d 512, 516-21, 685 N.W.2d 536; United States v. Ferguson, 2001 WI App 102, 244 Wis.2d 17, 629 N.W.2d 788; State v. Rome, 2000 WI App 243, 239 Wis.2d 491, 620 N.W.2d 225; State v. York, 159 Wis.2d 215, 464 N.W.2d 36 (Ct. App. 1990); State v. Boggess, 115 Wis.2d 443, 340 N.W.2d 516 (1983); Brigham City, Utah v. Stuart, 547 U.S. 398, 126 S.Ct. 1943 (2006); United States v. Bell, 500 F.3d 609 (7th Cir. 2007); United States v. Uscanga-Ramirez, 475 F.3d 1024 (8th Cir. 2007) (see 20 below); United States v. Najar, 451 F.3d 710 (10th Cir. 2006), cert. denied, ____ U.S. ____, 127 S.Ct. 542 (2006).

11. The emergency doctrine exception—animals. State v. Bauer, 127 Wis.2d 401, 379 N.W.2d 895 (Ct. App. 1985); Siebert v. Severino, 256 F.3d 648 (7th Cir. 2000).

12. The vehicle inventory exception. State v. Sumner, 2008 WI 94, ¶ 71, ____ Wis.2d ____, ____, 752 N.w.2d 783; State v. Clark, 2003 WI App 121, 265 Wis.2d 557, 666 N.W.2d 112; State v. Gaines, 197 Wis.2d 102, 539 N.W.2d 723 (Ct. App. 1995); State v. Weber, 163 Wis.2d 116, 471 N.W.2d 187 (1991); State v. Weide, 155 Wis.2d 537, 455 N.W.2d 899 (1990); State v. Callaway, 106 Wis.2d 503, 317 N.W.2d 428

(1982), cert. denied, 459 U.S. 967 (1982); Florida v. Wells, 495 U.S. 1, 110 S.Ct. 1632 (1990); South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976); United States v. Cherry, 436 F.3d 769 (7th Cir. 2006); United States v. Lozano, 171 F.3d 1129 (7th Cir. 1999), cert. denied, 528 U.S. 946 (1999); State v. Richardson, 121 F.3d 1051 (7th Cir. 1997).

13. Custodial or inventory search of an arrestee and items associated with the arrestee. State v. Gaines, 197 Wis.2d 102, 539 N.W.2d 723 (Ct. App. 1995); State v. Fillyaw, 104 Wis.2d 700, 312 N.W.2d 795 (1981), cert. denied, 455 U.S. 1026 (1982); Illinois v. LaFayette, 462 U.S. 640, 103 S.Ct. 2605 (1983).

14. The police examination of the effects of a person lawfully in custody that have previously been searched (usually referred to as a "second look" search). State v. Betterly, 191 Wis.2d 407, 529 N.W.2d 216 (1995). See my separate outline which addresses this issue.

15. The plain view, feel/touch, hearing, etc., seizure exception. State v. Applewhite, 2008 WI App 138, ____ Wis.2d ____, ____ N.W.2d ____ (an extensive discussion of the plain feel doctrine in the context of an officer feeling an item that he believes is/contains a controlled substance during a Terry frisk; the recovery of the drugs was valid under the plain feel doctrine; statement of the three plain view requirements); State v. Sanders, 2008 WI 85, ¶ 37, ____ Wis.2d ____, ____, 752 N.W.2d 713; State v. Kelley, 2005 WI App 199, 285 Wis.2d 756, 704 N.W.2d 377; State v. Ragsdale, 2004 WI App 178, ¶¶ 2-3, 16-17, 276 Wis.2d 52, 56-57, 62-63, 687 N.W.2d 785; State v. Trecroci, 2001 WI App 126, ¶ 13 n.6, 246 Wis.2d 261, 272 n.6, 630 N.W.2d 555; State v. Schroeder, 2000 WI App 128, 237 Wis.2d 575, 613 N.W.2d 911; State v. McGill, 2000 WI 38, 234 Wis.2d 560, 609 N.W.2d 795, cert. denied, 531 U.S. 906 (2000); State v. Oswald, 2000 WI App 2, ¶¶ 40-44, 232 Wis.2d 103, 130-32, 606 N.W.2d 207; State v. Ford, 211 Wis.2d 741, 746, 565 N.W.2d 286 (Ct. App. 1997) (plain feel); State v. Gil, 208 Wis.2d 531, 533-38, 543-47, 561 N.W.2d 760 (Ct. App. 1997) (plain hearing); State v. Edgeberg, 188

Wis.2d 339, 524 N.W.2d 911 (Ct. App. 1994); State v. Angiolo, 186 Wis.2d 488, 520 N.W.2d 923 (Ct. App. 1994); State v. Johnston, 184 Wis.2d 794, 809-10, 518 N.W.2d 759, cert. denied, 513 U.S. 1021 (1994); State v. Buchanan, 178 Wis.2d 441, 449-50, 504 N.W.2d 400 (Ct. App. 1993) (plain feel); State v. Guy, 172 Wis.2d 86, 101-02, 492 N.W.2d 311 (1992), cert. denied, 509 U.S. 914 (1993) (plain feel); State v. Washington, 134 Wis.2d 108, 396 N.W.22d 156 (1986) (plain feel); Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993) (plain feel); Horton v. California, 496 U.S. 128, 110 S.Ct. 2301 (1990); United States v. Yamba, 506 F.3d 251 (3d Cir. 2007) (an excellent discussion of the plain feel concept in the context of a Terry frisk of a person during which the officer feels an item that he or she believes contains a controlled substance); United States v. Rivers, 121 F.3d 1043 (7th Cir. 1997); United States v. Brown, 79 F.3d 1499 (7th Cir.), cert. denied, 519 U.S. 875 (1996). See my separate outline for a detailed discussion of the plain view doctrine.

16. A Terry stop identification search. State v. Black, 2000 WI App 175, 238 Wis.2d 203, 617 N.W.2d 210, cert. denied, 531 U.S. 1182 (2001); State v. Flynn, 92 Wis.2d 427, 285 N.W.2d 710 (1979).

17. The Terry search (frisk) of a vehicle exception—a protective search of a vehicle. State v. Alexander, 2008 WI App 9, 307 Wis.2d 323, 744 N.W.2d 909; State v. Johnson, 2007 WI 32, 299 Wis.2d 675, 729 N.W.2d 182; State v. Williams, 2001 WI 21, 241 Wis.2d 631, 623 N.W.2d 106; State v. Moretto, 144 Wis.2d 171, 423 N.W.2d 841 (1988); Minnesota v. Dickerson, 508 U.S. 366, 374, 113 S.Ct. 2130, 2136 (1993); Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469 (1983); United States v. Arnold, 388 F.3d 237 (7th Cir. 2004); United States v. Brown, 232 F.3d 589 (7th Cir. 2000); United States v. Mancillas, 183 F.3d 682 (7th Cir. 1999), cert. denied, 529 U.S 1005 (2000); United States v. Brown, 133 F.3d 993 (7th Cir. 1998), cert. denied, 118 S.Ct. 1824 (1998); United States v. Evans, 994 F.2d 317 (7th Cir. 1993).

18. The exigent circumstances exception—general law. State v. Sanders, 2008 WI 85, ¶¶ 61, 78-93, 112, 113, 138-150, ____ Wis.2d ____, ____, 752 N.W.2d 713.

19. The exigent circumstances exception—— destruction or loss of evidence. State v. Faust, 2004 WI 99, ¶¶ 11-14, 22-24, 274 Wis.2d 183, 192-94, 682 N.W.2d 371; cert. denied, 543 U.S. 1089 (2005); State v. Larson, 2003 WI App 150, 266 Wis.2d 236, 668 N.W.2d 338; State v. Garrett, 2001 WI App 240, 248 Wis.2d 61, 635 N.W.2d 615; State v. Rodriguez, 2001 WI App 206, 247 Wis.2d 734, 634 N.W.2d 844; State v. Hughes, 2000 WI 24, 233 Wis.2d 280, 607 N.W.2d 621, cert. denied, 531 U.S. 856 (2000); State v. Kiekhefer, 212 Wis.2d 460, 569 N.W.2d 316 (Ct. App. 1997); State v. Johnston, 184 Wis.2d 794, 815-16, 518 N.W.2d 759, cert. denied, 513 U.S. 1021 (1994); State v. Bohling, 173 Wis.2d 529, 537-38, 494 N.W.2d 399 (1993); State v. Amos, 153 Wis.2d 257, 268-70, 450 N.W.2d 503 (Ct. App. 1989); State v. Peardot, 119 Wis.2d 400, 351 N.W.2d 172 (Ct. App. 1984); United States v. Rivera, 248 F.3d 677 (7th Cir. 2001).

20. The exigent circumstances exception——hot pursuit. State v. Sanders, 2008 WI 85, ¶¶ 6-13, 25, 61-159, ____ Wis.2d ____, ____, 752 N.W.2d 713; State v. Larson, 2003 WI App 150, 266 Wis.2d 236, 668 N.W.2d 338; State v. Mikkelson, 2002 WI App 152, 256 Wis.2d 132, 647 N.W.2d 421; State v. Rodriguez, 2001 WI App 206, 247 Wis.2d 734, 634 N.W.2d 844; State v. Kryzaniak, 2001 WI App 44, 241 Wis.2d 358, 624 N.W.2d 389; State v. Richter, 2000 WI 58, 235 Wis.2d 524, 612 N.W.2d 29; State v. Milashoski, 159 Wis.2d 99, 111, 464 N.W.2d 21 (Ct. App. 1990), aff'd, 163 Wis.2d 72, 471 N.W.2d 42 (1991); State v. Smith, 131 Wis.2d 220, 388 N.W.2d 601 (1986). In State v. Ferguson, 2007AP2095-CR, presently pending before the Wisconsin Supreme Court, one of the issues is whether the hot pursuit doctrine was applicable and rendered constitutional a warrantless entry into an individual's home when the police are seeking to arrest the individual for a misdemeanor.

21. The exigent circumstances exception——a threat to the safety of the officers or others. State v. Leutenegger, 2004 WI App 127, 275

Wis.2d 512, 685 N.W.2d 536; State v. Harwood, 2003 WI App 215, 267 Wis.2d 386, 671 N.W.2d 325; State v. Larson, 2003 WI App 150, 266 Wis.2d 236, 668 N.W.2d 338; State v. Mielke, 2002 WI App 251, 257 Wis.2d 876, 653 N.W.2d 316; State v. Londo, 2002 WI App 90, 252 Wis.2d 731, 643 N.W.2d 869; State v. Richter, 2000 WI 58, 235 Wis.2d 524, 612 N.W.2d 29; State v. Kiekhefer, 212 Wis.2d 460, 569 N.W.2d 316 (Ct. App. 1997); State v. Smith, 131 Wis.2d 220, 388 N.W.2d 601 (1986); United States v. Bell, 500 F.3d 609 (7th Cir. 2007); United States v. Uscanga-Ramirez, 475 F.3d 1025 (8th Cir. 2007) (officers received information from the defendant's wife that the defendant had locked himself in a bedroom with a gun and that he was upset over the disintegration of his marriage; officers were justified in entering the home and the bedroom without a warrant; a search under a pillow in the bedroom for a gun was reasonable). United States v. Kempf, 400 F.3d 501 (7th Cir. 2005); United States v. Lenoir, 318 F.3d 725 (7th Cir. 2003); United States v. Jenkins, 329 F.3d 579 (7th Cir. 2003); United States v. Richardson, 208 F.3d 626 (7th Cir.2000).

22. The exigent circumstances exception——a likelihood that the suspect would flee. State v. Harwood, 2003 WI App 215, 267 Wis.2d 386, 671 N.W.2d 325; State v. Smith, 131 Wis.2d 220, 388 N.W.2d 601 (1986).

23. The exigent circumstances exception——fire emergency exception. State v. Gonzalez, 147 Wis.2d 165, 432 N.W.2d 651 (Ct. App. 1988); State v. Monosso, 103 Wis.2d 368, 373-74, 308 N.W.2d 891 (Ct. App. 1981); Michigan v. Clifford, 464 U.S. 287, 293, 104 S.Ct. 641 (1984); Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942 (1978); State v. O'Keefe, 143 Idaho 278, 141 P.3d 1147 (2006) (the entry of a warehouse to see if an electrical problem inside of it caused a fire outside of the warehouse; State v. Bunting, 142 Idaho 908, 136 P.3d 379 (Ct. App. 2006) (when can law enforcement officers enter a building not in connection with the determination of the cause of the fire)..

24. The exigent circumstances exception——animals. See 11. above.

25. The protective sweep search exception—arrest related. State v. Sanders, 2008 WI 85, ¶¶ 1-4, 25-42, ____ Wis.2d ____, 752 N.W.2d 713 (defendant was arrested in a living room outside of a bedroom that he had just left, the bedroom was then entered and searched, the Court assumed that during the search of the bedroom a beef jerky canister found under the bed was searched and cocaine was found in it; the Court concluded that the search of the bedroom may have been justified under the protective sweep exception; however, the search of the canister and the seizure of its contents were not justified under the protective sweep exception; statement of general protective sweep law including that the standard is reasonable suspicion); State v. Stout, 2002 WI App 41, ¶¶ 25-26, 250 Wis.2d 768, 787-88, 641 N.W.2d 474; State v. Garrett, 2001 WI App 240, 248 Wis.2d 61, 635 N.W.2d 615; State v. Horngren, 2000 WI App 177, 238 Wis.2d 347, 617 N.W.2d 508; State v. Blanco, 2000 WI App 119, 237 Wis.2d 395, 614 N.W.2d 512; State v. Kruse, 175 Wis.2d 89, 499 N.W.2d 185 (Ct. App. 1993); Maryland v. Buie, 494 U.S. 325, 110 S.Ct. 1093 (1990); Commonwealth v. DeJesus, 70 Mass. App. Ct. 114, 872 N.E.2d 1178 (2007) (the required articulable facts can be found in the violent crime which serves as the basis for the arrest and in the defendant's violent criminal history); United States v. Torress-Castro, 470 F.3d 992 (10th Cir. 2006) (protective sweep was performed prior to the arrest); United States v. Hauk, 412 F.3d 1179 (10th Cir. 2005) (it is an objective test and the legality of a sweep that is conducted pursuant to a policy of conducting a sweep of every residence when executing an arrest warrant).

26. The protective search sweep exception—other than an arrest situation. United States v. Miller, 430 F.3d 93 (2d Cir. 2005), cert. denied, 547 U.S. 1206 (2006); United States v. Rudaj, 390 F.Supp.2d. 395 (S.D.N.Y. 2005) (a protective sweep in connection with entering the home of an arrestee to get clothes for the person; a listing of other than arrest situations where a protective sweep would be justified).

27. The detention of property on the basis of reasonable suspicion that it contains contraband or evidence of criminal activity. United States v. Place, 462 U.S. 696, 103 S.Ct. 2637 (1983); United States v. Ward, 144 F.3d 1027 (7th Cir. 1998).

28. Routine border searches and seizures. United States v. Flores-Montano, 541 U.S. 149, 124 S.Ct. 1582 (2004); United States v. Montoya De Hernandez, 473 U.S. 531, 537-38, 105 S.Ct. 3304, 3308-09 (1985); United States v. Ramsey, 431 U.S. 606, 97 S.Ct. 1972 (1977); United States v. Johnson, 991 F.2d 1287 (7th Cir. 1993).

29. Monitoring the conduct of a person in custody. State v. Dull, 211 Wis.2d 651, 565 N.W.2d 575 (Ct. App. 1997); Washington v. Chrisman, 455 U.S. 1, 102 S.Ct. 812 (1982).

30. The seizure of a dwelling pending the arrival of a search warrant. Illinois v. McArthur, 531 U.S. 326, 121 S.Ct. 946 (2001).

31. Entry of back-up officers. State v. Johnston, 184 Wis.2d 794, 518 N.W.2d 759, cert. denied, 513 U.S. 1021 (1994) (to assist another officer); State v. Gonzalez, 147 Wis.2d 165, 432 N.W.2d 651 (Ct. App. 1988) (to assist fireman); Pearson v. Callahan, 07-751, presently before the United States Supreme Court (see the discussion under consent).

Search Of A Person

1. The consent exception. See 1. under ***Search And/Or Seizure Of An Inanimate Object*** above.

2. The consent exception—the implied consent law. State v. Wintlend, 2002 WI App 314, 258 Wis.2d 875, 655 N.W.2d 745; Village of Little Chute v. Walitalo, 2002 WI App 211, 256 Wis.2d 1032, 650 N.W.2d 891.

3. The search incident to an arrest exception—the arrestee and items associated with the arrestee. See 5. and 6. under ***Search And/Or Seizure Of An Inanimate Object*** above.

4. The custodial or inventory search of an arrested person and the items associated with

that person exception. See 13. under ***Search And/Or Seizure Of An Inanimate Object*** above.

5. A Terry stop identification search. See 16. under ***Search And/Or Seizure Of An Inanimate Object*** above.

6. The Terry search (frisk) of a person exception. State v. Applewhite, 2008 WI App 138, ____ Wis.2d ____, ____ N.W.2d ____ (defendant produced several weapons pursuant to inquires from an officer as to whether the defendant had any weapons, the officer performed a pat-down search of the defendant, the officer felt what he believed were drugs in the defendant's pockets, marijuana was recovered from the defendant; the frisk was based on reasonable suspicion; the drugs were legally recovered/seized under the plain feel doctrine; statement of general frisk law; statement and use of the analytical framework that is used in determining if a frisk is based on factors that supply reasonable suspicion; the primary factors, in the analytical framework in this case, were the type of crime under investigation—burglary is a type of crime that commonly involves a weapon, the defendant's possession of and initial reluctance to produce two knives, and the defendant's repeatedly reaching into his pants pockets; discussion of the law relating to each of the primary factors); State v. Sumner, 2008 WI 94, ____ Wis.2d ____, 752 N.W.2d 783 (a frisk of the driver during a traffic stop; statement of general frisk law including that it is a totality of the circumstances test; the frisk was based on reasonable suspicion; statement and use of the analytical framework that is used in determining if a frisk is based on factors that supply reasonable suspicion—an analysis of each primary factor present and then a viewing of the primary factors in the totality of the circumstances; the primary factors were furtive/reaching gestures, unusual nervousness including visible perspiration, the defendant's repeatedly reaching into his pockets, and the officer's subjective fear for his safety; the fact that the defendant was not initially ordered out of the car and that there was fifteen minutes between the stop and the frisk did not mean that reasonable suspicion was not present);

State v. Limon, 2008 WI App 77, ____ Wis.2d ____, 751 N.W.2d 877 (the police, following an anonymous tip that drug dealing and drug loitering activities were taking place on a porch, approached the defendant and two men on the porch; the police learned that the three did not live there; a smokeable form of marijuana was observed on the porch; the police opened the defendant's purse and observed cocaine; two frisk issues—was the frisk supported by reasonable suspicion and was the way it was conducted valid; the frisk was based on reasonable suspicion; statement of general frisk law including that an objective standard is used which means that factors, even if not used by the officer, can be used as long as they were known to the officer; factors used included high crime area, drugs, and area shootings; statement of law that suspicion of drug dealing of itself does not per se justify a frisk—however, there is a link between dangerous weapons and the drug trade; the opening of the purse, rather than a pat-down of it, was reasonable under the facts of this case); State v. Alexander, 2008 WI App 9, 307 Wis.2d 323, 744 N.W.2d 909 (a general discussion of frisk law in the context of a frisk of a car during a traffic stop; listing of numerous factors that can support a frisk including furtive movements); State v Johnson, 2007 WI 32, 299 Wis.2d 675, 729 N.W.2d 182 (a frisk of the driver and the car during a routine traffic stop; extensive statement of general law; discussion of prior vehicle stop frisk cases; furtive movement—head and shoulders—case; discussion of the role of an officer's subject belief and the officer's conclusion that actions of the defendant may have a certain meaning or significance based on the officer's experience and training; search of the defendant and the vehicle were not reasonable; dissent by Justice Roggensack); State v. Kolk, 2006 WI App 261, 298 Wis.2d 99, 726 N.W.2d 337 (brief statement of general law; one of the criteria for a valid frisk is the presence of grounds for a valid stop); State v. Triplett, 2005 WI App 255, 288 Wis.2d 515, 707 N.W.2d 881; State v. Leutenegger, 2004 WI App 127, ¶¶ 14-18, 275 Wis.2d 512, 522-24, 685 N.W.2d 536; State v. Kyles, 2004 WI 15, 269 Wis.2d 1, 675 N.W.2d 449 (a frisk of a passenger during a routine traffic stop; the Court held that the frisk

was not valid because the reasonable suspicion that is required to perform a frisk was not present; an extensive discussion/ statement of the general frisk law; addressing the issue of an officer's subjective belief that his or her safety or that of others is/was in danger—an officer's subjective fear—the Court held that: (1)it is not a prerequisite to conducting a frisk, (2) an officer may be questioned about it at the hearing, (3) a court may consider it in determining whether the objective standard of reasonable suspicion was present; an extensive discussion of the hands-in-the-pocket situation—the fact that a person places his hand or hands in his pocket after an officer directs that the person not do so is an important factor in determining the presence of reasonable suspicion, but there is no per se rule that this is sufficient for reasonable suspicion; the Court considered the additional factors of the defendant's clothing—a bulky winter coat, overt nervousness, the time when the frisk occurred, and the geographical area in its opinion); State v. Vorburger, 2002 WI 97, 255 Wis.2d 537, 648 N.W.2d 829; State v. Stout, 2002 WI App 41, ¶¶ 1-8, 22-32, 250 Wis.2d 768, 774-77, 786-91, 641 N.W.2d 474; State v. Hart, 2001 WI App 283, 249 Wis.2d 329, 639 N.W.2d 213; State v. Kolp, 2002 WI App 17, 250 Wis.2d 296, 640 N.W.2d 551; State v. Kelsey C.R., 2001 WI 54, 243 Wis.2d 422, 626 N.W.2d 777; State v. Mohr, 2000 WI App 111, 235 Wis.2d 220, 613 N.W.2d 186 (summarized in Sumner, 2008 WI at ¶¶ 28-32, ____ Wis.2d at ____); State v. McGill, 2000 WI 38, 234 Wis.2d 560, 609 N.W.2d 795, cert. denied, 531 U.S. 906 (2000); State v. Mata, 230 Wis.2d 567, 602 N.W.2d 158 (Ct. App. 1999) (defendant was a passenger in a car which was stopped for a traffic violation; the officer detected a strong odor of marijuana when the driver rolled down the window; during a Terry frisk of the defendant the officer felt a hard object, the officer asked the defendant what it was, the defendant stated it was a bag of socks, and the officer then reached into the pocket of the defendant's jacket and recovered drugs; the frisk of the defendant was valid based on the odor of marijuana and the fact that the stop of the vehicle occurred in a high crime area known for its gang, drug and weapon activity; the officer

could have arguably removed the drugs when he felt the hard object; clearly the officer's removal of the drugs was reasonable when the defendant's explanation did not jibe with what the officer felt); State v. Ford, 211 Wis.2d 741, 565 N.W.2d 286 (Ct. App. 1997); State v. Morgan, 197 Wis.2d 200, 539 N.W.2d 887 (1995); State v. Guy, 172 Wis.2d 86, 492 N.W.2d 311 (1992), cert. denied, 509 U.S. 914 (1993); Minnesota v. Dickerson, 508 U.S. 366, 373, 113 S.Ct. 2130, 2136 (1993); Maryland v. Buie, 494 U.S. 325, 110 S.Ct. 1093 (1990); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968); United States v. Barnett, 505 F.3d 637 (7th Cir. 2007) (reasonable suspicion is an objective and not a subjective test and, therefore, the fact that an officer does not subjectively fear that the defendant was armed is not required; some crimes by themselves authorize a Terry frisk); United States v. Mitchell, 256 F.3d 734 (7th Cir. 2001). Arizona v. Johnson, 07-1122, is presently pending before the United States Supreme Court. 128 S.Ct. 2961 (2008). The issue is whether, after a car is stopped for a minor traffic infraction, an officer may "conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense." The lower court case is State v. Johnson, 217 Ariz. 58, 170 P.3d 667 (2007). Numerous Terry stop issues/principles are discussed in my outline entitled **A TERRY STOP—GENERAL PRINCIPLES**.

7. The Terry search (frisk) of a person exception——during the serving of a search warrant. State v. Kolp, 2002 WI App 17, 250 Wis.2d 296, 640 N.W.2d 551; State v. Guy, 172 Wis.2d 86, 492 N.W.2d 311 (1992), cert. denied, 509 U.S. 914 (1993).

8. The obtaining of blood from a person to determine its alcohol content—an arrest for a drunk-driving related offense. State v. Repenshek, 2004 WI App 229, 277 Wis.2d 780, 691 N.W.2d 369; State v. Faust, 2004 WI 99, 274 Wis.2d 183, 682 N.W.2d 371; cert. denied, 543 U.S. 1089 (2005); State v. Erickson, 2003 WI App 43, 260 Wis.2d 279, 659 N.W.2d 407;

State v. Riedel, 2003 WI App 18, 259 Wis.2d 921, 656 N.W.2d 789; State v. Krajewski, 2002 WI 97, 255 Wis.2d 98, 648 N.W.2d 385, cert. denied, 537 U.S. 1089 (2002); State v. Marshall, 2002 WI App 73, 251 Wis.2d 408, 642 N.W.2d 571; State v. Daggett, 2002 WI App 32, 250 Wis.2d 112, 640 N.W.2d 546; State v. VanLaarhoven, 2001 WI App 275, 248 Wis.2d 881, 637 N.W.2d 411; State v. Wodenjak, 2001 WI App 216, 247 Wis.2d 554, 634 N.W.2d 867; State v. Thorstad, 2000 WI App 199, 238 Wis.2d 666, 618 N.W.2d 240, cert. denied, 531 U.S. 1153 (2001); State v. Bohling, 173 Wis.2d 529, 494 N.W.2d 399 (1993); State v. Krause, 168 Wis.2d 578, 484 N.W.2d 347 (Ct. App. 1992); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966).

9. The obtaining of blood from a person to determine its alcohol content—an arrest for other than a drunk-driving related offense. State v. Repenshek, 2004 WI App 229, 277 Wis.2d 780, 691 N.W.2d 369.

10. Routine border searches. See 6. below under ***Seizure Of A Person***.

11. Physically invasive procedures (other than the obtaining of blood to determine its alcohol content) used to retrieve evidence from a person. State v. Payano-Roman, 2006 WI 47, 290 Wis.2d 380, 714 N.W.2d 548; Sullivan v. Bornemann, 384 F.3d 372 (7th Cir. 2004); Winston v. Lee, 470 U.S. 753, 105 S.Ct. 1611 (1985).

12. A probation or parole-related search performed by a law enforcement officer pursuant to a probation or parole condition. See my outline entitled **THE FOURTH AMENDMENT—SPECIFIC MISCELLANEOUS SITUATIONS**.

13. A probable cause search of a person. State v. Mata, 230 Wis.2d 567, 602 N.W.2d 158 (Ct. App. 1999).

Seizure Of A Person

1. The consent exception. See 1. above under ***Search And/Or Seizure Of An Inanimate Object***.

2. The Terry seizure (stop) of a person exception. State v. Limon, 2008 WI App 77, ____ Wis.2d ____, 751 N.W.2d 877 (both the Terry stop of the defendant and the Terry frisk of the defendant's purse—which consisted of the officer's opening of the purse and looking into it—were proper under Terry); State v. Newer, 2007 WI App 236, 306 Wis.2d 193, 742 N.W.2d 923 (a traffic basis—revoked license—car stop situation; brief statement of some reasonable suspicion law; the fact that an officer knows that the driver's license of the registered owner of a vehicle is revoked or suspended is reasonable suspicion to justify a traffic stop as long as the officer remains unaware of any facts which would render unreasonable the assumption that the owner is driving the vehicle); State v. Post, 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634 (a traffic basis-OWI-car stop situation; extensive statement of general stop law including that the state has the burden of proof; driving need not be illegal in order to give rise to reasonable suspicion; repeated weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle; Court rejected the defendant's position that weaving within a single lane must be erratic, unsafe, or illegal to give rise to reasonable suspicion; the Court rejected the bright-line rules proposed by both sides as being inconsistent with the totality of the circumstances test; Court set forth some examples in paragraph 19 of movements that may be characterized as repeated weaving within a single lane that may fail to give rise to reasonable suspicion; the officer in this case, under the totality of the circumstances, had reasonable suspicion to stop the defendant for driving while intoxicated based upon the driving observed by the officer; the factors/ facts supporting that determination included the width of the weaving, it was not a slight deviation, the number of weaves, the weaving was across the travel and parking lanes and the lane was approximately twice as wide as the standard single lane, the car was canted into the parking lane—the car wasn't traveling in the designed traveling lane, the weaving created a discernible S-type pattern, and the time—9:30 p.m.); State v Bons, 2007 WI App 124, 301 Wis.2d 227, 731 N.W.2d 367 (a traffic stop

that was extended based on reasonable suspicion; statement of general stop law including that the violation may be of either a criminal law or noncriminal traffic law; reasonable suspicion to extend the traffic stop to investigate further existed based on the defendant's unusual nervousness, the fact that he rolled up the windows and locked the car doors when the officer asked him to exit the car, and the presence of a shot glass sitting on the console of the vehicle in close proximity to the driver's seat); State v. Kolk, 2006 WI App 261, 298 Wis.2d 99, 726 N.W.2d 337 (a crime basis—drugs—car stop situation; the police received a tip from a citizen informant that the defendant would be transporting drugs to Madison in his car, the police followed the defendant and stopped him for traffic violations, after the completion of the traffic stop the officer searched the defendant, the state argued that the tip provided reasonable suspicion for the defendant's continued detention once the traffic stop was completed; no reasonable suspicion to detain the defendant for possession of drugs after the completion of the traffic stop because the tipster had not told the police how he or she knew of the defendant's legal or illegal activities, the information that the police were able to confirm was widely available, and the person's predictions were general and weakly confirmed; brief statement of general stop law and collective knowledge rule; discussion of the difference between a citizen and confidential informant and an extensive discussion of how to evaluate the information that is received from both of them); State v. Patton, 2006 WI App 235, 297 Wis.2d 415, 724 N.W.2d 347; State v. Lord, 2006 WI 122, 297 Wis.2d 592, 723 N.W.2d 425; State v. Young, 2006 WI 98, ¶¶ 1-16, 20, 21, 58-64, 81, 84-89, 94, 294 Wis.2d 1, 9-18, 34-36, 42-46, 48, 717 N.W.2d 729 (a crime basis stop of a parked car containing the defendant; the officer observed a parked car containing five persons near midnight in a "bar" problem area, the car had Illinois plates, none of the people in the car left the vehicle during a five-to ten-minute period), the officer was familiar with the area; the Court held that reasonable suspicion existed to justify the stop; statement of some general stop law including reasonable suspicion and an officer need not dispel all

innocent inferences before conducting a stop); State v. Alexander, 2005 WI App 231, 287 Wis.2d 645, 706 N.W.2d 191 (a crime basis—a shooting-stop of a person who was walking within ten blocks of the crime and twenty-six hours after the crime; the Court, using the six Guzy factors, found that the officer lacked reasonable suspicion to stop the defendant; statement of general law including that the traditional standard at times provides little guidance for courts and law enforcement officials; the Court used the collective knowledge rule, in relation to the first Guzy factor, to impute knowledge to officers that would negate reasonable suspicion); State v. Washington, 2005 WI App 123, 284 Wis.2d 456, 700 N.W.2d 305; State v. Sherry, 2004 WI App 207, 277 Wis.2d 194, 690 N.W.2d 435; State v. Malone, 2004 WI 108, 274 Wis.2d 540, 683 N.W.2d 1; State v. Powers, 2004 WI App 143, 275 Wis.2d 456, 685 N.W.2d 869; State v. Begicevic, 2004 WI App 57, 270 Wis.2d 676, 678 N.W.2d 293; State v. Kassube, 2003 WI App 64, 260 Wis.2d 876, 659 N.W.2d 499 (traffic stop situation); State v. Keith, 2003 WI App 47, 260 Wis.2d 592, 659 N.W.2d 403; State v. Colstad, 2003 WI App 25, 260 Wis.2d 406, 659 N.W.2d 394, cert. denied, 540 U.S. 877 (2003); State v. Williams, 2002 WI App 306, 258 Wis.2d 395, 655 N.W.2d 462 (a crime basis-domestic violence-vehicle stop; the police obtained a description of both the person who was involved in a domestic violence crime and the car that he used to leave the crime scene; four days later the police stopped a car being driven by the defendant—it was determined after the stop that the defendant was not involved in the crime; the defendant matched the sex and race of the description and the car was very similar, but not identical, to the description; the Court held that the officer had reasonable suspicion to stop the car to investigate whether the driver was the person involved in the crime; brief statement of some general stop law; statement of the Guzy factors; discussion and application of the first and second Guzy factors to the facts of the case); State v. Vorburger, 2002 WI 97, 255 Wis.2d 537, 648 N.W.2d 829; State v. Morgan, 2002 WI App 124, 254 Wis.2d 602, 648 N.W.2d 23; State v. Wallace, 2002 WI App 61, ¶¶ 1-15, 251 Wis.2d 625, 630-37, 642 N.W.2d 549; State v. Stout, 2002 WI App 41, ¶¶ 1-16, 24, 32, 250 Wis.2d

768, 774-81, 786-87, 791, 641 N.W.2d 474; State v. Olson, 2001 WI App 284, 249 Wis.2d 391, 639 N.W.2d 207; State v. Rodriguez, 2001 WI App 206, 247 Wis.2d 734, 634 N.W.2d 844; State v. Sisk, 2001 WI App 182, 247 Wis.2d 443, 634 N.W.2d 877; State v. Kelsey C.R., 2001 WI 54, 243 Wis.2d 422, 626 N.W.2d 777; State v. Gammons, 2001 WI App 36, 241 Wis.2d 296, 625 N.W.2d 623; State v. Rutzinski, 2001 WI 22, 241 Wis.2d 729, 623 N.W.2d 516; State v. Williams, 2001 WI 21, 241 Wis.2d 631, 623 N.W.2d 106 (the facts and holding of the Court are set forth in Kolk, 2006 WI App at ¶¶ 14-19, 298 Wis.2d at 110-14); State v. Fields, 2000 WI App 218, 239 Wis.2d 38, 619 N.W.2d 279; State v. Griffith, 2000 WI 72, 236 Wis.2d 48, 613 N.W.2d 72; State v. Longcore, 226 Wis.2d 1, 594 N.W.2d 412 (Ct. App. 1999), aff'd by an equally divided court, 2000 WI 23, 233 Wis.2d 278, 607 N.W.2d 620 (*per curiam*); State v. Amos, 220 Wis.2d 793, 584 N.W.2d 170 (Ct. App. 1998); State v. Gruen, 218 Wis.2d 581, 582 N.W.2d 728 (Ct. App. 1998); State v. Quartana, 213 Wis.2d 440, 570 N.W.2d 618 (Ct. App. 1997); State v. Young, 212 Wis.2d 417, 569 N.W.2d 84 (Ct. App. 1997); State v. Ford, 211 Wis.2d 741, 565 N.W.2d 286 (Ct. App. 1997); State v. Harris, 206 Wis.2d 242, 557 N.W.2d 245 (1996); State v. Waldner, 206 Wis.2d 51, 556 N.W.2d 681 (1996) (a summary appears in State v. Post, 2007 WI 60, ¶¶ 15, 16, 23, 301 Wis.2d 1, 9, 10, 14, 733 N.W.2d 634); State v. Buchanan, 178 Wis.2d 441, 504 N.W.2d 400 (Ct. App. 1993); State v. King, 175 Wis.2d 146, 499 N.W.2d 190 (Ct. App. 1993); State v. Richardson, 156 Wis.2d 128, 456 N.W.2d 830 (1990); State v. Guzy, 139 Wis.2d 663, 407 N.W.2d 548 (1987) (this case is summarized in Williams, 2002 WI App at ¶ 17, 258 Wis.2d at 405-07); Warrix v. State, 50 Wis.2d 368, 375, 184 N.W.2d 189 (1971); Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 124 S.Ct. 2451 (2004); United States v. Arvizu, 534 U.S. 266, 122 S.Ct. 744 (2002); Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375 (2000); Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673 (2000); Minnesota v. Dickerson, 508 U.S. 366, 372-73, 113 S.Ct. 2130, 2135 (1993); United States v. Drake, 456 F.3d, 771 (7th Cir. 2006) (the stop of a car based on a 911 call that people in the car were involved in criminal activity; extensive discussion of Terry stops which are based on a 911 call); United States v. Askew, 403 F.3d 496 (7th Cir.

2005); United States v. Baskin, 410 F.3d 788 (7th Cir. 2005); United States v. Lenoir, 318 F.3d 725 (7th Cir. 2003); United States v. Felix-Felix, 275 F.3d 627 (7th Cir. 2001); United States v. Mitchell, 256 F.3d 734 (7th Cir. 2001); United States v. Raibley, 243 F.3d 1069 (7th Cir. 2001), cert. denied, 534 U.S. 876 (2001).

3. The Summers detention of a person to prevent flight and to protect officers while executing a search warrant. State v. Vorburger, 2002 WI 97, 255 Wis.2d 537, 648 N.W.2d 829; Muehler v. Mena, 544 U.S. 93, 125 S.Ct. 1465 (2005); Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587 (1981).

4. The Summers detention of a person pending the signing and/or arrival of a search warrant. State v. Vorburger, 2002 WI 97, 255 Wis.2d 537, 648 N.W.2d 829.

5. The detention of a person who approaches a place where a search warrant is being executed. United States v. Jennings, 544 F.3d 815 (7th Cir. 2008).

6. The Buie protective detention of a person during an arrest of another person. United States v. Maddox, 388 F.3d 1356 (10th Cir. 2004), cert denied, 544 U.S. 935 (2005).

7. Routine border searches and seizures. United States v. Flores-Montano, 541 U.S. 149, 124 S.Ct. 1582 (2004); United States v. Montoya De Hernandez, 473 U.S. 531, 537-38, 105 S.Ct. 3304, 3308-09 (1985); United States v. Ramsey, 431 U.S. 606, 97 S.Ct. 1972 (1977); United States v. Johnson, 991 F.2d 1287 (7th Cir. 1993).

8. Monitoring the conduct of a person in custody. State v. Dull, 211 Wis.2d 651, 565 N.W.2d 575 (Ct. App. 1997); Washington v. Chrisman, 455 U.S. 1, 102 S.Ct. 812 (1982).

9. The arrest of a person. See the discussion below under **ARREST**.

COMMUNITY CARETAKING EXCEPTION

One of the circumstances where an arrest or search warrant is not required is when the police are acting in their community

caretaking function/capacity. Cases which have addressed this exception include:

> State v. Kramer, 2008 WI App 62, ____ Wis.2d ____, 750 N.W.2d 941, petition for review granted by the Wisconsin Supreme Court (a seizure of the driver of a parked car situation; the driver's car was legally parked on the side of a rural road with its hazard lights flashing; the officer pulled behind the car with his red and blue lights activated, approached the defendant's car, and observed signs of intoxication; the Court assumed that a seizure occurred; the Court, after an extensive discussion involving the application of the two community caretaker requirements/inquiries including the four balancing test factors to the facts of the case, found that the seizure of the defendant was lawful because the officer was acting in a community caretaker capacity; an extensive discussion of the community caretaker doctrine including the two requirements /inquiries; an extensive discussion, in the context of the facts of the case, of the fourth 'alternative action' balancing factor; a 'must read' discussion of the 'totally divorced' facet of the first requirement that the police activity must be a bona fide community caretaker activity); State v. Ziedonis, 2005 WI App 249, 287 Wis.2d 831, 707 N.W.2d 565; State v. Sykes, 2005 WI 48, ¶ 29, 279 Wis.2d 742, 759, 695 N.W.2d 277 (characterizing law enforcement's presence as a community caretaking/ peacekeeping function does not preclude an officer, once he has probable cause to arrest, from acting accordingly); State v. Leutenegger, 2004 WI App 127, ¶¶ 7, 10, 275 Wis.2d 512, 518, 520-21, 685 N.W.2d 536; State v. Harwood, 2003 WI App 215, ¶¶ 13-14, 267 Wis.2d 386, 393-94, 671 N.W.2d 325; State v. Clark, 2003 WI App 121, 265 Wis.2d 557, 666 N.W.2d 112; State v. Ferguson, 2001 WI App 102, 244 Wis.2d 17, 629 N.W.2d 788 (summarized in Ziedonis); State v. Kelsey C.R., 2001 WI 54, 243 Wis.2d 422, 626 N.W.2d 777; State v. Fields, 2000 WI App 218, ¶¶ 8, 12, 239 Wis.2d 38, 42-43, 619 N.W.2d 279; State v. Horngren, 2000 WI App 177, 238 Wis.2d 347, 617 N.W.2d 508; State v. Bermudez, 221 Wis.2d 338, 357, 585 N.W.2d 628 (Ct. App. 1998); State v. Paterson, 220 Wis.2d 526, 583 N.W.2d 190 (Ct. App. 1998) (summarized in Ziedonis); State v. Dull, 211

Wis.2d 652, 565 N.W.2d 575 (Ct. App. 1997) (summarized in Ziedonis); State v. Ellenbecker, 159 Wis.2d 91, 464 N.W.2d 427 (Ct. App. 1990); State v. Anderson, 142 Wis.2d 162, 417 N.W.2d 411 (Ct. App. 1987), rev'd on other grounds, 155 Wis.2d 77, 454 N.W.2d 763 (1990); Bies v. State, 76 Wis.2d 457, 251 N.W.2d 461 (1977); Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523 (1973); People v. Mikrut, 371 Ill. App. 3d 1148, 864 N.E.2d 958 (2007) (police were acting in a community caretaking function when they accompanied a woman into a home to retrieve her personal belongings).

To determine whether a particular activity qualifies under the community caretaker exception, a three-step test is used. First, did the search or seizure, within the meaning of the Fourth Amendment, take place (I refer to this as the first requirement). Second, if the Fourth Amendment is implicated, was the police conduct a bona fide community caretaker activity/the police activity must be a bona fide community caretaker activity (I refer to this as the second requirement). Third, if the answer to the second question is yes, did the public need and interest outweigh the intrusion upon the privacy of the individual/the public need and interest must outweigh the intrusion upon the privacy of the individual (I refer to this as the third requirement or the balancing test). The balancing aspect of this test requires an objective analysis of the circumstances confronting the police officer and an objective assessment of the intrusion upon the privacy of the citizen. In evaluating the third requirement four considerations or factors are taken into account/the requirement that the public need and interest outweigh the intrusion upon the privacy of the individual requires consideration of the following factors: (1) the degree of public interest and exigency of the situation; (2) the attendant circumstances surrounding the search or seizure including time, location, the degree of overt authority, and force displayed; (3) whether an automobile is involved; (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished (I refer to these factors as the balancing test factors). In some cases the court sets forth the test for determining whether a search or seizure is justified by the community caretaker function by assuming that a search or seizure has occurred. In those situations the court sets forth the test/the requirements using a two-step rather than a three-step test—if there is a search or seizure, the community caretaker function justifies the search or seizure two requirements: the police activity must be a bona fide community caretaker activity and the police need must outweigh the intrusion upon the privacy of the individual. In order to be a community caretaker activity, the officer's actions must be totally divorced from the detection, investigations,

or acquisition of evidence relating to the violation of a criminal statute.

SITUATIONS THAT ARE NOT AN EXCEPTION TO THE WARRANT REQUIREMENT

Crime/Murder Scene

In Flippo v. West Virginia, 528 U.S. 11, 120 S.Ct. 7 (1999) (*per curiam*) the Court reiterated that there is no crime/murder scene exception to the warrant requirement.

Squad Car Ride

In State v. Kelsey C.R., 2001 WI 54, 243 Wis.2d 422, 626 N.W.2d 777, and State v. Hart, 2001 WI App 283, 249 Wis.2d 329, 639 N.W.2d 213, the Court addressed the proposed "search incident to a squad car ride" exception to the search warrant requirement. In Kelsey, the plurality (three justices) specifically refused to adopt a blanket rule that a police officer may frisk a person just because the officer is going to place that person inside a police vehicle. The two dissenting justices agreed that the so-called "search incident to squad car ride" exception was not consistent with Fourth Amendment case law requiring specific and articulable facts to support reasonable suspicion that a person may be armed and dangerous. The two concurring justices would have justified the search based upon the need to transport Kelsey in the squad car, a need independent of any suspicion that she might be armed and dangerous. In Hart, 2001 WI App 283, ¶¶ 13-19, 249 Wis.2d at 342-46, the Court, after discussing that part of Kelsey that dealt with the proposed "search incident to a squad car ride" exception, stated that "With five members of the court declining to adopt a per se rule, the law in Wisconsin is that the need to transport a person in a police vehicle is not, in and of itself, an exigency which justifies a search for weapons." But see, the discussion in State v. Sykes, 2005 WI 48, ¶¶ 32-33, 279 Wis.2d 742, 761-62, 695 N.W.2d 277.

Search Incident To Citation

In Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484 (1998), the Court held that the search incident to arrest exception to the search warrant requirement is not applicable in a citation situation—there is no search incident to citation exception to the search warrant requirement. The holding of the Court in Knowles and its applicability to similar situations has been discussed in:

> State v. Marten-Hoye, 2008 WI App 19, 307 Wis.2d 671, 746 N.W.2d 498; State v. Nieves, 2007 WI App 189, ¶¶ 15-16, 304 Wis.2d 182, 190-91, 738 N.W.2d 125; State v. Pallone, 2000 WI 77, ¶¶ 2, 37-53, 236 Wis.2d 162, 167, 182-

88, 613 N.W.2d 568; Virginia v. Moore, ____ U.S. ____, ____, 128 S.Ct. 1598, 1602, 1607-08 (2008).

Investigative Arrest

In numerous cases the United States Supreme Court has stated, in the context of a person being involuntarily taken to a police station and then questioned, that an "arrest for questioning" or "investigative arrest" is not permitted on less than probable cause to arrest grounds. Kaupp v. Texas, 538 U.S. 626, 630-31, 123 S.Ct. 1843, 1846-47 (2003) (*per curiam*).

THE ADMINISTRATIVE SEARCH EXCEPTION

Administrative Search Warrants

In some situations an administrative inspection search warrant (special inspection warrants pursuant to sec. 66.0119) is sufficient to support an entry and search. Some of these situations are:

1. The administrative inspection of private property to ensure compliance with public health and safety codes. State v. Jackowski, 2001 WI App 187, 247 Wis.2d 430, 633 N.W.2d 649; Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967); Platteville Area Apartment Ass'n v. City of Platteville, 179 F.3d 574 (7th Cir. 1999) (compliance with housing code). See also Redevelopment Authority v. Uptown Arts, 229 Wis.2d 458, 464, 599 N.W.2d 655 (Ct. App. 1999).

2. The administrative inspection of commercial property to ensure compliance with public health and safety codes. See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737 (1967). See also Redevelopment Authority v. Uptown Arts, 229 Wis.2d 458, 464, 599 N.W.2d 655 (Ct. App. 1999).

3. The administrative inspection of a place after a fire to determine the origin of the fire. Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641 (1984).

Warrantless Administrative Searches

1. The inspection of fire-damaged premises to determine the cause of the fire. State v. Monosso, 103 Wis.2d 368, 308 N.W.2d 891 (Ct. App. 1981); Michigan v. Tyler, 436 U.S. 499,

507-09, 511-12, 98 S.Ct. 1942, 1948-51 (1978).

Closely Regulated Business Exception

Cases which addressed the warrantless administrative inspection of closely regulated or pervasively regulated business premises include:

> Float-Rite Park v. Somerset, 2001 WI App 113, ¶¶ 10-11, 244 Wis.2d 34, 42-43, 629 N.W.2d 818; Redevelopment Authority v. Uptown Arts, 229 Wis.2d 458, 464-65 n.1, 599 N.W.2d 655 (Ct. App. 1999); State v. Mendoza, 220 Wis.2d 803, 584 N.W.2d 174 (Ct. App. 1998), rev'd on other grounds, 227 Wis.2d 838, 596 N.W.2d 736 (1999); Lundeen v. Wisconsin Dept. of Agric. Trade & Consumer Protection, 189 Wis.2d 255, 525 N.W.2d 758 (Ct. App. 1994); State v. Schwegler, 170 Wis.2d 487, 490 N.W.2d 292 (Ct. App. 1992); New York v. Burger, 482 U.S.691, 107 S.Ct. 2636 (1987); Donovan v. Dewey, 452 U.S. 594, 101 S.Ct. 2534 (1981) (inspection of underground mines).

Section 194.11, Stats., provides that:

> **194.11 Inspection of premises or vehicles.** The department or its duly authorized agents may at any time enter upon any premises within this state occupied by any common motor carrier of property or passengers, any contract motor carrier or any private motor carriers, or any motor vehicle of a common motor carrier, contract motor carrier or a private motor carrier for the purpose of exercising any power provided for in this chapter. Duly authorized agents of the department may stop a motor vehicle under this section upon the public highways for the purpose of exercising any power provided for in this chapter.

Cases that may be relevant if the constitutionality of sec. 194.11 is at issue include United States v. Mercado-Nava, 486 F.Supp.2d 1271, 1273-75 (D. Kan. 2007), United States v. Vasquez-Castillo, 258 F.3d 1207 (10th Cir. 2001), and United States v. Fort, 248 F.3d 475 (5th Cir. 2001).

"SPECIAL NEEDS" SITUATIONS

The Courts have recognized that in certain "special needs" situations a search or arrest warrant is not required.

> A search unsupported by probable cause can be constitutional, we have said, 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709 (1987) (internal quotation marks omitted).

Vernonia School District 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 2391 (1995). Some of these special needs situations are:

1. In O'Connor v. Ortega, 480 U.S. 709, 107 S.Ct. 1492 (1986), the Court upheld certain work-related searches of government employees' desks and offices. See also Custodian of Records v. State, 2004 WI 65, ¶¶ 40-41, 272 Wis.2d 208, 235, 680 N.W.2d 792, modified, 204 WI 149, 277 Wis.2d 75, 689 N.W.2d 908; United States v. Slanina, 283 F.3d 670 (5th Cir. 2002); United States v. Fernandes, 272 F.3d 938 (7th Cir. 2001); United States v. Simons, 206 F.3d 392 (4th Cir. 2000).

2. In Treasury Employees v. Von Raab, 489 U.S. 655, 109 S.Ct. 1384 (1989), the Court sustained a United States Customs Service program that made drug tests a condition of promotion or transfer to positions directly involving drug interdiction or requiring the employee to carry a firearm.

3. In Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 109 S.Ct. 1402 (1989), the Court upheld mandatory drug and alcohol tests for railway employees involved in train accidents or found to be in violation of particular safety regulations. See State v. Bohling, 173 Wis.2d 529, 540-541, 494 N.W.2d 399 (1993).

4. In State v. Pittman, 159 Wis.2d 764, 465 N.W.2d 245 (Ct. App. 1990), the Court held that a "judicially issued" arrest warrant is not a constitutional prerequisite for the entry and seizure of a parole violator in his residence pursuant to an apprehension warrant.

5. The search of students in a school setting. State v. Angelia D.B., 211 Wis.2d 140, 564 N.W.2d 682 (1997); Isiah B. v. State, 176

Wis.2d 639, 500 N.W.2d 637, cert. denied, 510 U.S. 884 (1993); Interest of L.L. v. Washington County Cir. Ct., 90 Wis.2d 585, 280 N.W.2d 343 (Ct. App. 1979); New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985).

6. The random drug testing of student-athletes. Vernonia School Dist 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386 (1995).

7. The random suspicionless drug testing of high school students who participate in competitive extracurricular activities. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 122 S.Ct. 2559 (2002).

8. A warrantless nonconsensual entry into a home for the purpose of detaining a person for civil commitment purposes. McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540 (1st Cir.), cert. denied sub. nom. McCabe v. Lynn, 519 U.S. 911 (1996).

9. The drug testing of welfare recipients. Marchwinski v. Howard, 309 F.3d 330 (6th Cir. 2002).

10. The warrantless (1) search of a probationer's or parolee's home or vehicle and/or (2) the warrantless seizure of a probationer or parolee by a probation or parole officer or a police officer is discussed in my outline entitled **THE FOURTH AMENDMENT—SPECIFIC MISCELLANEOUS SITUATIONS.**

11. In State v. Tarrell, 74 Wis.2d 647, 247 N.W.2d 696 (1976), the Court ruled that a probationer did not suffer an unconstitutional seizure of his person when his probation officer ordered him to appear at a police station to have his photograph taken in conjunction with a sexual assault investigation.

12. The obtaining of a DNA sample from a person under some circumstances is discussed in my outline entitled **THE FOURTH AMENDMENT—SPECIFIC MISCELLANEOUS SITUATIONS.**

In Ferguson v. City of Charleston, S.C., 532 U.S. 67, 121 S.Ct. 1281 (2001), the Court held that a South Carolina hospital's policy of conducting warrantless, nonconsensual drug

tests on pregnant women and turning positive results over to the police violates the Fourth Amendment. The Court said that the law enforcement purposes behind the policy take it outside the scope of prior rulings in which the court has been willing to uphold searches conducted under policies that dispense with the usual Fourth Amendment requirements in order to serve "special needs" beyond the normal need for law enforcement.

In Chandler v. Miller, 520 U.S. 305, 117 S.Ct. 1295 (1997), the Court held that Georgia's requirement that candidates for state office pass a drug test did not fit within the closely guarded category of constitutionally permissible suspicionless searches and therefore violated the Fourth Amendment.

CHECKPOINTS

1. Highway checkpoints to look for drunk drivers. City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447 (2000); Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481 (1990).

2. Roadblock/checkpoints to check drivers licenses and vehicle registrations. City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447 (2000); Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391 (1979).

3. Highway checkpoints to intercept illegal immigrants. City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447 (2000); United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074 (1976).

4. Information-seeking highway checkpoints. Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885 (2004).

In City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447 (2000), the Court held that a highway checkpoint program, whose primary purpose is the discovery and interdiction of illegal narcotics, violates the Fourth Amendment. See also Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885 (2004).

Section 349.02(2) prohibits numerous types of automobile checkpoints including for alcohol, drugs, and licensing requirements. Snowmobile checkpoints are addressed at 350.17(3). Checkpoints relating to all-terrain vehicles and boats are not statutorily prohibited in Wisconsin.

PROBABLE CAUSE TO SEARCH

Numerous basic probable cause to search concepts/principles are set forth in my outline entitled **SEARCH WARRANTS: GENERAL LAW, REVIEW LAW, AND BASIC PROBABLE CAUSE TO SEARCH CONCEPTS.**

SEARCH WARRANTS

Search warrants are discussed in my outline entitled **SEARCH WARRANTS: GENERAL LAW, REVIEW LAW, AND BASIC PROBABLE CAUSE TO SEARCH CONCEPTS**.

A SUBPOENA FOR RECORDS

A John Doe Subpoena

In Custodian of Records For the Legislative Technology Services Bureau v. State, 2004 WI 65, ¶¶ 32-56, 272 Wis.2d 208, 229-43, 680 N.W.2d 792, modified by, 204 WI 149, 277 Wis.2d 75, 689 N.W.2d 908 (*per curiam*), the Court addressed the interaction of a subpoena duces tecum and the Fourth Amendment and a John Doe subpoena for records and the Fourth Amendment.

A Subpoena For Documents—968.135

Section 968.15 provides in part that a court shall, upon a showing of probable cause to search, issue a subpoena requiring the production of documents. This statute does not state what the remedy is for a violation of its provisions. In State v. Popenhagen, 2008 WI 55, 309 Wis.2d 601, 749 N.W.2d 611, the Court addressed numerous issues associated with a situation where bank records of the defendant were obtained by the police using sec. 968.15 subpoenas that were issued without a showing of the required probable cause to search. The police, after obtaining the bank records, obtained several incriminating statements from the defendant after confronting the defendant with information contained in the bank records. The Court, on statutory rather than constitutional grounds, held: (1) that the defendant had standing to challenge the subpoenas; (2) 968.135 encompasses a defendant's motion to suppress evidence and statements obtained in violation of it; (3) suppression of the bank records was an appropriate remedy in this case; (4) suppression of the defendant's incriminating statements was an appropriate remedy when the incriminating statements were obtained by the police confronting the defendant with unlawfully obtained bank records.

In State v. Swift, 173 Wis.2d 870, 496 N.W.2d 713 (Ct. App. 1993), the Court discussed several 968.135 issues.

WAS THERE A SEIZURE OF A PERSON

General Law

Cases which have addressed this issue include:

> State v. Kramer, 2008 WI App 62, ____ Wis.2d ____, 750 N.W.2d 941, petition for review granted by the Wisconsin Supreme Court (see the discussion below); State v. Hartwig, 2007 WI App 160, 302 Wis.2d 678, 735 N.W.2d 597; State v. Kolk, 2006 WI App 261, ¶¶ 20-24, 298 Wis.2d 99, 344-46, 726 N.W.2d 337; State v. Young, 2006 WI 98, 294 Wis.2d 1, 717 N.W.2d 729; State v. Luebeck, 2006 WI App 87, 292 Wis.2d 748, 715 N.W.2d 639; State v. Washington, 2005 WI App 123, 284 Wis.2d 456, 700 N.W.2d 305; State v. Jones, 2005 WI App 26, 278 Wis.2d 774, 693 N.W.2d 104; State v. Powers, 2004 WI App 143, ¶¶ 2-8, 275 Wis.2d 456, 460-63, 685 N.W.2d 869; State v. Colstad, 2003 WI App 25, ¶¶ 2-7, 260 Wis.2d 406, 412-13, 659 N.W.2d 394, cert. denied, 540 U.S. 877 (2003); State v. Williams, 2002 WI 94, 255 Wis.2d 1, 646 N.W.2d 834; State v. Morgan, 2002 WI App 124, ¶ 13 n.8, ¶ 23 n.13, 254 Wis.2d 602, 613-15 n.8, 622 n.13, 648 N.W.2d 23; State v. Stout, 2002 WI App 41, ¶¶ 1-9, 19-22, 32, 250 Wis.2d 768, 774-77, 783-86, 791, 641 N.W.2d 474; State v. Kelsey C.R., 2001 WI 54, 243 Wis.2d 422, 626 N.W.2d 777; State v. Harris, 206 Wis.2d 243, 557 N.W.2d 245 (1996); Brendlin v. California, ____ U.S. ____, 127 S.Ct. 2400 (2007); Muehler v. Mena, 544 U.S. 93, 101-02, 125 S.Ct. 1465, 1471-72 (2005); Kaupp v. Texas, 538 U.S. 626, 123 S.Ct. 1843 (2003) (*per curiam*); United States v. Drayton, 536 U.S. 194, 122 S.Ct. 2105 (2002).

The Mendenhall seizure test was discussed in Brendlin, Young, Luebeck, Jones, Williams, and Stout.

The Hodari D. seizure test was discussed in Brendlin, Young, Washington, Powers, and Kelsey C.R.

In Mena, the Court found that the questioning of the defendant about her immigration status, during a Summers detention of the defendant, was not an additional seizure of the defendant and therefore no additional Fourth Amendment justification was required.

Specific Situations

In Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 185, 124 S.Ct. 2451, 2458 (2004), the Court reiterated that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.

The questioning of bus passengers during a drug interdiction effort was addressed in United States v. Drayton, 536 U.S. 194, 122 S.Ct. 2105 (2002).

In State v. Colstad, 2003 WI App 25, ¶¶ 2-7, 260 Wis.2d 406, 412-13, 659 N.W.2d 394, cert. denied, 540 U.S. 877 (2003), the defendant was the driver of an automobile which was involved in a traffic accident. On appeal the State did not dispute that the defendant was seized when an officer directed the defendant to move to a location away from the accident scene until further instructed. The Court of Appeals assumed a seizure occurred at that point in time.

In State v. Young, 2006 WI 98, 294 Wis.2d 1, 717 N.W.2d 729, the relevant facts were: the defendant exited from a car, the officer ordered him back into the vehicle, the defendant turned and started walking away, the officer yelled at the defendant to "get back in the car right now," the defendant then ran from the officer, the officer then chased and caught the defendant on a porch. The Court, using the Hodari D. seizure test, held that the defendant was not seized until the officer physically apprehended him on the porch.

In State v. Luebeck, 2006 WI App 87, 292 Wis.2d 748, 715 N.W.2d 639, State v. Jones, 2005 WI App 26, 278 Wis.2d 774, 693 N.W.2d 104, and State v. Williams, 2002 WI 94, 255 Wis.2d 1, 646 N.W.2d 834, the Court addressed the issue of whether the defendant was seized during the time he was questioned immediately after the traffic stop (that proceeded the questioning) was over. In Luebeck, the Court found that the defendant was seized. In Williams, the Court (in finding that the consent was valid) held that the traffic stop had ended, the defendant was free to leave when the officer asked for consent to search and that the defendant's consent was voluntary. In Jones, the officer stopped a motorist for speeding, questioned him and a passenger, and wrote out a warning citation. The officer returned the driver's and passenger's identification cards and then asked if there was anything illegal in the car and whether he could search it. The driver said he could and the officer discovered a gun and drugs. The Court upheld the trial court's suppression of the gun and the drugs, holding that the traffic stop for speeding was concluded, but unlike the defendant in Williams, the defendant was seized. Therefore his detention had continued beyond its legal justification and the search was invalid. The difference between Jones and Williams is that in Williams, the officer by his words and actions created a

situation in which a reasonable person in the defendant's shoes would believe that he or she was free to leave, whereas in Jones, the defendant's detention continued after the business of the traffic stop was concluded. As stated in Jones, 2005 WI App at ¶ 17, 278 Wis.2d at 785:

> We therefore read [(Lawrence)] Williams to require some verbal or physical demonstration by the officer, or some other equivalent facts, which clearly convey to the person that the traffic matter is concluded and that the person should be on his or her way. Absent that, it is a legal fiction to conclude that a reasonable person would deduce, infer or believe that he or she is free to depart the scene.

In State v. Kolk, 2006 WI App 261, ¶ 21, 298 Wis.2d 99, 115, 726 N.W.2d 337, both the state and the defendant agreed that the defendant was seized when the search of the defendant occurred.

In State v. Kelsey C.R., 2001 WI 54, ¶¶ 1-33, 243 Wis.2d 422, 430-44, 626 N.W.2d 777, the Court, using the Hodari D. seizure test, held in a community caretaking function situation that the defendant was not seized when an officer told the defendant (a juvenile) to stay put and the defendant then fled from the police.

In State v. Washington, 2005 WI App 123, 284 Wis.2d 456, 700 N.W.2d 305, one of the issues was whether the defendant "yielded to the show of authority" under the Hodari D. seizure test. The Court found that the defendant was seized when he was ordered to do so even though he continued to take a few steps backwards and the officer may have thought that he might run.

In State v. Powers, 2004 WI App 143, 275 Wis.2d 456, 685 N.W.2d 869, the officer watched the defendant get into his truck, start it and then drive through the parking lot to the entry onto a public street. As the defendant prepared to pull the truck onto the public street, the officer activated his emergency lights. After the defendant did not immediately respond to the emergency lights, the officer tapped his siren at least one or two times in an attempt to attract the defendant's attention. The defendant finally turned into another parking lot and stopped in front of a restaurant where he was confronted by the officer. Using the Hodari D. test, the Court held that the seizure did not occur until the defendant pulled off the public street into a parking lot and parked in front of the restaurant.

In State v. Kramer, 2008 WI App 62, ____ Wis.2d ____, ____ N.W.2d ____, the Court assumed (in the context of a discussion of the community caretaker function) that the driver of a car, which was parked legally on the side of a rural road with its hazard lights flashing, was seized when an officer pulled behind the

defendant's car with his red and blue lights activated and the officer approached the defendant and asked the defendant if he could help him. The Wisconsin Supreme Court granted the defendant's petition for review. One of the questions before the court is whether the stop of the defendant's vehicle was a seizure within the meaning of the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.

ARREST

Introduction

Numerous probable cause to arrest related issues are discussed in my outlines entitled **PROBABLE CAUSE TO ARREST—GENERAL PRINCIPLES** and **PROBABLE CAUSE TO ARREST—SPECIFIC SITUATIONS AND FACTORS**.

The law of arrest in general was discussed in Virginia v. Moore, ____ U.S. ____, ____, 128 S.Ct. 1598, 1605-08 (2008).

Probable Cause To Arrest— The Required Quantum Of Evidence

Cases which have addressed this issue include:

> State v. Nieves, 2007 WI App 189, 304 Wis.2d 182, 738 N.W.2d 125 (**obstructing an officer and a "not on file" situation during a traffic stop-**see Attachment A); State v. Dubose, 2005 WI 126, ¶ 36, 285 Wis.2d 143, 168-70, 699 N.W.2d 582 (**armed robbery/ burglary**); State v. Sykes, 2005 WI 48, ¶¶ 4-11, 17-19, 279 Wis.2d 742, 747-50, 753-54, 695 N.W.2d 277 (**criminal trespass to dwellings**); State v. Cash, 2004 WI App 63, ¶¶ 8, 21-25,271 Wis.2d 451, 457, 462-63, 677 N.W.2d 709 (**burglary**); State v. Pfaff, 2004 WI App 31, 269 Wis.2d 786, 676 N.W.2d 562 (**OWI**); State v. Kutz, 2003 WI App 205, 267 Wis.2d 531, 671 N.W.2d 651 (**a crime of violence against his spouse**); State v. Larson, 2003 WI App 150, 266 Wis.2d 236, 668 N.W.2d 338 (**OWI**); State v. McAttee, 2001 WI App 262, 248 Wis.2d 865, 637 N.W.2d 774 (**homicide**); State v. Ritchie, 2000 WI App 136, 237 Wis.2d 664, 614 N.W.2d 837 (**homicide**); State v. Wilson, 229 Wis.2d 256, 600 N.W.2d 14 (Ct. App. 1999) (**drug odor**); State v. Secrist, 224 Wis.2d 201, 589 N.W.2d 387, cert. denied, 526 U.S. 1140 (1999) (**drug odor**); State v. Eckert, 203 Wis.2d 497, 553

N.W.2d 539 (Ct. App. 1996) (**shooting**); Maryland v. Pringle, 540 U.S. 366, 124 S.Ct. 795 (2003) (**drugs and money in a car**); Kaupp v. Texas, 538 U.S. 626, 123 S.Ct. 1843 (2003) (*per curiam*) (**homicide**).

Probable Cause To Arrest—What Information Can Be Used (The "Gates" Test)

Cases which have addressed this issue include:

State v. Kolk, 2006 WI App 261, 298 Wis.2d 99, 726 N.W.2d 337; State v. McAttee, 2001 WI App 262, 248 Wis.2d 865, 637 N.W.2d 774; State v. Ritchie, 2000 WI App 136, ¶ 15, 237 Wis.2d 664, 672, 614 N.W.2d 837; Kaupp v. Texas, 538 U.S. 626, 123 S.Ct. 1843 (2003) (*per curiam*). See also State v. Powers, 2004 WI App 143, 275 Wis.2d 456, 685 N.W.2d 869, where this issue was addressed in the context of a Terry traffic stop.

Probable Cause To Arrest—An Objective Standard

This issue was discussed in State v. Sykes, 2005 WI 48, 279 Wis.2d 742, 695 N.W.2d 277; State v. Repenshek, 2004 WI App 229, 277 Wis.2d 780, 691 N.W.2d 369; Devenpeck v. Alford, 543 U.S. 146, 125 S.Ct. 588 (2004); Kaupp v. Texas, 538 U.S.626, 632, 123 S.Ct. 1843, 1847 (2003) (*per curiam*).

Probable Cause To Arrest—The Collective Knowledge Rule

This issue is discussed in detail in my outline entitled **THE COLLECTIVE KNOWLEDGE DOCTRINE/RULE IN FOURTH AMENDMENT SITUATIONS**.

Was The Defendant Under Arrest

Cases which have addressed this issue include:

State v. Carroll, 2008 WI App 161, ____ Wis.2d ____, ____ N.W.2d ____ (the defendant was under arrest); State v. Marten-Hoye, 2008 WI App 19, 307 Wis.2d 671, 746 N.W.2d 498; State v. Colstad, 2003 WI App 25, ¶¶ 2-6, 15-18, 260 Wis.2d 406, 412-13,418-19, 659 N.W.2d 394, cert. denied, 540 U.S. 877 (2003); State v. Vorburger, 2002 WI 105, 255 Wis.2d 537, 648 N.W.2d 829; State v. Morgan, 2002 WI App 124, ¶ 13 n.8, 254 Wis.2d 602, 613-15 n.8, 648 N.W.2d 23; State v. Hart, 2001 WI App 283, 249 Wis.2d 329, 639 N.W.2d 213; State v. Wilson, 229 Wis.2d 256, 600

N.W.2d 14 (Ct. App. 1999); State v. Quartana, 213 Wis.2d 440, 570 N.W.2d 618 (Ct. App. 1997); State v. Swanson, 164 Wis.2d 437, 475 N.W.2d 148 (1991); Kaupp v. Texas, 538 U.S. 626, 123 S.Ct. 1843 (2003) (*per curiam*).

In Marten-Hoye, the Court summarized the facts and holdings of the Court in Vorburger, Wilson, and Quartana.

The Duration Issue

Cases which have addressed this issue include:

State v. Wallace, 2002 WI App 61, ¶¶ 1-15, 251 Wis.2d 625, 630-37, 642 N.W.2d 549.

An Arrest In A Public Place

No warrant is required to arrest a person in a public place. Cases which have addressed this issue include:

State v. Larson, 2003 WI App 150, 266 Wis.2d 236, 668 N.W.2d 338; State v. Ford, 211 Wis.2d 741, 565 N.W.2d 286 (Ct. App. 1997); Laasch v. State, 84 Wis.2d 587, 590-92, 267 N.W.2d 278 (1978); Florida v. White, 526 U.S. 559, 565, 119 S.Ct. 1555, 1559 (1999); New York v. Harris, 495 U.S. 14, 110 S.Ct. 1640, 1643 (1990).

Arrest Warrants

Cases which have addressed this subject include:

State v. Dabney, 2003 WI App 108, 264 Wis.2d 843, 663 N.W.2d 366; State v. Ritchie, 2000 WI App 136, 237 Wis.2d 664, 614 N.W.2d 837.

The Arrest Of A Person In A Home Including The Entry

Cases which have addressed the situation where (1) an entry into a home is made (2) to arrest a person (3) without the required type of warrant (4) and the state's theory is that exigent circumstances justified the entry, include:

State v. Sanders, 2008 WI 85, ____ Wis.2d ____, 752 N.W.2d 713; State v. Larson, 2003 WI App 150, 266 Wis.2d 236, 668 N.W.2d 338; State v. Kryzaniak, 2001 WI App 44, 241 Wis.2d 358, 624 N.W.2d 389; State v. Kiper, 193 Wis.2d 69, 532 N.W.2d 698 (1995); Kirk v. Louisiana, 536 U.S. 635, 122 S.Ct. 2458

(2002) (*per curiam*); Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980); Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642 (1981).

Cases which have addressed the situation where (1) an entry into the defendant's home is made (2) to arrest the defendant (3) and there exists an arrest warrant for the defendant, include:

State v. Blanco, 2000 WI App 119, 237 Wis.2d 395, 614 N.W.2d 512; State v. Kiper, 193 Wis.2d 69, 532 N.W.2d 698 (1995); Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1641 (1981); Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980).

The issue of whether "probable cause" or "reasonable suspicion" is the required level of information as to knowledge of the defendant's presence in the building, was recently discussed in Brown v. United States, 932 A.2d 521, 529-30 (D.C. 2007).

Cases which have addressed the situation where (1) an entry into a third party's home is made (2) to arrest the defendant (3) and the issue is whether the police possessed the proper type of warrant, include:

State v. Kryzaniak, 2001 WI App 44, 241 Wis.2d 358, 624 N.W.2d 389; State v. Blanco, 2000 WI App 119, 237 Wis.2d 395, 614 N.W.2d 512; State v. Kiper, 193 Wis.2d 69, 532 N.W.2d 698 (1995); Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642 (1981).

The entry of a home to arrest a person on probation, parole, or extended supervision pursuant to an apprehension warrant is discussed in State v. Pittman, 159 Wis.2d 764, 465 N.W.2d 245 (Ct. App. 1990).

Cases involving the protective sweep of a home when a person is arrested in the home are set forth above in number 24. under ***Search And/Or Seizure Of An Inanimate Object***.

In State v. Cash, 2004 WI App 63, ¶¶ 8, 26-27, 271 Wis.2d 451, 464-65, 677 N.W.2d 709 and Russell v. Harms, 397 F.3d 458 (7th Cir. 2005), the Court addressed a Payton challenge in the situation where the police entered a home pursuant to a search warrant for items and arrested the defendant when he was found in the home. The Court held that where the police are lawfully on the suspect's premises by virtue of a valid search warrant, they may make a warrantless arrest of the suspect prior to the search if the arrest is supported by probable cause.

The Effect Of A Lack Of Probable Cause To Arrest On Subsequent Actions

The effect of an illegal arrest (no probable cause to arrest) on the admissibility into evidence of a subsequent statement by the defendant has been addressed in Kaupp v. Texas, 538 U.S. 626, 123 S.Ct. 1843 (2003); United States v. Reed, 349 F.3d 457 (7th Cir. 2003).

The Effect Of A Payton Violation On Subsequent Actions

This topic is discussed in my outline entitled **REMEDIES FOR AN UNLAWFUL ARREST, SEARCH, OR SEIZURE—THE EXCLUSIONARY RULES**.

The Effect Of A "Violation Of State" Arrest Law

This issue is discussed in my outline entitled **REMEDIES FOR AN UNLAWFUL ARREST, SEARCH, OR SEIZURE—THE EXCLUSIONARY RULES**.

In Virginia v. Moore, ____ U.S. ____, 128 S.Ct. 1598 (2008), the Court held that the police did not violate the Fourth Amendment when they made an arrest that was based on probable cause but prohibited by state law or when they performed a search incident to that arrest.

THE REQUIREMENT OF GOVERNMENTAL ACTION

In some situations the actions at issue are not subject to the requirements of the Fourth Amendment because they were performed by persons not subject to the Fourth Amendment. Cases which have addressed this issue include:

> State v. Cole, 2008 WI App ____, ____ Wis.2d ____, ____ N.W.2d ____ (an off-duty officer, after receiving a letter at her home sent by the defendant which was addressed to someone other than the officer but which contained the home address of the officer, opened the letter and reviewed its contents; the letter served as a basis for an intimidation of a witness charge; the Court held that the officer acted in a private capacity, and not an official capacity, when she opened the letter and read it and therefore, the Fourth Amendment was not applicable; it was irrelevant, under the circumstances of this case, what the officer did after she read the defendant's letter; there was no evidence that the officer knew the letter concerned a criminal matter before opening it or that a fact-finder might

reasonably infer that the officer had reason to suspect that the contents might concern a criminal matter); State v. Sloan, 2007 WI App 146, ¶¶ 1-16, 303 Wis.2d 438, 443-51, 736 N.W.2d 189 (the defendant delivered a package to UPS for shipping; there was a sign posted that reserved the right of UPS to open any parcels; defendant did not dispute that the original search by UPS was a private-party search; the issue was whether the subsequent police action, including conducting a field test on the substance that was in a canister in the package, went beyond a mere replication of what UPS did and therefore was unconstitutional; conducting of the field test did not violate the Fourth Amendment; the police actions did not exceed the scope of the private-party search); State v. Bruski, 2007 WI 25, ¶ 21, 299 Wis.2d 177, 186, 727 N.W.2d 503 (to have a Fourth Amendment claim the search must be performed by a government agent); State v. Payano-Roman, 2006 WI 47, 290 Wis.2d 380, 714 N.W.2d 548; State v. Knight, 2000 WI App 16, 232 Wis.2d 305, 606 N.W.2d 291 (a search and seizure performed by an attorney, who was appointed a trustee attorney by the court in relation to an attorney who had abandoned his practice of law, was governmental action for Fourth Amendment purposes); State v. Rogers, 148 Wis.2d 243, 435 N.W.2d 275 (Ct. App. 1988) (the Court held that several insurance investigators were not governmental agents when they searched a fire scene); State v. Bembenek, 111 Wis.2d 617, 331 N.W.2d 616 (Ct. App. 1983) (the inventory of the contents of the defendant's locker at her place of employment by a member of the Marquette University Public Safety Department was not a governmental search or action; the person's purpose was to inventory and not to search for evidence of a crime; the fact that two police officers were present during the inventory did not make it governmental action); State v. Jenkins, 80 Wis.2d 426, 259 N.W.2d 109 (1977) (the defendant, after a car accident, was admitted to a hospital; a doctor ordered a blood test for alcohol for a diagnostic purpose; a blood test that is taken at the request of a physician, solely for diagnostic purposes and not at the request or suggestion of any governmental authority, is not a search or seizure within the meaning of the Fourth Amendment; neither is there a search or seizure because the doctor later testifies concerning

> the results at a homicide trial); Mears v. State, 52 Wis.2d 435, 190 N.W.2d 184 (1971) (a mother called the police after finding furs in her son's room which she suspected he had stolen; when the police arrived, she showed them the furs and they left the house to trace the furs to see if they were stolen; when the police returned, the mother executed a written consent to search the house; the court held that the mother had sufficient control over the house to agree to the search; the court also stated that the furs were separately admissible as the product of a private search); Michael C. v. Gresbach, 526 F.3d 1008, 1013-14 (7th Cir. 2008) (child welfare workers/social workers are included under the Fourth Amendment); United States v. Jacobsen, 446 U.S. 109, 104 S.Ct. 1652 (1984); Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574 (1921) (a corporation stole voluminous records from a former employee and turned them over to the prosecution; the Court stated the fourth amendment prohibition against unreasonable searches and seizures was designed to protect people from government searches and did not apply to the acts of private individuals).

Private searches are not subject to the Fourth Amendment's protections because the Fourth Amendment is applicable only to government action. Cole, 2008 WI App at ¶ 12, ____ Wis.2d at ____; Payano-Roman, 2006 WI at ¶ 17, 290 Wis.2d at 390.

The Fourth Amendment is applicable to "governmental" conduct and not just "police" conduct.

> On appeal, the State correctly notes that the proper inquiry is whether the search was governmental conduct, not whether the search was police conduct. See State v. Bembenek, 111 Wis.2d 617, 631, 331 N.W.2d 616, 624 (Ct. App. 1983). 'The strictures of the Fourth Amendment, applied to the States through the Fourteenth Amendment, have been applied to the conduct of governmental officials in various civil activities. . . . Searches and seizures by government employers or supervisors of the private property of their employees, therefore, are subject to the restraints of the Fourth Amendment.' O'Connor v. Ortega, 480 U.S. 709, 714-15 (1987). These protections have been applied in school search situations, see New Jersey v. T.L.O., 469 U.S. 325, 334-37 (1985); building inspections, see Camara v. Municipal

> Court, 387 U.S. 523, 528-34 (1967); and inspections conducted under the Occupational Safety and Health Act, see Marshall v. Barlow's, Inc., 436 U.S. 307, 311-15 (1978).

Knight, 2000 WI App at ¶ 7, 232 Wis.2d at 310.

When the issue is whether a private/nongovernmental person was acting as a governmental instrument or agent, the three requirements in Wisconsin that must be met for a search to be a private search are: (1) the police may not initiate, encourage or participate in the private entity's search; (2) the private entity must engage `in the activity to further its own ends or purpose; (3) the private entity must not conduct the search for the purpose of assisting governmental efforts. Payano-Roman, 2006 WI at ¶ 18, 290 Wis.2d at 390.

The mere presence of a government official will not necessarily transform a private search into government action. Payano-Roman, 2006 WI at 30, 290 Wis.2d at 391.

Once the State raises the issue/asserts that a search is a private search, the defendant has the burden of proving by a preponderance of the evidence that government involvement in a search or seizure brought it within the protections of the Fourth Amendment. Cole, 2008 WI App at ¶ 12, ____ Wis.2d at ____; Bruski, 2007 WI at ¶ 21, 299 Wis.2d at 186; Payano-Roman, 2006 WI at ¶ 23, 290 Wis.2d at 391-92. This includes the situation where the issue is whether a private party acted as an agent of the government. Rogers, 148 Wis.2d at 246-47.

In Payano-Roman, 2006 WI at ¶¶ 19-29, 290 Wis.2d at 390-95, the Court discussed the "joint endeavor" situation—a search may be deemed a government search when it is a joint endeavor between private and government actors.

The question of whether a search is a private search or a government search is one that must be answered taking into consideration the totality of the circumstances. Cole, 2008 WI App at ¶ 12, ____ Wis.2d at ____; Payano-Roman, 2006 WI at ¶ 21, 290 Wis.2d at 391.

In Cole, 2008 WI App at ¶ 13, ____ Wis.`2d at ____, the Court, in deciding when an off-duty officer acts in a private capacity rather than as a government agent for purposes of the Fourth Amendment, held that "government involvement in a search is not measured by the primary occupation of the actor, but by the capacity in which he or she acts at the time in question—an off-duty officer acting in a private capacity in making a search does not implicate the Fourth Amendment."

In Payano-Roman, 2006 WI at ¶¶ 16 n.3, 24, 290 Wis.2d at 389 n.3, 392, the Court discussed the appellate standard of review.

Specific 1
(FOURTH I)