CHAPTER 17

JANUARY, 2012

Search and Seizure

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§ 17.1 ORIGIN AND RATIONALE OF THE EXCLUSIONARY RULE

§ 17.1A. EXCLUSION UNDER THE FOURTH AMENDMENT

Under the exclusionary rule, evidence obtained by searches and seizures in violation of a criminal defendant's constitutional rights is inadmissible against him. The rule has its roots in the Fourth Amendment's right of privacy and has been applied in the federal courts for seventy-five years.[1] The principle was made applicable to the states in *Mapp v. Ohio.*[2]

There are three purposes served by the exclusionary rule.[3] *First*, the rule was judicially fashioned to deter the police from illegal conduct by removing any incentive to disregard constitutional requirements. *Second*, the enforcement of the exclusionary rule protects the integrity of the judiciary by ensuring that convictions will be secured without the benefit of evidence acquired illegally. *Finally*, the rule protects the public interest in individual privacy by assuring people that the government will not be allowed to profit from unwarranted intrusions.

In recent cases, the U.S. Supreme Court has focused on the deterrence rationale to narrow the application of the exclusionary rule,[4] using an ad hoc cost-benefit analysis that tends to overemphasize the interest in effective law enforcement.[5] In *United States v. Leon,*[6] the Court held that drugs seized pursuant to an invalid search

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[1] Weeks v. United States, 232 U.S. 383 (1914). Exclusion is not the only conceivable remedy for unlawful police conduct. The S.J.C. has suggested that outrageous conduct even in the absence of a showing of prejudice might call for dismissal but has never imposed or approved such a remedy. *See* Commonwealth v. Viverito, 422 Mass. 228, 230 (1996) (failure to release arrestee promptly as required does not warrant dismissal); Commonwealth v. Jacobsen, 419 Mass. 269, 277 (1994) (illegal arrest did not warrant dismissal); Commonwealth v. Phillips, 413 Mass. 50, 59 (1992) (vacating dismissal of indictments in cases involving "search on sight" policy of Boston Police Department but ordering suppression). *See also* Commonwealth v. Lewin, 405 Mass. 566, 586–87 (1989) (vacating dismissal of indictments in case of police perjury). Commonwealth v. Hill, 49 Mass. App. Ct. 58, 61 (2000) (dismissal not alternative remedy to suppression where no fruits found or no allegation of serious police misconduct).

[2] 367 U.S. 643 (1961).

[3] *See* LAFAVE, SEARCH AND SEIZURE § 1.1 (4th ed. 2004).

[4] *See, e.g.,* Hudson v. Michigan, 547 U.S. 586, 600 (2006) (fourth amendment

exclusionary rule does not apply to evidence seized after violation of knock and announce rule); See also Davis v. United States, _U.S._, 131 S.Ct. 2419,2429 (2011) (good faith reliance on binding precedent)

[5] *See e.g.,* Massachusetts v. Sheppard, 468 U.S. 981 (1984) (" [s]uppressing evidence because the judge failed . . . will not serve the deterrent functions that the exclusionary rule was designed to achieve").

[6] 468 U.S. 897 (1984). In Arizona v. Evans, 514 U.S. 1, 16 (1995), the U.S. Supreme Court held that *Leon* applies to good faith reliance on a mistake by court personnel. In Commonwealth v. Treadwell, 402 Mass. 355, 356 n.3 (1988), the Supreme Judicial Court declined to adopt the good faith exception under art. 14, leaving open the issue for the future. *But see* Commonwealth v. Wilkerson, 436 Mass. 137, 143 (2002) (deterrent purpose of exclusionary rule not served where officer relied on information received from registry). Recent

warrant were admissible since the police had seized the items in "good faith" reliance on the warrant; the exclusion of "inherently trustworthy tangible evidence" would be too costly to the truth-finding function of the criminal justice system and the deterrent effect of exclusion too "marginal or non-existent."[7] The good faith exception has been expanded to cover good faith reliance by officers on a statute later deemed unconstitutional[8] and on a mistake by court personnel.[9] More recent cases have made clear that good faith errors of any type will not result in suppression. [9.5] Despite the recent narrowing of the exclusionary rule, older Fourth Amendment cases are still important authority for any motion to suppress because Massachusetts courts interpreting parallel provisions of the state constitution often begin by relying on Fourth Amendment precedent from an earlier, more protective period.[10]

§ 17.1B. EXCLUSION UNDER ARTICLE 14

The Supreme Judicial Court has interpreted article 14 of the Massachusetts Constitution Declaration of Rights to afford "more substantive protection to criminal defendants than [that which] prevails under the Constitution of the United States."[11] Thus every motion to suppress evidence obtained as a result of an alleged illegal search or seizure should rely on article 14 as well as the Fourth Amendment.[12]

Supreme Court cases have expanded the reach of the good faith exception. See Davis. v. United States, _U.S._, 1315. Ct. 2419,2429 (2011) (good faith reliance on binding precedent); Herring v. United States, 555 U.S. 135 (2009) (good faith reliance on warrant recalled but not cleared in police data base).

[7] United States v. Leon, 468 U.S. 897, 922 (1984). There were precursors to *Leon. See* United States v. Calandra, 414 U.S. 338 (1974) (witness at grand jury may not refuse to answer questions based on evidence obtained from illegal search); United States v. Janis, 428 U.S. 433 (1976) (evidence seized under invalid state warrant not excludable in federal civil tax proceeding]. *See also* Pennsylvania Bd. of Probation v. Scott, 524 U.S. 357, 364-368 (1998) (exclusionary rule not applicable in parole revocation hearings for evidence seized in violation of parolee's Fourth Amendment rights); Immigration & Naturalization Service v. Mendoza, 468 U.S. 1032 (1984) (exclusionary rule not applicable to deportation proceedings).

[8] *See* Illinois v. Krull, 480 U.S. 340 (1987) (no exclusion of fruits of administrative search of auto junkyard authorized under statute later held unconstitutional for leaving inspectors with too much discretion). *See also* United States v. Aiudi, 835 F.2d 943 (1st Cir. 1987) (cost-benefit analysis applied in federal prosecution to justify admission of evidence seized by local police under invalid state warrant and subsequently turned over to federal authorities).

[9] Arizona v. Evans, 514 U.S. 1 (1995).

[9.5] See Davis v. United States, __U.S.__, 131 S. Ct. 2419, 2429 (2011) ("evidence obtained in reasonable reliance on binding precedent is not subject to the exclusionary rule"). See also Herring v. United States, 555 U.S. 135 (2009) (reliance on warrant recalled but not cleared in police data base); Hudson v. Michigan, 547 U.S. 586 (2006) (violation of knock and announce rule does not warrant exclusion).

[10] *See, e.g.,* Commonwealth v. Upton, 394 U.S. 363 (1985) (art. 14 interpreted to require standard of probable cause formerly applicable under Fourth Amendment cases of *Aguilar v. Texas* and *Spinelli v. United States*).

[11] Commonwealth v. Ford, 394 Mass. 421, 426 (1985) (storage search of automobile trunk invalid under art. 14). *See* Commonwealth v. Treadwell, 402 Mass. 355, 356 n.3 (1988). *See also* Commonwealth v. Balicki, 436 Mass. 1, 12 n.11 (2002).

[12] Article 14 of the Declaration of Rights to the Constitution of the Commonwealth of Massachusetts provides: "Every subject has a right to be secure from all unreasonable searches,

Massachusetts began its separate doctrinal development of article 14 in *Commonwealth v. Upton.*[13] The Supreme Judicial Court explicitly rejected the Supreme Court's "totality of circumstances test" in reviewing information provided by anonymous informants and held under article 14 that the stricter, abandoned federal standard would continue to be the benchmark in Massachusetts.[14] Exclusion of evidence in *Upton* was dictated by statute,[15] but the court soon held that article 14 itself requires the exclusion of illegally seized evidence.[16] Article 14 has become a separate bulwark against government intrusions on individual privacy, in part preserving protection once recognized under the Fourth Amendment but also promising the expansion of privacy rights in Massachusetts.[17] Thus unlike the Fourth Amendment,

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and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize heir property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws." *Cf. Commonwealth v. Nattoo*, 452 Mass. 826, 832 (2009) (art.14 not applied because not argued although mentioned).

[13] 394 Mass. 363 (1985) *(Upton II).*

[14] Commonwealth v. Upton, 394 Mass. 363, 373–77 (1985). The U.S. Supreme Court adopted the totality of circumstances test in Illinois v. Gates, 462 U.S. 213 (1983).

[15] The court relied on G.L. c. 276, § 2B.

[16] Commonwealth v. Ford, 394 Mass. 421 (1985) (firearm seized in illegal search of car trunk excluded under authority of art. 14). *But see* Commonwealth v. Sheppard, 394 Mass. 381 (1985) (no exclusion of evidence seized pursuant to warrant which violated particularity requirements of warrant statute and art. 14 because affidavit identified items and officers executed warrant as if it were appropriately limited). Commonwealth v. Nelson, 460 Mass. 564,573 (2011) (violation of warrant statute by obtaining warrant by telephone did not prejudice defendant but finding of reasonable efforts to locate judge in person necessary to avoid exclusion). The Supreme Judicial Court has not recognized a good-faith exception to the exclusionary rule under state law. See Commonwealth v. Hernandez, 456 Mass. 528,533 (2010); Commonwealth v. Valerio, 449 Mass. 562,570 (2007) ("Massachusetts has never adopted the 'good faith' execution and we do not adopt it now"). But it has stated that "the mere fact that an unlawful search and seizure has occurred should not automatically result in the exception of any illegally seized evidence." Commonwealth v. Gomes, 408 Mass. 43, 46 (1990). In determining whether to exclude the evidence the court will examine "(1) the degree to which the violation undermined the principles underlying the governing rule of law . . . and (2) the extent to which exclusion will tend to deter such violations from being repeated in the future." *Gomes, supra,* 408 Mass. at 46. In *Gomes,* the court held that a violation of the "knock and announce" rule required suppression. *See* Commonwealth v. Grimshaw, 413 Mass. 73, 77 (1992) ("Generally, evidence seized in violation of the law will be suppressed only if the violation is substantial or rises to the level of a Federal or State constitutional violation."). *Cf.* Commonwealth v. Beldotti, 409 Mass. 553, 559 (1991) (testing results of occult blood from murder suspect's hands and arms based on invalid warrant not subject to exclusion in view of minimal intrusion and likelihood of inevitable discovery).

[17] *See* Commonwealth v. Connollly, 454 Mass. 808,822 (2009) (added art.14 protection for privacy in motor vehicles) Commonwealth v. Gonsalves, 429 Mass. 658, 668 (1999) (expressing opinion that state supreme courts should be "strong independent repositories of authority in order to protect the rights of their citizens."). *See also* Commonwealth v. Amendola, 406 Mass. 592 (1990) (automatic standing of Jones v. United States preserved under art. 14); Commonwealth v. Robinson, 403 Mass. 163 (1988) (adhering to prior standard of

article 14 has been interpreted to provide additional protection against warrantless electronic eavesdropping by one party to a conversation with another[18] and mandatory employee drug testing;[19] and to impose stricter standards for inventory searches[20] and searches of probationers.[21] The trend toward reliance on the state constitution demonstrates that the Supreme Judicial Court places a greater value on individual privacy than does its federal counterpart and is more willing to scrutinize police conduct.[22]

§ 17.1C. OTHER BASES FOR EXCLUSION

Exclusion of evidence has historically been sanctioned as the remedy for violations of certain other constitutional, statutory, or court-promulgated rights, and these should be cited, where applicable, to bolster suppression motions. Among the

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corroboration for otherwise insufficient informant hearsay in warrant affidavit); Commonwealth v. Amaral, 398 Mass. 98 (1986) (sobriety checkpoint roadblock invalid under art. 14); Commonwealth v. Bishop, 402 Mass. 449 (1988) (inventory search of closed gym bag located in back of impounded pick-up invalid under art. 14); Commonwealth v. Bottari, 395 Mass. 777, 783 (1985) (art. 14 applicable to arrest of suspect); Commonwealth v. Sullo, 26 Mass. App. Ct. 766 (1989) (booking search of arrestee exceeds limits of art. 14 when officer peruses arrestee's papers).

The Supreme Judicial Court has expressly left open the possibility that art. 14 will provide greater protection than the Fourth Amendment in several cases. *See* Commonwealth v. Grant, 403 Mass. 151, 160–61 (1988) (open fields doctrine "not adopted" under art. 14);

[18] Commonwealth v. Blood, 400 Mass. 61 (1987). *Compare* United States v. White, 401 U.S. 745 (1971) (Fourth Amendment does not protect individual from risk that a person he speaks with might be taping or transmitting the conversation). See Commonwealth v. Thorpe, 384 Mass. 271 (1981) (police officer, known to be such, secretly recorded conversation with defendant — held admissible). *Blood* is significant because it broadened the scope of protected privacy under art. 14 and suggests that any technologically enhanced observation by government agents will activate constitutional requirements. *Compare* Dow Chem. Co. v. United States, 476 U.S. 227 (1986) (use of sophisticated aerial photographic equipment to investigate industrial premises not a Fourth Amendment search). *See also* Commonwealth v. Eason, 427 Mass. 595, 599–600 (1998) (police do not need a warrant under Art. 14 to listen on an extension phone to a phone conversation with the consent of one of the speakers).

[19] *Compare* Horsemen's Benevolent & Protective Ass'n v. State Racing Comm'n, 403 Mass. 692 (1989) *with* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (upholding mandatory drug and alcohol testing of railroad employees involved in train accidents) *and* National Treasury Employees Union v. Von Rabb, 489 U.S. 656 (1989) (upholding mandatory drug testing of federal customs officers seeking promotion or transfer to certain positions).

[20] Commonwealth v. Ford, 394 Mass. 421 (1985) (storage search of automobile trunk invalid under art. 14 because not conducted pursuant to standard police procedures).

[21] Commonwealth v. LaFrance, 402 Mass. 789 (1988) (warrant based on "reasonable suspicion" necessary to justify search of probationer's home). *But see* Commonwealth v. Olsen, 405 Mass. 491 (1989) (probation may properly be revoked on evidence suppressed in separate criminal proceeding resulting in not guilty finding).

[22] The Supreme Judicial Court has appeared willing to analyze intrusions under art. 14 by use of a less intrusive means test that provides greater protection for privacy. *See* Commonwealth v. LaFrance, 402 Mass. 789, 793 n.4 (1988) (in reviewing reasonableness of searches of probationers other factors relevant under art. 14 including "the extent to which less intrusive means than a search would fulfill the needs of probation officers").

most common bases for suppression are violations of the Fifth Amendment (due process and right against self-incrimination) and the Sixth Amendment (right to counsel).[23] The appropriate state constitutional provision should always be cited as well and argued separately. Additionally suppression has been recognized in Massachusetts for violations of: (1) G.L. c. 276, § 1, ¶ 2, purportedly restricting the use of evidence discovered during a search incident to an arrest;[24] (2) G.L. c. 276, §§ 2 through 2C, defining the requirements for search warrants in Massachusetts;[25] (3) G.L. c. 276, § 33A, entitling arrestees to prompt use of a telephone;[26] and (4) Mass. R. Crim. P. 11, relating to pretrial conference discovery agreements and orders.[27]

§ 17.2 SCOPE OF SUPPRESSION

§ 17.2A. "FRUIT OF THE POISONOUS TREE"

While the exclusionary rule provides the basis for suppression of evidence, it is the fruit of the poisonous tree doctrine articulated in *Wong Sun v. United States*[28] that determines the scope of exclusion. Simply stated, any piece of evidence or information obtained as a result of government illegality is a "fruit" of the illegality and may not be offered as evidence or used by the government to obtain evidence against someone whose rights have been violated.[29]

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[23] These issues are discussed *infra* in chs. 18 and 19. A violation of the equal protection clause as a result of racial profiling by police can also call for suppression. See *Commonwealth v. Lora*, 451 Mass. 425,437 (2008) (suppression for stops based on racial profiling and statistical evidence can raise inference of discrimination). But see *Commonwealth v. Betances*, 451 Mass. 457,462 (2008) (trooper's arrest reports not discoverable without "reasonable basis" to show profiling).

[24] Commonwealth v. Stafford, 18 Mass. App. Ct. 964 (1984) (section looks at purpose of officer's search as defined by the arrest); *Commonwealth v. Toole*, 389 Mass. 159 (1983) (gun properly suppressed after search of truckcab following arrest of defendant on outstanding warrant for assault and battery).

[25] Commonwealth v. Upton, 394 Mass. 363 (1985) *(Upton II).*

[26] Commonwealth v. Leahy, 445 Mass. 481,491 (2005) (no suppression of statements without showing by defendant of intentional violation); *Commonwealth v. Novo*, 442 Mass.262 (2004) (right not activated until formal arrest); *Commonwealth v. Rivera* 441 Mass. 358, 375 (2004) (no requirement to advise defendant of right to phone call).

[27] *See, e.g.*, Commonwealth v. Gliniewicz, 398 Mass. 744 (1986); Commonwealth v. Chappee, 397 Mass. 508 (1986). *See supra* § 14.3.

[28] 371 U.S. 471 (1963). The phrase was first used in Nardone v. United States, 308 U.S. 338 (1939).

[29] The evidence must be "tainted" by the illegality. *See, e.g.* Commonwealth v. Rodriguez, 456 Mass. 578,588 (2010) (drugs dropped after illegal stop tainted but not if dropped before); Commonwealth v. Ware, 75 Mass. App. Ct. 220,233-234 (2009) (entry and sweep valid but, if not, probable cause not tainted by illegality); Commonwealth v. Webster, 75 Mass. App. Ct. 247,259 (2009) (outrageous conduct by officer waiting for warrant not connected to illegality-no suppression); *See* also Commonwealth v. Watkins, 425 Mass. 830, 842 (1997) (search warrant not based on information from arguably illegal prior entry and sweep of premises). While the emphasis in this chapter is on search and seizure, the "fruit of the poisonous tree" principle applies as well to other types of government illegality such as suggestive lineups and involuntary confessions. *See, e.g.*, Commonwealth v. White, 374 Mass.

An illegal stop, search or seizure may result in suppression of such pieces of evidence as:

1. Physical evidence;[30]

2. Statements made by the defendant;[31]

3. Statements by witnesses. Often it can be shown that the police have obtained statements from witnesses by exploiting information they gathered illegally.[32] However, it is more difficult to show that such evidence is causally related to prior police illegality;[33]

4. Identification evidence. Most identification suppression cases are based on due process violations arising out of overly suggestive identification procedures.[34] However, if the police are led to an eyewitness as the result of a prior illegal search or seizure, the identification testimony may be suppressed;[35]

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132 (1977) (search warrant relying on information obtained from illegally induced confession held invalid and evidence seized pursuant to warrant suppressed).

[30] *See, e.g.,* Commonwealth v. Swanson, 56 Mass. App. Ct. 459,464-465 (2002) (gun seized after illegal search); Commonwealth v. Ferrara, 376 Mass. 502, 505 (1978) (all evidence taken from car after occupants unlawfully ordered to step out vehicle suppressed); Commonwealth v. Pietrass, 392 Mass. 892 (1984) (clothing seized from defendant after illegal arrest suppressed as "fruit of poisonous tree"; further findings necessary to determine if statements of defendant and results of line-up were causally connected to prior illegality). See also Commonwealth v. Tyree, 455 Mass. 676 (2010) (seizure of shoes outside home after illegal arrest deemed fruit).

[31] *See, e.g.,* Commonwealth v. O'Connor, 21 Mass. App. Ct. 404, 406 (1986) (" 'fruit of poisonous tree' doctrine . . . applies to verbal statements as well as to tangible evidence"). *See also* Brown v. Illinois, 422 U.S. 590, 597–604 (1975) *(Miranda* warnings alone do not break causal connection between illegal arrest and subsequent statement of defendant). *But see* New York v. Harris, 495 U.S. 14 (1990) (written confession obtained at police station after illegal warrantless arrest in home based on probable cause not fruit of illegality); See Commonwealth v. Marquez, 434 Mass. 370, 379-380 (2001) (adopting rule of New York v. Harris under Art. 14); *Compare* Dunaway v. New York, 442 U.S. 200 (1979) (illegal arrest without probable cause requires exclusion of statements of defendant). Cf. *Commonwealth v. Tyree,* 455 Mass. 676 (2010) (seizure of arrestee's shoes outside home after illegal arrest distinguished from statements).

[32] *See, e.g.,* Commonwealth v. Lahti, 398 Mass. 839 (1986) (testimony of additional victims of child abuse whose names were obtained by police in illegally obtained confession suppressed despite fact that witnesses willingly came forward); *see also* Commonwealth v. Caso, 377 Mass. 236 (1979) (recognizing that testimony of live witness discovered as a result of illegal wiretap might be suppressible if police exploited information to persuade or coerce reluctant citizen to testify). *But see* Commonwealth v. Waters, 420 Mass. 276, 278 (1995) (characterizing suppression of witness testimony as "a level of suppression we are not inclined to recognize").

[33] *See* discussion of independent source doctrine and inevitable discovery rule, *infra* § 17.2B.

[34] *See infra* ch.18 for a discussion of due process limitations on identification procedures. *See also, e.g.,* Commonwealth v. Santos, 402 Mass. 775, 784–85 (1988) (out-of-court identification of defendant violated due process guarantee — testimony of police officers corroborating identification also excluded).

[35] *See, e.g.,* Commonwealth v. Pietrass, 392 Mass. 892, 902–03 (1984); Commonwealth v. Bodden, 11 Mass. App. Ct. 964 (1981) (defendant identified while detained illegally; remanded to determine whether in-court identification was fruit of "primary illegality"). *But cf.* Commonwealth v. Pandolfino, 33 Mass. App. Ct. 96 (1992) (identification by victim of detained suspect deemed not product of detention).

5. The defendant. Although the defendant's identity has generally not been deemed excludable, and the government is not prevented from bringing the defendant to trial because of an unlawful arrest or seizure,[36] there may be exceptional cases warranting suppression.[37]

§ 17.2B. LIMITS ON THE "FRUITS" DOCTRINE

Once the defendant's counsel has established a link between the improper police conduct and the evidence, the burden is on the prosecution to persuade the court that one of the following exceptions to the *Wong Sun* doctrine applies.[38]

1. Independent Source Doctrine

The independent source doctrine is based "upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it otherwise would have occupied."[39] Under it, suppression will be denied if evidence was derived from a source independent of the illegality. For example, a search has been upheld even though the warrant affidavit contained information obtained illegally because the court found sufficient probable cause after excising the tainted information.[40] The independent source rule has been followed in Massachusetts although the Supreme Judicial Court appears to focus more attention on the degree to which the police "exploited" the information acquired illegally.[41]

2. Inevitable Discovery Rule

[36] Commonwealth v. Fredette, 396 Mass. 455 (1985); United States v. Crews, 445 U.S. 463 (1980).

[37] *See, e.g.,* Zimmerman v. Commonwealth, 363 S.E.2d 708 (Va. 1988) (defendant's identity suppressed in prosecution for habitual traffic offender because illegal stop led to discovery of her status).

[38] *See, e.g.,* Nix v. Williams, 467 U.S. 431 (1984) (burden on government to show admissibility under inevitable discovery doctrine of evidence seized in violation of defendant's Sixth Amendment rights). *See also* Commonwealth v. Fredette, 396 Mass 455, 459 (1985); Commonwealth v. Cote, 386 Mass. 354, 361–62 (1982).

[39] Murray v. United States 482 U.S. 533 (1988). *See also* Boston Hous. Auth. v. Guirola, 410 Mass. 820, 829 (1991) (exterminators' observation of contraband in apartment was source independent of housing authority officer's subsequent search).

[40] See Commonwealth v. DeJesus, 439 Mass. 616, 628 n.11 (2003) (affidavit purged of information obtained illegally still supported probable cause). *See also* Segura v. United States, 468 U.S. 796 (1984) (illegal entry of premises where officers observed narcotics does not vitiate subsequent search under warrant because information used to obtain warrant came from independent sources); Murray v. United States, 487 U.S. 533 (1988) (same); Commonwealth v. Hall, 366 Mass. 790 (1975) (balance of affidavit held to justify issuance of warrant despite reference to illegally overhead conversation).

[41] See Commonwealth v. Avellar,70 Mass. App. Ct. 608, 618 (2007) (no exploitation of arguable illegality). *Compare* Commonwealth v. Frodyma, 393 Mass. 438 (1984) (seizure of pharmacy records from federal authorities pursuant to valid state warrant deemed justifiable as independent from illegality of initial federal seizure) *with* Commonwealth v. Lahti, 398 Mass. 829 (1986) (illegally obtained confession led to other child abuse victims willing to testify; testimony suppressed because of strong link between confession and coming forward of witnesses).

If the prosecution can "establish by a preponderance of the evidence that the [illegally obtained] information ultimately or inevitably would have been discovered by lawful means," the evidence acquired as a result of the information will not be suppressed.[42] The chief problem with the inevitable discovery doctrine is the chance that it may encourage unconstitutional shortcuts that can be excused by speculation that proper investigative procedures would eventually have led to the same result.[43] Expressing that concern the Supreme Judicial Court has refused to apply the inevitable discovery doctrine to evidence seized in an illegal warrantless search merely because the officers eventually would have secured a warrant.[44] However, if the illegality is not serious and the court finds that the eventual lawful discovery of the evidence was "certain as a practical matter," the doctrine will apply and the evidence will be admitted.[45] The inevitable discovery rule will not apply if the officers have acted in bad faith.[46]

3. Dissipation of the Taint

Courts have held that in some circumstances the connection between police misconduct and the evidence challenged is so attenuated that the deterrent effect of exclusion no longer justifies its social cost.[47] Thus, for example, the Supreme Judicial Court has upheld the admission of court-ordered fingerprints of a defendant despite the

[42] Nix v. Williams, 467 U.S. 431, 444 (1984).

[43] *See generally* LAFAVE, SEARCH AND SEIZURE § 11.4(a) (4th ed. 2004).

[44] Commonwealth v. Benoit, 382 Mass. 210, 217–19 (1981).

[45] Commonwealth v. O'Connor, 406 Mass. 112, 117 (1989). In *O'Connor* a police officer took an intoxicated person into protective custody and conducted a legal patdown for weapons. However, the search extended illegally to a jacket pocket containing a plastic bag with pills later determined to be contraband. The court held the evidence admissible because the evidence would have been discovered at the required inventory search at the jail. *See* Commonwealth v. Lahey, 80 Mass. App. Ct. 606,615 (2011) (suspect in OUI stopped outside of officer's authority would inevitably have been discovered by local police);Commonwealth v. Linton, 456 Mass. 534, 559-560 (2010) (evidence of ATM transaction would have been discovered without tainted receipt); Commonwealth v. Sbordone, 424 Mass. 802, 811 (1997) (use of civilian investigator in execution of warrant without adequate supervision not so serious as to vitiate application of inevitable discovery rule). *See also* Commonwealth v. Miller, 42 Mass. App. Ct. 703, 707 (1997) (extraction of blood ordered without hearing prior to Matter of Lavigne, 418 Mass. 831 (1994), requiring hearing, would have been allowed "inevitably"); Commonwealth v. Somers, 44 Mass. App. Ct. 920 (1998) (gun found in car subject to impoundment would have been discovered in required inventory search). *Contrast* Commonwealth v. Ilges, 64 Mass. App. Ct. 503, 515-516 (2005) (discovery of cash after illegal stop not "certain as a practical matter"); Commonwealth v. Ferguson, 410 Mass. 611, 616 (1991) (search of bag in fleeing suspect's jacket not justified under rule because suspect was not in custody and custody was not inevitable); Commonwealth v. Perrot, 407 Mass. 539, 547–48 (1990) (statements of suspect detained illegally led to victim's pocketbook 10 days after crime-discovery deemed not inevitable).

[46] Commonwealth v. Gomes, 408 Mass. 43, 47–48 (1990).

[47] *See, e.g.,* Commonwealth v. Benoit, 382 Mass. 210, 216 (1981). The origin of this doctrine can he found in Nardone v. United States, 308 U.S. 338, 341 (1939). *Cf.* Commonwealth v. Westerman, 414 Mass. 688, 691–92 (1993) (results of pen register later ruled invalid incorporated into one paragraph of 37-page warrant application had "de minimis" effect; no suppression).

fact that his arrest had been unlawful.[48] In determining whether the taint of the original illegality has been dissipated, the court will balance three factors: (1) the amount of time between the illegality and discovery of evidence; (2) the intervening circumstances; and (3) the nature and flagrancy of the improper police conduct.[49] The more serious the illegality, the less likely it is that the court will find the taint to have dissipated.[50] Defense counsel should reflect on all possible advantages that might have accrued to the police from their improper activity so as to characterize the case as one of exploiting the illegality.[51]

4. Use for Impeachment

Evidence seized in violation of the Fourth Amendment may be used to impeach a defendant who testifies either on direct or cross-examination to matters inconsistent with the illegally seized evidence.[52] The exclusionary rule does not apply because the

[48] Commonwealth v. Fredette, 396 Mass. 445 (1985). In *Fredette* the officers had entered the defendant's house to arrest without a warrant or exigent circumstances.

[49] Commonwealth v. Fredette, 396 Mass. 445 (1985) (adopting test enunciated in Brown v. Illinois, 422 U.S. 590, 603–04 (1975). *See* Commonwealth v. Damiano, 444 Mass. 444, 456 (2005) (admissions and consent to search not tainted by prior illegality); Commonwealth v. Kolodziej, 69 Mass. App.199, 203-204 (2007) (independent criminal act of reckless driving after illegal stop dissipates taint) Commonwealth v. Chongarlides, 52 Mass. App. Ct. 366, 376-378 (2001) (statement made two hours after interview began and no flagrant illegality – no suppression).

[50] Compare Commonwealth v. Kipp, 57 Mass. App. Ct. 629 (2003) (two hours from arguably illegal sweep to consent deemed sufficient "break in the nexus") with Commonwealth v.Yehudi Y., 56 Mass. App. Ct. 812, 819 (2002) (second illegal entry to consent was matter of minutes) See Commonwealth v. Manning, 44 Mass. App. Ct. 695, 699–200 (1998) (illegal arrest leading to mug shot and photo identification of suspect not deemed sufficiently serious—suppression denied). *Contrast* Commonwealth v. Crowe, 21 Mass. App. Ct. 456, 461, *cert. denied*, 479 U.S. 838 (1986) (illegal arrest for same crime in which photo identification used — suppression warranted). *See also* Commonwealth v. Bennett, 414 Mass. 269 (1993) (warrant search of suspect's apartment by Brookline officer tainted by prior illegal search by Boston police accompanied by Brookline officer); Commonwealth v. Ellsworth, 41 Mass. App. Ct. 554, 557 (1996) (verbal assent to search vehicle did not attenuate illegality of prior detention). *Compare* Commonwealth v. Meehan, 377 Mass. 552 (1979) (statutory violation of right of arrestee to use telephone a factor in concluding suppression of statement warranted), *with* Commonwealth v. Shipps, 399 Mass. 820 (1987) (statutory violation of protective custody law "not a deliberate one aimed at encouraging the defendant to incriminate himself").

[51] *See, e.g.*. Commonwealth v. Allen, 54 Mass. App. Ct. 719,723 (2002) (Commonwealth failed to meet burden to show dissipation of taint); Commonwealth v. Webster, 75 Mass. App. Ct. 247,256 (2009) (officers exploited illegality to make arrest). Commonwealth v. Laughlin, 385 Mass. 60 (1982). In *Laughlin* a state trooper stopped a car legally but went beyond the proper scope of the stop when he ordered the occupants out of the car. The defendant was pat frisked and consented to a search of the vehicle. The drugs found in the car were suppressed because the record failed to show that the consent was "unaffected by the taint of the illegality." *See also* Commonwealth v. Midi, 46 Mass. App. Ct. 591, 595 (1999) (alleged consent deemed product of illegal entry into apartment); *See also* Commonwealth v. Ferrara, 376 Mass. 502 (1978) (consent to search car trunk held to be product of illegal threshold inquiry).

[52] *See* United States v. Havens, 446 U.S. 620 (1980) (illegally seized teeshirt introduced to impeach defendant's denial on cross-examination that he had sewn pockets on inside of shirts for smuggling purposes). *See also* Walder v. United States, 347 U.S. 62, 65

deterrent effect of the rule is outweighed in the impeachment context by the government's interest in discouraging perjury.[53] However, the impeachment exception to the exclusionary rule does not extend to the use of illegally seized evidence to impeach witnesses called by the defendant.[54]

Some evidence seized in violation of article 14 may be inadmissible for purposes of impeaching the testimony of a defendant. In *Commonwealth v. Fini*[55] the Supreme Judicial Court held that conversations surreptitiously recorded in the defendant's home in violation of article 14 could not be used to impeach the defendant's testimony. In reaching its conclusion the court emphasized the serious nature of the intrusion occasioned by recording the product of a person's thoughts and emotions in the privacy of his home and held that the evidence must be excluded "irrespective of whether the conversations dealt with collateral matters or directly with the crimes charged."[56]

PART II: SEIZURE OF THE PERSON

§ 17.3 SEIZURE OF THE PERSON GENERALLY

The Fourth Amendment and article 14 guarantee the right to be free from unreasonable searches and seizures. A seizure of the person occurs whenever the police

(1954) (evidence of possession of heroin illegally seized from defendant in prior case admissible to impeach defendant's denial of ever having possessed narcotics). *But see* Agnello v. United States, 269 U.S. 20, 35 (1925) (evidence of cocaine found during illegal search of defendant's house not admissible to impeach defendant who did not testify on direct about the cocaine).

[53] *See* United States v. Havens, 446 U.S. 620, 626–28 (1980) (balancing interest in "proper functioning of the adversary system" and policies underlying exclusionary rule). The balancing of interests approach was articulated in cases allowing the use for impeachment purposes of statements elicited from the defendant in violation of the Fifth Amendment standards of Miranda v. Arizona, 384 U.S. 436 (1966). Oregon v. Hass, 420 U.S. 714 (1975); Harris v. United States, 401 U.S. 222 (1971).

[54] James v. Illinois, 493 U.S. 307 (1990) (statements of defendant following invalid arrest held not admissible to impeach witness called by defense).

[55] 403 Mass. 567 (1988).

[56] Commonwealth v. Fini, 403 Mass. 567, 573 (1988). In *Fini* the balance of interests favored exclusion because of the serious nature of the intrusion and the likely deterrent effect of excluding the evidence for all purposes. Where a lesser intrusion is involved, the likely impact on the defendant of the illegally obtained evidence may be relevant to a determination of whether the evidence is admissible for impeachment. *Fini, supra,* 403 Mass. at 571 (balance has "focused on the kind of unconstitutional intrusion that had occurred as well as on the likely impact on the defendant of the evidence obtained thereby"). See Commonwealth v. Mahnke, 368 Mass. 662, 696 (1975) (statements of defendant elicited in violation of Fifth Amendment right to counsel admissible); Commonwealth v. Harris, 364 Mass. 236, 240 (1973) (statements elicited without warning required by *Miranda v. Arizona*, but not tending to prove an element of crime charged held admissible). *Cf.* Commonwealth v. Domaingue, 397 Mass. 693 (1986) (questions to defendant on cross-examination referring to statements of defendant recorded during illegal electronic eavesdropping at restaurant were proper).

detain a suspect by restraining his or her freedom of movement.[57] The test is an objective one focusing on the coercive nature of the circumstances and not on the subjective perception of the individual approached or of the officer.[58] An unintentional

[57] *See* Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) ("Only when an officer by means of physical force or show of authority has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred"). When an automobile is stopped, every passenger has been seized under the fourth amendment. Brendlin v. California, ___U.S.___, 127 S.Ct. 2400, 2410 (2007). Police officers are justified in conducting a 'field interrogation observation' in which they approach and question an individual and ask for identification in a non-threatening manner. See Commonwealth v. Lyles 453 Mass. 811,813 n.6 (2009) (recognizing such consensual encounters but officer's use of ID to check for warrants converted it to a stop). Compare Commonwealth v. DePeiza, 449 Mass. 362, 370(2007) (suspect offered ID voluntarily).

[58] Under the Fourth Amendment, a seizure has not occurred until the individual's freedom of movement has actually been restrained. See California v. Hodari D., 499 U.S. 621 (1991) (if suspect does not submit to police order to stop and flees, seizure does not occur until pursuing officers have restrained suspect). See also Michigan v. Chesternut, 486 U.S. 567 (1988) (investigatory pursuit of pedestrian not Fourth Amendment seizure). The police may question someone without giving rise to a fourth amendment seizure and the suspect need not respond. But the failure to respond to a request to identify oneself can be made a crime which can subject the individual to arrest. Hiible v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177 (2004). Under art. 14, the pursuit of a suspect for the purpose of effecting a forcible stop is a seizure. See Commonwealth v. Stoute, 422 Mass. 782, 789 (1996) ("pursuit which, objectively considered, indicates to a person that he would not be free to leave the area (or to remain there) without first responding to a police officer's inquiry, is the functional equivalent of a seizure"). See also Commonwealth v. Thibeau, 384 Mass. 762, 764 (1981) (pursuit for purpose of effecting forcible stop constitutes seizure). Compare Commonwealth v. Franklin, 456 Mass. 818,823 (2010) (running after fleeing suspect without command to stop not a seizure); Commonwealth v. Lopez. 451 Mass. 608, 612 (2008) (following bicycle in cruiser and request to speak with suspect not a seizure); Commonwealth v. Perry, 62 Mass. App. Ct. 500, 503(2004) (running after a running person is not a seizure); Commonwealth v. Hart, 45 Mass. App. Ct. 81 (1998) (officer following suspect into foyer not Thibeau pursuit).

An encounter will not be deemed a seizure in the absence of "some show of authority that could be expected to command compliance." Commonwealth v. Sanchez, 403 Mass. 640, 644 (1988)(quoting United States v. West, 651 F.2d 71, 73 (1st Cir. 1981), *vacated on other grounds*, 463 U.S. 1201 (1983), *cert. denied*, 469 U.S. 1188 (1985)). Whether there has been a seizure will depend on how coercive the encounter was. *See Commonwealth v. DePina*, 456 Mass. 238,243 (2010). (three officers "converge" on suspect after he changed direction deemed a stop); Commonwealth v. Lyles, 453 Mass. 811,818 (2009) (taking suspect's ID to check for warrants deemed a seizure); Commonwealth v. Stephens, 451 Mass. 370,384 (2008) (parking alongside suspect's vehicle not a stop until officer opened door of that vehicle); Commonwealth v. Sykes, 449 Mass. 308.314-315 (2007) (following suspect without lights flashing or demand to stop not yet a chase); Commonwealth v. Dasilva, 56 Mass. App. Ct. 220, 225-226 (2002) (cruiser pulls up to suspect on bicycle who speeds off, no seizure until officer yelled "stop!"); Commonwealth v Barros, 435 Mass. 171, 176-177 (2001) (officer drives up alongside suspect and asks to speak with him, not a stop; but approach on foot and repeating request in presence of other officers was seizure); Commonwealth v. Grandison, 433 Mass. 135, 139 (2001) (suspect on foot turns into alley and police follow in vehicle illuminating 'alley lights', not deemed seizure); Commonwealth v. Watson, 430 Mass. 725 (2000) (following suspects' car not a stop): Commonwealth v. Mock, 54 Mass. App. Ct. 276, 279-280 (2002) (following suspect on foot and telling him to stop deemed seizure): Commonwealth v. Fletcher, 52 Mass. App. 166, 162 (2001) (officer hails two suspects to "come over and talk to me" not deemed seizure); Commonwealth v. Thinh Van Cao, 419 Mass. 383, 388 (1995), *cert. denied*, 115 S. Ct. 170 (1996) (policy of approaching, questioning, and conducting warrant check of suspected Asian

restriction on a person's freedom of movement is not a seizure under the fourth amendment. [58.5]

Except in certain limited circumstances,[59] a seizure must be based on some level of suspicion that the person detained has engaged in or is about to engage in

gang members in noncoercive atmosphere deemed not seizure); Commonwealth v. Cook, 419 Mass. 192, 199 (1994) (approaching and questioning suspect who was voluntarily at police station, patting him down, and asking him to "take a seat" deemed no seizure); Commonwealth v. Gunther G., 45 Mass. App. Ct. 116, 117–118 (1999) (approach by police and request to talk deemed no seizure because no intimidation or coercion); Commonwealth v. Kitchings, 40 Mass. App. Ct. 591, 595 (1996) (approaching car in restaurant parking lot and questioning driver and passengers about vehicle rental deemed routine inquiry not stop); Commonwealth v. McHugh, 41 Mass. App. Ct. 906, 907 (1996) (pulling alongside auto stopped on highway and asking if assistance needed not a seizure); Commonwealth v. Dowdy, 36 Mass. App. Ct. 495 (1994) (approach of individual and questioning about report of shots fired not a seizure); Commonwealth v. Houle, 35 Mass. App. Ct. 474, 476 (1993) (approach of couple in parked truck and asking what they were doing not seizure); Commonwealth v. Doulette, 414 Mass. 653, 655 (1993) (officer's approach of occupied vehicle in parking lot not Fourth Amendment seizure). *Compare* Commonwealth v. Cheek, 413 Mass. 492, 494 n.2 (1992) approaching suspect in stabbing case walking on street and asking name constitutes seizure); Commonwealth v. Badore, 47 Mass. App. Ct. 600, 603 (1999) (blocking car by parking cruisers in front and behind suspect's auto); Commonwealth v. Berment, 39 Mass. App. Ct. 522 (1995) (seizure under Fourth Amendment and art. 14 when suspect is told "not to move" and submits).

See also Commonwealth v. Smigliano, 427 Mass. 490, 492 (1998) (activating patrol car lights constitutes seizure); Commonwealth v. Grinkley, 44 Mass. App. Ct. 62, 74 (1997) (police investigating report of gun on playground approached group dispersing and yelled stop). *Compare* Commonwealth v. Tompert, 27 Mass. App. Ct. 804, 806–07 (1989) (investigative check of vehicle parked in roadside rest area constitutes Fourth Amendment seizure) *and* Commonwealth v. Pimentel, 27 Mass. App. Ct. 557, 561 (1989) (stopping vehicle parallel to suspect's truck and approaching suspect not Fourth Amendment seizure). *Cf.* Commonwealth v. Leonard, 422 Mass. 504, 508 (1996) (suggesting that approaching occupied vehicle pulled over in breakdown area and opening door when driver failed to respond not a constitutional intrusion).

[58.5] Brower v. County of Inyo, 489 U.S. 593. 596-597 (1989): Gutierrez v. M.B.T.A., 437 Mass. 396. 402 (2002) (same).

[59] The brief stop and questioning of motorists at a roadblock conducted under strict limitations has been upheld. *See, e.g.,* Commonwealth v. Shields, 402 Mass. 162 (1988) (sobriety checkpoint upheld under Fourth Amendment and art. 14); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (stop of vehicles at permanent immigration checkpoint removed from border upheld); Commonwealth v. King, 389 Mass. 233 (1983) (state police policy of checking all vehicles stopped during cold weather justified initial inquiry of occupied vehicle in rest area). The police may detain briefly the occupants of a house that they have a warrant to search. Michigan v. Summers, 452 U.S. 692, 705 (1981) (officers executing search warrant may detain occupants of the premises while search is conducted). See Los Angeles County, California v. Rettele. _U.S._, 127S.Ct.1989 (2007) (mistaken seizure of three persons in home pursuant to valid warrant did not violate fourth amendment): Muelher v. Mena, 544 U.S. 93.99 (2005) (officers justified in detaining occupant for three hours in handcuffs during search); Compare *Commonwealth v. Charros,* 443 Mass. 752, 765 (2005) (no authority to stop and detain persons who had left premises prior to intended search) and *Commonwealth v. Catanzaro,* 441 Mass. 46 (2004) (detention of occupant who had just left premises deemed not to violate fourth amendment or article 14).

criminal activity.[60] The more intrusive the seizure, the greater is the amount of suspicion required to justify it:[61]

1. A custodial arrest must be based on "probable cause" to believe the suspect has committed a crime.[62] A lawful arrest justifies a full search of the suspect and the area within his immediate control.[63]

2. A "stop" and brief detention may be based on "reasonable suspicion" that the suspect has committed or is about to commit a crime.[64] A stop merely allows the officers to conduct a threshold investigative inquiry and to frisk the suspect if there is reason to believe he has a weapon.[65] Under article 14 the pursuit of a suspect for the

[60] When officers are engaged in a "community caretaking function" rather than the investigation of crime, the encounter may not be deemed a seizure. *See* Commonwealth v. Mateo German, 453 Mass. 838, 844 (2009) (stopping at car on roadside and waiting while one occupant brought gas deemed part of community caretaking function); Commonwealth v. Evans, 436 Mass. 369, 377 (2002) (approach of driver in automobile stopped in breakdown lane at 11:30 p.m. and request for license and registration deemed no seizure); Commonwealth v. Eckert, 431 Mass. 591, 593–595 (2000) (opening car door to check on condition of driver parked in rest area not yeta seizure-drawing quoted phrase from Cady v. Dombrowski, 413 U.S. 433, 441 (1973)). See Commonwealth v. Murdough, 428 Mass. 760, 763–764 (1999) (knocking on car window to rouse sleeping driver deemed no seizure as within community caretaking function). *See also* Commonwealth v. Leonard, 422 Mass. 504, 508 (1996) (opening door of car pulled over into breakdown area because of reasonable concern for health of driver). However the reach of the community caretaking function is limited. *See e.g.* Commonwealth v. Knowles 451 Mass. 91, 96 (2008) (may stop and inquire as to person's well-being but must have objective belief of some 'jeopardy'); Commonwealth v. Quizada, 67 Mass. App. Ct. 693,696 (2006) (ordering 'out of it' pedestrian to stop and chasing him deemed beyond scope of caretaking function distinguishing Murdough); Commonwealth v. McDevitt, 57 Mass. App. Ct. 733, 737 (2003) (approach of car with lights on and motor running within caretaking function). Commonwealth v. Lubiejewski, 49 Mass. App. 212, 216 (2000) (encounter with suspected drunk driver resulting from investigationof tip not within community caretaking function). See also Commonwealth v. Sondrini, 48 Mass.App. Ct. 704, 706 n. 6 (2000) (suggesting caretaking function does not apply to residence); Commonwealth v. Canavan, 40 Mass. App. Ct. 642, 646–648 (1996) (stopping motorist believed to be lost violates Art. 14 and Fourth Amendment); Commonwealth v. Smigliano, 427 Mass. 493 n.1 (1998) (stop to help lost motorist not within community caretaking function). A requirement that a person perform a field sobriety test is a search or seizure under the fourth amendment and article 14. Commonwealth v. Blais, 428 Mass. 294, 297-298 (1998) (reasonable suspicion of OUI required). See Commonwealth v. McCaffery, 49 Mass. App. Ct. 713, 718 (2000) (reasonable belief that pedestrian needed protective custody.)

[61] Commonwealth v. Borges, 395 Mass. 788, 794 (1985). See *Commonwealth v. Watts,*74 Mass. App. Ct. 514, 520 (2009) (traffic stop, rental car overdue, intrusion deemed proportional to suspicion).

[62] *See, e.g.,* Dunaway v. New York, 442 U.S. 200, 216 (1979) (taking suspect into custody for purposes of interrogation without probable cause violates Fourth Amendment).

[63] Chimel v. California, 395 U.S. 752, 763 (1969). *See* G.L. c. 276, § 1 (statutory limitations on search incident to arrest).

[64] *See, e.g.,* United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) ("reasonable suspicion" required for roving-patrol stops by Border Patrol, relying on Terry v. Ohio, 392 U.S. 1 (1968)). *Cf.* Commonwealth v. Phillips, 413 Mass. 50, 56–57 (1991) (evidence of official police department policy of "search on sight" of suspected gang members relevant evidence that reasonable suspicion was lacking in individual cases).

[65] *See* Terry v. Ohio, 392 U.S. 1, 30 (1968) (stop and frisk of suspect reasonably believed to be armed and dangerous). *See also* Commonwealth v. Silva, 366 Mass. 402, 405

purpose of effecting a stop is a seizure requiring at least reasonable suspicion.[66] But under the Fourth Amendment, there is no seizure until the suspect has been actually restrained.[67]

3. The police may approach and question an individual[68] or follow a car for investigative purposes without implicating constitutional interests as long as they do not restrain the individual's freedom to avoid the encounter[69] A seizure occurs "only if

(1974) (reason to suspect criminal activity justifies threshold inquiry). The frisk is not justified unless both prongs of Terry are present. Commonwealth v. Martin, 457 Mass. 14, 20-21 (2010); Commonwealth v. Narcise, 457 Mass. 1, 10, 11 (2010)(even if encounter began as consensual both elements of Terry necessary to justify frisk). Cf. Arizona v. Johnson _U.S._,129 S.Ct. 781,784 (2009) (reaffirming second prong of Terry).

[66] Commonwealth v. Stoute, 422 Mass. 782, 789 (1996). But see Commonwealth v. Franklin, 456 Mass. 818,823 (2010)(running after suspect without command to stop or show of authority not art.14 seizure) and Commonwealth v. Powell, 459 Mass. 572,578 (2011). See also Commonwealth v. Barros, 435 Mass. 171, 176 (2001) (pursuing suspect on foot); Commonwealth v. Grandison, 433 Mass. 135, 139 (2001) (pursuit begins when police attempt to stop suspect). *See* Commonwealth v. Thibeau, 384 Mass. 762, 764 (1981) ("Pursuit that appears designed to effect a stop is no less intrusive than a stop itself."). *See also* Commonwealth v. O'Laughlin, 25 Mass. App. Ct. 998 (1988) (attempt to avoid officers may be considered in assessing validity of stop only up to point when chase begins). However, merely following a suspect without any show of force does not activate constitutional requirements. *Commonwealth v. Franklin,* 456 Mass. 818,824 (2010) (suspect's flight preceded officer's pursuit); *Commonwealth v. Lopez,* 451 Mass. 608, 612 (2008) (following bicycle in cruiser, officer exits and asks to speak to suspect – not an order and not a seizure). *See* Commonwealth v. Williams, 422 Mass. 111, 117–18 (1996) (following suspect not deemed pursuit); Commonwealth v. Jimenez, 22 Mass. App. Ct. 286, 290 (1986) (following automobile on public highway not pursuit). *Cf.* Commonwealth v. Wedderburn, 36 Mass. App. Ct. 558, 560-61 (1994) (cruiser approaching suspect at 45-degree angle across road not seizure).

[67] California v. Hodari D., 499 U.S. 621 (1991).

[68] United States v. Drayton, 536 U.S. 194 (2002) (approach on bus by three officers during scheduled stop and questioning passengers not deemed fourth amendment seizure). *See* Florida v. Bostick, 501 U.S. 429 (1991) (overturning per se rule barring police from approaching bus passengers without reasonable suspicion and requesting consent to search luggage). *See also* INS v. Delgado, 466 U.S. 210 (1984) (questioning of factory employees by (immigration officials not seizure); Commonwealth v. Franklin, 456 Mass. 818, 822-823 (2010) (following suspect on foot without command to stop not a seizure under art.14); Commonwealth v. Powell, 459 Mass. 572,578 2011 (following Franklin); Commonwealth v. Rock, 429 Mass. 609, 613 (1999) (following suspects in cruiser and then approaching on foot no seizure); Commonwealth v. Thomas, 429 Mass. 403, 406 (1999) (approaching suspect and asking if he had any money no seizure). Commonwealth v. Thinh Van Cao, 419 Mass. 383, 388 (1995) *cert. denied*, 115 S. Ct. 170 (1996) (policy of approaching, questioning, and conducting warrant checks of suspected Asian gang members in noncoercive atmosphere not seizure); Commonwealth v. McHugh, 41 Mass. App. Ct. 906, 907 (1996) (pulling alongside auto stopped on highway and asking if assistance needed not Fourth Amendment seizure); Commonwealth v. Kitchings, 40 Mass. App. Ct. 591, 595 (1996) (approaching car in restaurant lot and questioning driver and passengers deemed routine inquiry, not stop). *Cf.* Commonwealth v. Leonard, 422 Mass. 504, 508 (1996) (approach of occupied car pulled off into breakdown area of highway and opening door may not be encounter requiring constitutional justification).

[69] *See* Michigan v. Chesternut, 482 U.S. 567 (1988) (investigatory pursuit of pedestrian not a Fourth Amendment seizure); and cases *supra* at note 58. See also *Commonwealth v. Stephens,* 451 Mass. 370, 384 (2008) (pursuit of suspect's car and parking alongside no seizure until officer opened door of subject vehicle).

in view of all the circumstances surrounding the incident a reasonable person would have believed that he was not free to leave."[70]

§ 17.4 THE TERRY DOCTRINE: STOP AND FRISK

§ 17.4A. STANDARD OF REASONABLE SUSPICION

In *Terry v. Ohio*[71] the U.S. Supreme Court upheld a police officer's brief stop of a person suspected of imminent criminal activity and a frisk of his outer clothing to detect whether he had a weapon. *Terry* and its progeny allow for a brief detention of a suspect to conduct a threshold investigative inquiry if the police have reasonable suspicion, based on "specific and articulable facts,"[72] that a crime is about to be committed.[73] The principle applies as well to reasonable suspicion that the suspect has already committed a felony or misdemeanor involving a threat to public safety.[74] The police may stop an automobile for a traffic violation even if they have an ulterior purpose of investigating some other offense for which they have no reasonable

[70] United States v. Mendenhall, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.). The S.J.C. has consistently used the *Mendenhall* standard to evaluate seizures of the person under art. 14. *See, e.g.,* Commonwealth v. Thinh Van Cao, 419 Mass. 383, 386 (1995). Under the Fourth Amendment, the *Mendenhall* standard is "only part of the equation." Thinh Van Cao, supra. A Fourth Amendment seizure occurs only if the suspect is actually seized or submits to a show of lawful authority. See California v. Hodari D., 499 U.S. 621, 626 (1991) (chase of suspect after order to stop not a Fourth Amendment seizure). Under art. 14, pursuit of a suspect for purposes of effecting a forcible stop is a seizure. Commonwealth v. Stoute, 422 Mass. 782, 789 (1996). The continued inquiry of a lawfully stopped individual after the purpose of the stop has been accomplished is a seizure subject to constitutional justification. See Commonwealth v. Torres, 424 Mass. 153, 158 (1997) (driver and passenger questioned after traffic stop and after license and registration checked out). Forcing an individual by threat and aggressive conduct to come out of a building has the same effect as a police chase and constitutes a seizure. Commonwealth v. Ramos, 430 Mass. 545, 549 (2000). The seizure and holding of suspect's ID is a seizure. *Commonwealth v. Lyles,* 453 Mass. 811, 818 (2009).

[71] 392 U.S. 1 (1968).

[72] Terry v. Ohio, 392 U.S. 1, 21 n.18 (1968) ("This demand for specificity in the information upon which police action is predicated is the central teaching of this court's Fourth Amendment jurisprudence"). The determination of reasonable suspicion is a mixed question of law and fact that must be reviewed *de novo* by an appellate court. Ornelas v. United States, 517 U.S. 690 (1996).

[73] The *Terry* court did not separately analyze the stop and frisk aspects of the officers' conduct. See Arizona v. Johnson, _U.S._, 129 S. Ct. 781,784 (2009) (reaffirming danger prong of Terry). See also Commonwealth v. Silva, 366 Mass. 402, 405 (1974) (threshold inquiry justified where there is "reason to suspect that a person has committed, is committing, or is about to commit a crime"). Nor did the court articulate the standard of reasonable suspicion in *Terry*. *But see, e.g.,* United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (characterizing appropriate standard for a stop as "reasonable suspicion").

[74] Commonwealth v. Edwards, 71 Mass. App. Ct. 716, 722 (2008) (authority to stop with reasonable suspicion of completed misdemeanor involving threat to public safety). See United States v. Hensley, 469 U.S. 221, 229 (1985) (reasonable suspicion that suspect was involved in a completed felony justified stop). *See also* Commonwealth v. Owens, 414 Mass. 595, 599 (1993) (stop of car whose owner had outstanding felony warrants justified in that officer had reason to believe driver was owner).

suspicion.[75] But their authority to detain and question the motorist is strictly limited by the purpose of the stop and continued detention or questioning requires reasonable suspicion.[76]

"Reasonable suspicion" is a quantum of evidence less than probable cause but more than a "mere hunch."[77] It must be based on specific and articulable facts measured in the light of the officer's experience.[78] Some of the factors that typically contribute to a finding of reasonable suspicion are whether the suspect is observed in a high-crime area; whether the activity takes place at night; whether the suspect attempts to avoid the observation of the officer; and the extent of the officer's knowledge of the suspect or the situation.[79] Suspicion of the possession of a handgun, without more, does

[75] Whren v. United States, 517 U.S. 806, 813 (1996) (validity of traffic stop depends on probable cause,, not whether reasonable officer would have stopped car for that reason). *See* Commonwealth v. Santana, 420 Mass. 205, 209 (1995) (principle is same under art. 14). However, the ulterior purpose cannot be in violation of some separate constitutional command. Thus, selective stops based on race violate the equal protection clause and would call for suppression. Commonwealth v. Betances, 451 Mass. 457, 462 (2008) (defendant must show "reasonable basis" for inference of racial discrimination): Commonwealth v. Lora, 451 Mass. 425, 437 (2008) (statistical evidence can be used to raise inference).

[76] *See, e.g.*, Commonwealth v. Torres, 424 Mass. 153, 158 (1997) (driver and passenger of car stopped for speeding questioned after license and registration checked out without reasonable suspicion). See also Commonwealth v. Griffin, 79 Mass. App. Ct. 124,129 (2011) (insufficient grounds to detain passenger). Compare Commonwealth v. Robie, 51 Mass. App. Ct. 494, 498-499 (2001) (circumstances build up to reasonable suspicion after traffic stop and license check). Under the Fourth Amendment there is no requirement that the driver of a car stopped for a traffic offense be advised that he has the right to leave. *See* Ohio v. Robinette, 519 U.S. 33 (1996) (continued voluntary conversation with officer after decision to issue traffic citation resulted in valid consent to search vehicle). The S.J.C. has characterized the *Robinette* holding as "a narrow one." *Torres, supra,* 424 Mass. at 163 n.7. Reasonable suspicion is necessary for police to administer field sobriety tests. Commonwealth v. Blais, 428 Mass. 294, 298 (1998). See Commonwealth v. McCaffery, 49 Mass. App. Ct. 713, 718 (2000) (reasonable belief that pedestrian needed protective custody).

[77] *See* United States v. Sokolow, 490 U.S. 1 (1989). *See also* Commonwealth v. Clark, 65 Mass. App. Ct. 39, 45 (2005) (exchange of cash for unidentified object deemed "mere hunch"); Commonwealth v. Bartlett, 41 Mass. App. 468, 472 (1996) (eight "innocuous observations" deemed hunch, not reasonable suspicion).

[78] *See* Terry v. Ohio, 392 U.S. 1, 27 (1968) ("due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience"). In *Terry* an experienced officer personally observed two suspects repeatedly approach a store in turn and look inside in a manner that led the officer to conclude they were casing the store and were about to commit a robbery. See Commonwealth v. Grandison, 433 Mass. 135, 141 (2001) (officer's experience credited in considering projectile spit out by suspect).

[79] See Commonwealth v. DePina, 45 Mass. 238, 248 (2010) (suspect near scene of shooting, ten minutes after, and reverses direction upon approach of officers, matching general description of assailant – sufficient for stop under art. 14); Commonwealth v. Phillips, 452 Mass. 617, 627 (2008) (general description of suspect in violent assault crouched behind tree – sufficient); Compare Commonwealth v. Cheek, 413 Mass. 492, 496 (1992) (black male with coat matching description one-half mile from scene of stabbing not sufficient) and Commonwealth v. Mercado, 422 Mass. 367 (1996) (evasive conduct, proximity to scene and match of general description deemed sufficient). See also Commonwealth v. Stephens, 451 Mass. 370, 385-386 (2008) (experienced officer witnessed conduct following pattern of drug activity in place known for it); Commonwealth v. Garden, 451 Mass. 43 (2008) (female owner

of car had suspended license, stop justified to determine because of tinted windows whether driver was female); Commonwealth v. Bostock, 450 Mass. 616 (2008) (suspect matched description of man engaged in two recent car burglaries, stop warranted); Commonwealth v. DePeiza, 449 Mass. 367, 371-372 (2007) (totality of facts gave rise to suspicion of illegal firearm, high-crime area involving guns, heavy object in pocket, nervous demeanor, attempts to conceal – characterized as "close case"); Commonwealth v. Sykes, 449 Mass. 308, 316 (2007) (suspect flees on approach of officers falls and abandons bicycle holding waistband – deemed sufficient but "close case"); Commonwealth v. Hernandez, 448 Mass. 711, 715-716 (2007) (suspect pacing prior to encounter in which he retrieves object from shoe and hands to person – reasonable suspicion of drug transaction); Commonwealth v. Deramo, 436 Mass. 40, 43-44 (2002) (officer recognized vehicle as belonging to suspect in license suspension – sufficient for stop); Commonwealth v. Barros, 425 Mass. 572, 584 (1997) (report from eyewitnesses describing murder suspects, one with uncommon jacket, stop of persons matching description walking away from scene "briskly" at distance of 1.5 blocks – deemed valid); Commonwealth v. Stoute, 422 Mass. 782, 790-791 (1996) (high-crime area, report of handgun, suspect flees before chase begins deemed sufficient for stop); Commonwealth v. Moses, 405 Mass. 136, 140 (1990) (daytime stop in high-crime area of automobile with motor running after several individuals grouped around vehicle dispersed on approach of officer – valid); Commonwealth v. Vasquez, 74 Mass. App. Ct. 920 (2009) (suspect of being joint venturer in assault – sufficient facts for stop in "swiftly unfolding situation"); Commonwealth v. Emaukpor, 57 Mass. App. Ct. 192, 200 (2003) (armed robbery suspects in car driving away from area of crime scene looking toward cop car with lights flashing almost matching description – stop deemed reasonable).

The factual basis was deemed insufficient in the following cases. Commonwealth v. Scott, 440 Mass. 642, 649 (2004) (rape suspect seen in wooded area of rapes two months earlier with reported description as "tall black man" not enough); Commonwealth v. Cheek, 413 Mass. 492, 496 (1992) (black male with coat matching description one-half mile from scene of stabbing – not sufficient); Commonwealth . Barros, 435 Mass. 171, 177-178 (2001) (breaking eye contact and refusing to answer questions not sufficient to support unreliable tip); Commonwealth v. Torres, 424 Mass. 153, 159 (1997) (no reasonable suspicion to detain and interrogate passenger at rear of vehicle stopped for speeding); Commonwealth v. Phillips, 413 Mass. 50, 55-56 (1992) (black youths in high-crime area suspected of gang activity – not sufficient for stop); Commonwealth v. Helme, 399 Mass. 248 (1987) (occupied vehicle in lot know for drug activity and interior light on – not enough); Commonwealth v. Thibeau, 384 Mass. 762, 763-764 (1981) (sudden turn by bicyclist after seeing police car not sufficient for reasonable suspicion); Commonwealth v. Bacon, 381 Mass. 642, 645-646 (1980) (teenager in expensive car in high-crime area at 4:10 a.m. and concealing face from police – not deemed adequate to stop); Commonwealth v. Clark, 65 Mass. App. Ct. 39, 43-45 (2005) (suspect hands another an unidentified item in exchange for cash in high-drug area deemed "mere hunch"); Commonwealth v. Doocey, 56 Mass. App. Ct. 550, 558-559 (2002) (listing factors to be considered in assessing reasonable suspicion based on report of shots fired); Commonwealth v. Swenson, 56 Mass. App. Ct. 459, 464 (2002) (officer sees smoke, plate and razor blade in room – not enough to detain occupants); Commonwealth v. Smith, 55 Mass. App. Ct. 569, 573-574 (2002) (high-crime area, black youth enters alley with white adults); Commonwealth v. Mock, 54 Mass. App. Ct. 276, 283 (2002) (description of "heavy-set black male" with bulky object under sweater in area of reported break-in not sufficient); Commonwealth v. Grinkley, 44 Mass. App. Ct. 62, 72-73 (1997) (uncorroborated report of group of Hispanic kids with gun and kids walk away quickly on approach of police, not enough for reasonable suspicion). The mere presence of an individual in area of suspected drug activity is not enough to justify a Terry stop. But that fact plus the unprovoked flight of the individual at the approach of police gives rise to reasonable suspicion. Illinois v. Wardlow, 528 U.S. 119 (2000).

not give rise to reasonable suspicion.[80] "Drug courier profiles" have provided some of the closest cases applying the reasonable suspicion standard.[81] The mere desire to assist a motorist does not justify a stop,[82] but reasonable grounds to believe that the motorist may be in physical danger allows the officers to approach and take reasonable steps to investigate their concerns.[83]

Whether the information possessed by the officer rises to the level of reasonable suspicion depends on all of the circumstances surrounding the incident, and otherwise innocent-appearing activity may lead an experienced police officer to conclude that a brief stop and inquiry is warranted.[84] However, an inference of criminal

[80] *See* Commonwealth v. DeJesus, 72 Mass. App. Ct. 117, 121 (2008) (report of kids in white van with gun in high-crime area without evidence that suspect was a minor); Compare Commonwealth v. Haskell, 438 Mass. 790, 795 (2003) (not mere possession of gun but loading it in public that gives rise to reasonable suspicion); Commonwealth v. Doocey, 56 Mass. App. Ct. 550, 558-559 (2002) ("use of firearm adds an edge to the calculus" of reasonable suspicion). Commonwealth v. Couture, 407 Mass. 178 (1990) (information that person was in public possession of firearm insufficient for Terry stop). Compare Commonwealth v. Alvarado, 423 Mass. 266, 270 (1996) (information that several Hispanic males in blue car had handgun wrapped in towel insufficient to justify stop) *and* Commonwealth v. Alvarado, 427 Mass. 277, 284 (1998) (reliable report of possession of "sawed-off shotgun" plus some furtive effort to conceal justified stop). *See also* Commonwealth v. Barros, 435 Mass. 171, 178 (2001) (unreliable report of suspect in possession of gun); Commonwealth v. Foster, 48 Mass. App. Ct. 671, 676–677 (2000) (report that suspect had "displayed" gun at late hour on high-crime street sufficient for stop and frisk).

[81] In these cases, such factors as the point of origin and destination, the method of payment and the absence of baggage have been used to support an investigatory stop of an airline passenger. *See* United States v. Sokolow, 490 U.S. 1 (1989) (stop justified). *But see* Reid v. Georgia, 448 U.S. 438 (1990) (inadequate suspicious circumstances to justify stop). *Compare* Commonwealth v. O'Laughlin, 25 Mass. App. Ct. 998 (1988) (suspect getting off plane with only a jacket and appearing nervous insufficient) with Commonwealth v. Gutierrez, 26 Mass. App. Ct. 42 (1988) (suspect observed on arrival at airport after four-hour round trip to New York City wearing oversized topcoat and taking suspicious route through terminal sufficient to warrant investigative inquiry). *Cf.* Commonwealth v. Watson, 430 Mass. 725 (2000) (drug courier profile of person delivering drugs to suspects not necessary to justify stop).

[82] *See* Commonwealth v. Canavan, 40 Mass. App. Ct. 642, 646 (1996) (stopping motorist merely because he appeared to be lost not justified).

[83] The police need not justify an encounter with the individual, even if it results in what would be seen as a seizure, if the purpose is not investigatory but pursuant to the "community caretaking function." See Commonwealth v. Mateo-German, 453 Mass. 838, 844 (2009) (stopping at car on roadside and waiting while occupant brought gas deemed part of community caretaking function); Commonwealth v. Knowles, 451 Mass. 91, 96 (2008) (police may stop and inquire as to person's well-being but must have objective belief of some "jeopardy"); Commonwealth v. Evans, 436 Mass. 369,372 (2002) (stopping at car in breakdown lane and requesting license and registration within community caretaking function); Commonwealth v. Murdough, 428 Mass. 760, 764 (1999) (ordering driver appearing to be in narcotic stupor out of car parked in rest area deemed reasonable to protect public). But see Commonwealth v. Quezada, 67 Mass. App. Ct. 693, 696 (2006) (ordering "out of it" pedestrian to stop and chasing him deemed beyond scope of caretaking function distinguishing Murdough). See also Commonwealth v. Leonard, 422 Mass. 504, 509 (1996) (opening door of car stopped in breakdown area after driver failed to respond deemed reasonable to protect public).

[84] *See* United States v. Cortez, 449 U.S. 411, 417 (1981) ("the totality of the circumstances — the whole picture — must be taken into account"). See also United States v. Arvizu, 534 U.S. 266 (2002) (even potentially innocent conduct when viewed in totality can add up to reasonable suspicion – family in van in remote border area, driver avoids eye contact, but

activity may be found unreasonable "where many alternative explanations, all of them innocent, exist to negate the suspicion that a crime was being committed."[85]

The initial stop may be justified not only by the observations of the officer prior to the stop but also by *information that the officer has gained from other sources.* An anonymous informant's tip may be considered in the determination of reasonable suspicion if the tip is deemed reliable.[86] Under the Fourth Amendment, reliability is measured by the "totality of the circumstances."[87] Under article 14 the tip must satisfy the two-fold inquiry established in *Aguilar v. Texas*[88] and *Spinelli v. United States*[89] for reliability in determining probable cause to search or arrest.[90] That is, there must be some facts to establish the informant's basis of knowledge[91] and the informant's veracity.[92] The *Aguilar-Spinelli* test is addressed in detail in the discussion of search

kids waive mechanically); Commonwealth v. Stephens, 451 Mass. 370, 385 (2008) ("aggregation of otherwise innocent activities may give rise to reasonable suspicion"). Cf. Commonwealth v. Emuakpor, 57 Mass. App. Ct. 192, 199 (2003) (reasonable officer can take account of possible error of informant about whether vehicle had two or four doors).

[85] Commonwealth v. Helme, 399 Mass. 298, 301 (1987).

[86] *See* Commonwealth v. Lyons, 409 Mass. 16, 19 (1990) (invalidating under art. 14 car stop based on tip lacking information on basis of knowledge and veracity). See also Commonwealth v. Lopez, 455 Mass. 147,156 (2009) (Information satisfied both prongs).

[87] Alabama v. White, 496 U.S. 325, 331 (1990).

[88] 378 U.S. 108 (1964).

[89] 393 U.S. 410 (1969).

[90] See Commonwealth v. Mubdi, 456 Mass. 385,397 (2010) (tip from anonymous caller not sufficient because no basis for determining veracity). More weight will be given to a tip from an identified or identifiable informant. Commonwealth v. Costa, 448 Mass. 510,515 (2007) (phone number and location made caller identifiable). See Florida v. J.L., 529 U.S. 266,276 (2000) (Kennedy, J., concurring) ("If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip.") A "less rigorous" showing is needed in cases assessing whether reasonable suspicion to stop exists. Commonwealth v. Lyons, 409 Mass. 16, 19 (1990). See *Commonwealth v. Riggieri*, 438 Mass. 613, 616 n.4 (2003) (same).

[91] *See* Commonwealth v. Alfonso A., 438 Mass. 372,375 (2003) (inference of personal observation by informant); Commonwealth v. Alvarado, 423 Mass. 266, 271 (1996) (anonymous report to police of handgun in blue car at specified address allows inference that informant had recently seen activity — satisfies basis of knowledge prong). *See also* Commonwealth v. Redd, 50 Mass. App. Ct. 904 (2000) (inference that anonymous citizen informant had witnessed crime); Commonwealth v. Hall, 50 Mass. App. Ct. 208, 211 (2000) (reliable informant overheard street dealer arranging sale; basis of knowledge satisfied by police corroboration of predicted behavior); Commonwealth v. Barbosa, 49 Mass. App. Ct. 344, 346 (2000) (report of robbery specific enough to allow inference of personal knowledge); Commonwealth v. Grinkley, 44 Mass. App. Ct. 62, 67 (1997) (information from informant that black kids had gun at park not detailed but satisfied basis of knowledge prong on authority of *Alvarado*); Commonwealth v. Willis, 415 Mass. 814, 818–19 (1993) (report that suspect would arrive at bus station with pillow case and pistol adequately corroborated); Commonwealth v. Anderson, 366 Mass. 394, 399 (1974) (anonymous note thrown out of bus describing passenger with drugs sufficiently reliable).

[92] See Commonwealth v. Mubdi, 456 Mass. 385,397 (2010) (anonymous tip not reliable because no basis for veracity); Florida v. J.L. 529 U.S. 266, 269–271 (2000) (anonymous tip describing suspect and stating he had gun insufficient to justify stop); *See also* Commonwealth v. Alvarado, 423 Mass. 266, 272–74 (1996) (corroboration by police of innocent details of anonymous tip not sufficient to establish veracity prong); Commonwealth v.

warrant affidavits *infra* at § 17.8B(2). A police flyer or radio bulletin will be sufficient if the officer originating it has reasonable suspicion to justify the stop.[93]

§ 17.4B. EXTENT OF THE *TERRY* INTRUSION

Under *Terry*, it is important to analyze each level of intrusion into the suspect's privacy to insure that the "officer's action . . . was reasonably related in scope to the circumstances which justified the interference in the first place."[94] The court will determine whether the extent of the intrusion was reasonable by balancing the need for the intrusion against the degree to which it invaded the individual's privacy.[95] The balancing test applies both to the nature and extent of the detention of the suspect and to the scope of any protective search for weapons.

1. Threshold Investigative Inquiry

Where the officer has reasonable suspicion of criminal activity, she may follow up on the suspicion by stopping and questioning the suspect, but reasonable responses to the officer's inquiries may vitiate the suspicion and terminate the officer's authority.[96]

Lyons, 409 Mass. 16, 19 (1990) (corroboration of innocent details available to any uninformed bystander not sufficient). *Compare* Commonwealth v. Lubiejewski, 49 Mass. App. Ct. 212, 215 (2000) (only corroboration were vehicle type and license number following *Lyons*) with Commonwealth v. Willis, 415 Mass. 814, 818–19 (1993) (corroboration of incriminating details sufficient). *See also* Commonwealth v. Barros, 435 Mass. 171, 178 n. 7 (2001) (face-to-face meeting with unidentified informant provides no more reliability than telephone informant); *Commonwealth v. Riggieri*, 438 Mass. 613, 617 (2003) (sufficient evidence that anonymous caller was off duty officer); Commonwealth v. Grinkley, 44 Mass. App. Ct. 62, 69–72 (1997) (informant who gave only her name to police was not sufficiently accessible to be deemed a citizen-informant so as to satisfy veracity prong and corroboration by police was of only innocent details). *But see* Commonwealth v. Ruiz, 51 Mass. App. Ct. 346, 350 (2001) (crediting anonymous "citizen reports of ongoing suspicious activity"); Commonwealth v. Redd, 50 Mass. App. Ct. 904, 907 (2000) (corroboration of details of report by citizen informant); Commonwealth v. Butterfield, 44 Mass. App. Ct. 926, 927 (1998) (informant reliable because officer knew identity); Commonwealth v. Va Meng Joe, 425 Mass. 99, 103 (1997) (information not easily obtainable by casual observer corroborated); Commonwealth v. Modica, 24 Mass. App. Ct. 334 (1987) (tip that stolen computer equipment was located at suspect's home corroborated by police observation of men loading large box into car and acting nervous).

[93] United States v. Hensley, 469 U.S. 221, 232 (1985). *See* Commonwealth v. Lopes, 455 Mass. 147,155 (2009) (adequate basis for stop); Commonwealth v. Cheek, 413 Mass. 492, 495 (1992) (no evidence of factual basis for police radio report); Commonwealth v. Fraser, 410 Mass. 541, 546 (1991) (radio report of man with gun insufficient to justify frisk of suspect without information regarding reliability of information).

[94] Terry v. Ohio, 392 U.S. 1, 20 (1968).

[95] Terry v. Ohio, 392 U.S. 1, 21 (1968). *See* United States v. Place, 462 U.S. 696, 703 (1983) ("We must balance the nature and quality of the intrusion on the individual's Fourth Amendment rights against the importance of the governmental interest alleged to justify the intrusion"). See also Illinois v. McArthur, 531 U.S. 326 (2001) (restriction against drug suspect from re-entering home for two hours while warrant sought deemed reasonable).

[96] *See, e.g.*, Commonwealth v. Torres, 424 Mass. 153, 158 (1997) (initial routine traffic stop must end once valid license and registration provided — no right to continue to detain passenger at rear of vehicle). *Compare* Commonwealth v. Almeida, 373 Mass. 266 (1977) (where driver provides license but no registration and no adequate explanation of presence in high-crime area at late hour, officer justified in ordering suspect out of vehicle). *See also*

Thus, a routine traffic stop allows the officer to conduct a brief inquiry and check of license and registration, but no further detention is needed once the information is verified.[97] Under the Fourth Amendment the officer conducting a traffic stop may order the driver and passengers out of the vehicle without further justification.[98] But under article 14 the police may not order the occupants out of the vehicle after a routine traffic stop without some safety justification.[99] If the initial reaction or response of the suspect does not dispel the officer's suspicions, the detention may continue but only for

Commonwealth v. Watson, 430 Mass. 725, 730–31 (2000) (suspects pick up suitcases at motel near airport, drive erratically and evasively — sufficient for stop without consideration of drug courier profile of person delivering suitcases).

[97] *See* Commonwealth v. Torres, 424 Mass. 153, 158 (1997) (stop must end once valid license and registration provided). Compare *Commonwealth v. DePeiza*, 449 Mass. 367, 376 (2007) (displaying proper ID did not dispel suspicion from other facts surrounding encounter distinguishing Torres). See also Commonwealth v. Alvarez, 44 Mass. App. Ct. 531, 534 (1998) (no right to ask passenger for ID); Commonwealth v. Ellsworth, 41 Mass. App. Ct. 554, 557 (1996) (after concluding driver sober right to detain terminated). *But cf.* Ohio v. Robinette, 519 U.S. 33 (1996) (under Fourth Amendment continued interrogation of driver after information verified not unreasonable — no necessity to advise driver of right to leave). See Commonwealth v. Robie, 51 Mass. App. Ct. 494, 498-499 (2001) (officer writes up speeding warning but then notes suspicious facts sufficient for continued detention).

[98] Pennsylvania v. Mimms, 434 U.S. 106 (1977) (driver); Maryland v. Wilson, 519 U.S. 408 (1997) (passengers). However, the Supreme Court has held that a traffic stop does not justify a search of the vehicle. Knowles v. Iowa, 525 U.S. 113, 117 (1998).

[99] Commonwealth v. Gonsalves, 429 Mass. 658, 662, 663 (1999). See Commonwealth v. Bostock, 450 Mass. 616, 621-622 (2008) (Gonsalves rule applies only to routine traffic stops – reasonable suspicion to stop for criminal activity justifies automatic exit order). But cf. Commonwealth v. Cruz, 459 Mass. 459, 473 (2011) (odor of burnt marijuana from vehicle does not justify exit order). Reasonable belief of the officer that her safety is at risk will also justify the exit order. See Commonwealth v. Goewy, 452 Mass. 399, 408 (2008) (driver produced expired license with picture not clearly him and acting nervous reaching into areas of seat around him – exit order justified); Commonwealth v. Feyenord, 445 Mass. 72, 79-80 (2005) (driver could not produce license, very nervous, registration in name of another, officer alone and vehicle had passenger – exit order valid); Commonwealth v. Stampley, 437 Mass. 323, 327 (2002) (a "heightened awareness of danger" rather than immediate threat will justify the exit order quoting Gonsalves, supra, at 665). See also Commonwealth v. Elysee, 77 Mass. App. Ct. 233 (2010) (shaking of vehicle after stop and suspect's delayed answers to questions – sufficient); Commonwealth v. Hernandez, 77 Mass. App. Ct. 259, 269-270 (2010) (passenger shaking and sitting on left hand failed to answer question about weapons – sufficient); Commonwealth v. Graham, 78 Mass. App. Ct. 156 (2010) (after routine traffic stop driver kept reaching down between seat and console – exit order deemed reasonable). Compare Commonwealth v. Brown, 75 Mass. App. Ct. 528, 535 (2009) (nervous cab passenger without ID in high-crime area, police not outnumbered – no right to issue exit order); Commonwealth v. Santos, 64 Mass. App. Ct. 122, 127 (2005) (driver could not produce license or registration, high-crime area but no furtive movements nor "swiftly developing situation" – not valid). See also Commonwealth v. Santana, 420 Mass. 205, 213 (1995) (reasonable concern for safety necessary for exit order to driver); Commonwealth v. Torres, 433 Mass. 669, 676 (2001) (exit order after traffic stop deemed reasonable after one passenger fled and passenger's actions deemed suspicious). But see Commonwealth v. Hooker, 52 Mass. App. Ct. 683, 687 (2001) (looking back at officer from passenger seat and moving shoulders – not sufficient); Commonwealth v. Holley, 52 Mass. App. Ct. 659, 663-664 (2001) (leaning toward passenger side upon sight of officer not deemed "furtive").

a brief period.[100] In effect the degree of the intrusion on the suspect's privacy must be proportional to the amount of suspicion reasonably possessed by the officer. The longer the detention or the more force used to effect the stop, the more suspicion is necessary to justify the intrusion.[101] At some point a stop may be so intrusive in duration or manner as to be treated as an arrest requiring a showing of probable cause.[102]

2. Distinguishing Stop from Arrest

The test for assessing whether the detention of a suspect was an arrest is an objective one asking "whether the reasonable person would have believed that he was under arrest."[103] It is not necessary that the suspect have been placed formally under

[100] However, there is no specific time limit for a *Terry* stop. *Compare* United States v. Sharpe, 470 U.S. 675 (1985) (20-minute detention of drug suspects reasonable while officers diligently pursued investigation) *with* Commonwealth v. Sanderson, 398 Mass. 761 (1986) (40-minute detention of suspect by several officers while they awaited arrival of sniffer dog amounted to an arrest). *See* Commonwealth v. Feyenord, 445 Mass. 72, 81-82 (2005) (30-minute detention deemed reasonable in time and manner). Commonwealth v. Barros, 425 Mass. 572, 585 (1997) (suspects detained for 15 minutes and brought to crime scene deemed reasonable); Commonwealth v. Williams, 422 Mass. 111, 119 (1996) (transporting suspect to crime scene did not exceed threshold inquiry); Commonwealth v. Kitchings, 40 Mass. App. Ct. 591, 597 (placing two suspects in van reasonable in view of degree of suspicion and officer's fear); Commonwealth v. Crowley, 29 Mass. App. Ct. 1, 4–5 (1990) (detention reasonable). Commonwealth v. Laaman, 25 Mass. App. Ct. 354 (1988] (ten-minute delay while checking license and registration and waiting for back-up not too long for stop).

[101] See Commonwealth v. Phillips, 452 Mass. 617, 627 (2008) (handcuffing and placing robbery suspect in cruiser proportional to degree of suspicion); See also Commonwealth v. Feyenord, 445 Mass 72, 81-82 (2005) (suspicion of auto theft and transportation of contraband – reasonable to detain suspect for arrival of sniffer dog); Commonwealth v. Watts, 74 Mass. App. Ct. 514, 520 (2009) (rental car overdue, often used for drug transport, reasonable to detain for sniffer dog). Compare Commonwealth v. Borges, 395 Mass. 788 (1985) (detaining suspect and ordering him to remove shoe exceeded scope of permissible stop).

[102] *See* Commonwealth v. Phillips, supra; Commonwealth v. Sanderson, 398 Mass. 761 (1986) (40-minute detention considered an arrest); Commonwealth v. Bottari, 395 Mass. 777 (1985) (blocking car and ordering occupants out at gunpoint deemed an arrest rather than investigatory stop). *But see* Commonwealth v. Sinforoso, 434 Mass. 320, 324-327 (2001) (gradual escalation of suspicious facts after traffic stop justifies detention, distinguishing Sanderson): Commonwealth v. Torres, 433 Mass. 669, 676-677 (2001) (quickly evolving situation at night, sole officer acted properly to detain and frisk suspects); Commonwealth v. Moses, 408 Mass. 136, 142 n.5 (1990) (blocking car and approaching without gun drawn did not convert stop into arrest when officer had reason to fear for safety). See also Commonwealth v. Vasquez, 74 Mass. App. Ct. 920, 925 (2009) (reasonable suspicion ripened into probable cause only after suspect was being transported to station). Cf. Commonwealth v. Montoya, 73 Mass. App. Ct. 125, 129 (2008) (moment of arrest for resisting arrest charge occurred when officers ordered suspect at gunpoint to raise arms and move away from stairs). But cf. Commonwealth v. Quintos Q., 457 Mass. 107, 113 (2010) (chasing suspect with intent to stop not an arrest for purpose of resisting arrest charge).

[103] Commonwealth v. Sanderson, 398 Mass. 761, 768 (1966). *See* Massachusetts Gen. Hosp. v. Revere, 385 Mass. 772, 778 (1982) (defining arrest to include three elements: "(1) there must be an actual or constructive seizure or detention of the person, (2) performed with the intention to effect an arrest and (3) so understood by the person detained. . . . [T]he test must be not what the defendant . . . thought, but what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes"). In *Sanderson, supra*, 398 Mass. at 768 n.9,

arrest.[104] Rather, the court will examine all of the circumstances surrounding the encounter including the extent of the restraint on the suspect's freedom of movement, the degree of force used by police, and the length of the detention.[105] The court may also consider the seriousness of the crime suspected the purpose of the officers in stopping the suspect, the time and location of the detention, and the "danger to the safety of the officers or the public."[106]

The manner in which the officers have effected the detention can transform even a brief stop into an arrest. For example, the use of unnecessary force to detain a suspect will result in the detention being treated as an arrest.[107] Even a detention

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the court indicated that the intent of the officer is not determinative. See also Commonwealth v. Limone, 460 Mass. 834,839 (2011).

[104] *See* Kaupp v. Texas, 538 U.S. 626,631 (2003) (suspect removed from home in underwear brought to station for interrogation seen as arrest); Dunaway v. New York, 442 U.S. 200, 216 (1979) (taking custody of suspect for purpose of interrogation constitutes de facto arrest).

[105] Commonwealth v. Sanderson, 398 Mass. 761, 767 (1986). See Commonwealth v. Limone, 460 Mass. 834, 839 (2011) (ordering suspect out of car and retaining keys not yet arrest for OUI); Commonwealth v. Phillips, 452 Mass. 617, 627 (2008) (handcuffing and placing robbery suspect in cruiser not deemed an arrest). *See also* Commonwealth v. Feyenord, 445 Mass. 72,81 (2005) (detaining suspect not handcuffed in back seat of cruiser for 15-20 minutes not deemed or arrest). But see Commonwealth v. Brillante, 399 Mass. 152, 154 n.5 (1987) (detaining suspect outside car after discovery of cocaine characterized as arrest); Commonwealth v. Wedderburn, 36 Mass. App. Ct. 558, 562 (1994) (arrest occurred when officer grabbed suspect and handcuffed him). *Compare* Commonwealth v. Sinforoso, 434 Mass. 320, 324-327 (2001) (gradual escalation of suspicious facts after traffic stop justifies detention, distinguishing Sanderson): Commonwealth v. Torres, 433 Mass. 669, 676-677 (2001) (quickly evolving situation at night, sole officer acted properly to detain and frisk suspects); Commonwealth v. Martinez, 44 Mass. App. Ct. 513, 516 (1998) (suspect ordered to rear of car and pat-frisked not under arrest); Commonwealth v. Varnum, 39 Mass. App. Ct. 571, 575–74 (1996) (blocking car, removing and handcuffing occupants deemed reasonable); Commonwealth v. Pandolfino, 33 Mass. App. Ct. 96, 98 (1992) (detaining robbery suspect in handcuffs for 30 minutes until victim arrived not an arrest).

[106] Commonwealth v. Willis, 415 Mass. 814, 819–20 (1996) (report that suspect would arrive at bus station carrying loaded weapon). *See* Commonwealth v. Fitzgibbons, 23 Mass. App. Ct. 301, 306 (1986) ("The nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day, the reaction of the suspect to the approach of police are all facts which bear on the issue of reasonableness," quoting United States v. Harley, 682 F.2d 398, 402 (2d Cir. 1982)). *See* also Commonwealth v. Montoya, 73 Mass. App. Ct. 125, 127 (2008) (moment of arrest occurred when officers ordered suspect at gunpoint to raise arms and move away from stairs). Compare Commonwealth v. Quintos Q., 457 Mass. 107, 113 (2010) (chasing suspect with intent to stop not deemed arrest);Commonwealth v. Sanderson, 398 Mass. 761, 767 (1986) (detention for purpose of conducting search of suspect will be treated as arrest); Commonwealth v. Alvarado, 427 Mass. 277, 284 (1998) (reliable report of "sawed-off shotgun" allowed for detention and search — not an arrest); Commonwealth v. Barros, 425 Mass. 572, 583 (1997) (detention with guns drawn not an arrest); Commonwealth v. Moses, 408 Mass. 136, 142–43 (1990) (blocking car does not convert stop to arrest in view of possibililty of attempted flight and danger to police and public).

[107] *See* Massachusetts Gen. Hosp. v. Revere, 385 Mass. 772, 778 (1982] (shooting suspect constitutes an arrest). *See also* Commonwealth v. Bottari. 395 Mass. 777 (1985) (blocking car and approaching suspect with guns drawn in absence of fear- provoking circumstances constituted arrest). *But* see Commonwealth v. Moses, 408 Mass. 138, 142–43 (1990) (blocking car does not convert stop to arrest in view of possible flight and potential danger); Commonwealth v. Fitzgibbons, 23 Mass. App. Ct. 301 (1986) (officers' approach of

accomplished without force may rise to the level of an arrest if the intrusion on the suspect's privacy is greater than necessary under the circumstances.[108] In essence, the officers may do what is reasonably necessary to detain a suspect and conduct a threshold investigative inquiry. To the extent that the officers exceed what is necessary under the circumstances, the stop will be treated as an arrest, which must be supported by a showing of probable cause.[109] Officers executing a valid search warrant may detain an occupant of the premises for the duration of the search without probable cause to arrest[109.5]

3. The Protective Search for Weapons

In *Terry v. Ohio* [110] the court held that an officer who has reason to believe that a criminal suspect is "armed and presently dangerous" may conduct a limited protective

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suspect in car with guns drawn not an arrest where there were fear-provoking circumstances attending stop]. The court in*Fitzgibbons* stated that more force may be called for in stopping a vehicle than a person on footbecause there is less opportunity for a face-to-face encounter with the suspect, a greater chance that the officer will not see the suspect reaching for a weapon, and the possibility of a dangerous car chase. *Fitzgibbons, supra*, 23 Mass. App. Ct. at 305–06. *See also* Commonwealth v. Blake, 23 Mass. App. Ct. 456 (1987) (blocking car and approaching suspect without display of weapons did not constitute arrest). Ramming a suspect's vehicle to stop a dangerous car chase was not deemed an arrest under the fourth amendment. *Scott v. Harris*, 550 U.S. 372 (2007).

[108] *See* Commonwealth v. Borges, 395 Mass. 788 (1985) (detaining suspect and ordering him to remove one shoe to prevent flight constituted an arrest); Commonwealth v. Moses, 408 Mass. 136, 142 (1990) (requesting and taking keys to vehicle was "proportionate to the circumstances").

[109] Kaupp v. Texas, 538 U.S. 626,631 (2003) (Officers removed suspect from home in underwear and transported him to station for interrogation deemed an arrest). *See* Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion) ("an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"). *See also* United States v. Place, 462 U.S. 696 (1983) (90-minute detention of suspect's luggage awaiting sniffer dog exceeded scope of *Terry* stop); Dunaway v. New York, 442 U.S. 200 (1979) (taking suspect into custody for purposes of interrogation constituted de facto arrest); Commonwealth v. Griffin, 79 Mass. App. Ct.124,128 (2011) (handcuffing and transporting suspect to police station for strip search deemed in arrest). *But see* United States v. Sharpe, 470 U.S. 675, 687 (1985) (officers not required to use least intrusive means to investigate suspicions). *Compare* Commonwealth v. Andrews, 34 Mass. App. Ct. 324, 329–30 (1993) (blocking car containing four robbery suspects, holding them at gunpoint for several minutes, and subsequently handcuffing them until arrival of witness not an arrest) *with* Commonwealth v. Stawarz, 32 Mass. App. Ct. 211, 214–15 (1992) (five police cars converging on and encircling suspected stolen vehicle constituted arrest). *See* Commonwealth v. Williams, 422 Mass. 111, 119 (1996) (transporting suspect to crime scene and restraining him reasonable in light of attempt to flee and fact that he lied about having been shot). *See also* Commonwealth v. Sweezy, 50 Mass. App. Ct. 48, 54 (2000) (officers on foot almost encircling suspect's car not deemed an arrest); Commonwealth v. Gordon, 47 Mass. App. Ct. 825, 826–827 (1999) (handcuffing robbery suspect and placing her in cruiser for showup not excessive); Commonwealth v. Hart, 45 Mass. App. Ct. 81, 86 (1998) (ordering suspect to place hands on head during arrest of companion deemed reasonable).

[109.5] Muehler v. Mena, 544 U.S. 93, 99 (2005) (detention of occupant in handcuffs for three hours deemed reasonable under fourth amendment).

[110] 392 U.S. 1 (1968).

search for weapons.[111] As with the stop, the search for weapons must be supported by specific facts to suggest that the suspect is armed, and the suspicion must focus on the individual who is searched.[112] The most significant factor is the presence or absence of suspicious movements by the suspect that could increase the potential danger to the officer,[113] but even the nature of the crime itself may warrant the protective search.[114]

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[111] Terry v. Ohio, 392 U.S. 1, 24 (1968). The pat frisk must be justified by both elements of *Terry*, reasonable suspicion of criminal activity and reason to believe the suspect is armed and dangerous. Commonwealth v. Martin, 457 Mass. 14, 20-21 (2010); Commonwealth v. Narcisse, 457 Mass. I, 10-11 (2010) (even if encounter began as consensual both elements of Terry must be satisfied). See Arizona v. Johnson, _U.S._, 129 S. Ct. 781, 784 (2009) (second prong of Terry reaffirmed). See also Commonwealth v. Gomes, 453 Mass. 506, 513 (2009) (no reason to believe drug suspect was armed and dangerous); Commonwealth v. Washington, 449 Mass. 476, 484 (2007) (refusing to create blanket rule of fear for safety in all drug cases).

[112] *See* Ybarra v. Illinois, 444 U.S. 85 (1979) (patdown search of all patrons in a bar that officers had warrant to search held invalid). *See also* Commonwealth v. Wing Ng, 420 Mass. 236, 237–38 (1995) (no automatic right to pat down companion of arrestee under art. 14); Commonwealth v. Souza, 42 Mass. App. Ct. 186, 191 (1997) (no facts to support frisk of person present during warrant search of premises); Commonwealth v. Prevost, 44 Mass. App. Ct. 398, 400 (1998) (no automatic right to frisk passenger in stopped car).

[113] Commonwealth v. Johnson, 454 Mass. 159, 164-165 (2009) (high crime area with frequent gun violence and suspect persists in placing hands in pockets – sufficient for pat frisk); Commonwealth v. Goewy, 452 Mass. 399, 408 (2008) (driver of car stopped for traffic violation appeared nervous turning toward police frequently and reaching into area around him in vehicle – sufficient for pat frisk); Commonwealth v. Isaiah I., 450 Mass. 818, 825 (2008) (suspect in impending robbery in store reaches as if to put something in sock – sufficient); Commonwealth v. Rock, 429 Mass. 609, 613-614 (1999) (suspect sweating and nervous, bulge under shirt – justified); Commonwealth v. Alvarado, 427 Mass. 277, 284 (1998) (reliable report of "sawed-off shotgun" in car justified protective search of vehicle); Commonwealth v. Vasquez, 426 Mass. 99, 103 (1997) (danger of gun in car justifies removal of occupants and right "to conduct minimal search at least"); Commonwealth v. Sumerlin, 393 Mass. 127 (1984) (occupied vehicle parked wrong way in high-crime area late at night, passenger gets in carrying bag – valid protective search); Commonwealth v. Cabrera, 76 Mass. App. Ct. 341, 351 (2010) (suspicion of drug transaction, police outnumbered by suspects "need not gamble with their safety"); Commonwealth v. Graham, 78 Mass. App. Ct. 127 (2010) (driver kept reaching down between seat and console and passenger had knife – protective search of locked glove box deemed reasonable); Commonwealth v. White, 74 Mass. App. Ct. 342, 347 (2009) (stop on suspicion of violent assault, passenger failed to show hands – pat frisk of occupants deemed reasonable); Commonwealth v. Pagan, 63 Mass. App. Ct. 780, 784 (2005) (suspect appeared scared and walked away while reaching toward waist – frisk reasonable); Commonwealth v. Fisher, 54 Mass. App. Ct. 41 (2002) (suspect known for firearm possession makes quick move toward waist while evading approach of police – frisk justified).

The facts were deemed insufficient in the follow cases: Commonwealth v. Barros, 435 Mass. 171, 179 n.9 (2001) (anonymous tip of possession of gun); Commonwealth v. VaMeng Joe, 425 Mass. 99, 102 (1997) (search of suspect not reasonable motivated by safety concerns invalid under Terry); Commonwealth v. King, 389 Mass. 233 (1983) (black man and white man in car at 2 a.m. with motor running appearing nervous); Commonwealth v. Martinez, 74 Mass. App. Ct. 240 (2009) (no furtive gestures giving rise to safety concerns); Commonwealth v. Santos, 65 Mass. App. Ct. 122, 127-128 (2005) (traffic stop in high-crime area not "swiftly developing situation", suspect's conduct not "furtive"); Commonwealth v. Dasilva, 56 Mass. App. Ct. 220, 227 (2002) (suspect believed involved in gang feud riding bike with one hand in pants); Commonwealth v. Pierre P., 53 Mass. App. Ct. 215 (2001) (high-crime area, suspects wearing gang colors).

Reasonable suspicion that the suspect is armed and presently dangerous allows only for a limited protective search. What is reasonable is determined by balancing the need to search against the degree of intrusion on the suspect's privacy.[115] In *Terry* the court upheld the patdown or frisk of the suspect's outer clothing, but the courts have also upheld the immediate search into the suspect's waistband when he failed to respond to the officer's request to step out of the car,[116] the protective search of the passenger compartment of an automobile while the suspect was detained outside of the vehicle,[117] and a search of containers accessible to the suspect which may have contained a weapon.[118] However, the extent of the search must be limited to what is necessary to protect the officer's safety.[119]

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[114] In *Terry* the officer suspected that a robbery was about to take place and was therefore justified in frisking the suspect. 392 U.S. at 28. *Compare* Sibron v. New York, 392 U.S. 40, 64 (1968) (no reasonable grounds to believe drug suspect was armed and dangerous).

[115] Terry v. Ohio, 392 U.S. 1, 21 (1968). A pat frisk of the suspect's outer clothing is normally required before more intrusive means are used. Commonwealth v. Fleming, 76 Mass. App. Ct. 632, 639 (2010) (immediate lifting of suspect's shirt upon seeing bulge deemed not reasonable). But cf. Commonwealth v. Lopez, 55 Mass. App. Ct. 741, 746 (2002) (immediate opening of suspect's closed fist deemed reasonable for safety of officers).

[116] Adams v. Williams, 407 U.S. 143 (1972). Compare Commonwealth v. Fleming, 76 Mass. App. Ct. 632,639 (2010) (immediate lifting of suspect's shirt not reasonable).

[117] Michigan v. Long, 463 U.S. 1032 (1983). *See* Commonwealth v. Santiago, 53 Mass. App. Ct. 567, 571-572 (2002) (*Terry* protective search of passenger compartment after suspect was handcuffed outside deemed reasonable in light of possibility of later release of suspect to vehicle); Commonwealth v. Pena, 69 Mass. App. Ct. 713, 720 (2007) (protective search of passenger compartment justified by erratic hand movements of passenger). Compare Commonwealth v. Mubdi, 456 Mass. 385, 399 (2010) (protective sweep of vehicle not justified by reasonable suspicion of danger to officers). See also Commonwealth v. Lucido 18 Mass. App. Ct. 941 (1984) (protective search for weapons of passenger compartment valid); Commonwealth v. Robbins, 407 Mass. 147 (1990) (protective search of front seat after arrest of driver when officer observed brown-handled object wedged between front seats and passenger not arrested).

[118] See Commonwealth v. Pagan, 440 Mass. 62, 73 (2003) (pat frisk of soft container like bag should precede more intrusive search but soft bag containing hard objects does not dispel fear); Commonwealth v. Nutile, 31 Mass. App. Ct. 614, 618–19 (1991) (protective search extended to pouch with bulge hanging from driver's seat); Commonwealth v. Sumerlin, 393 Mass. 127, 131 (1984) (protective search of bag beneath feet of suspect in illegally parked car justified); Commonwealth v. Lucido, 18 Mass. App. Ct. 941 (1984) (search in bag in glove compartment after locating weapon in car justified). *Compare* Commonwealth v. Silva, 366 Mass. 402 (1974) (assuming validity of protective search beneath car seat, search into small packet that could not have contained weapon held invalid).

[119] *See* Minnesota v. Dickerson, 508 U.S. 366, 379 (1993) (during lawful frisk officer felt and manipulated object in suspect's pocket believed to be drugs; such tactile examination not justified as protective search under *Terry*). Contrast Commonwealth v. Wilson, 441 Mass. 390,398 (2004) (adopting "plain feel" doctrine under art. 14 but contraband nature of item felt must be immediately revealed without further manipulation); See also Commonwealth v. Pagan, 440 Mass. 62-73 (2003) (pat frisk of soft container should normally precede more intrusive search into container); Commonwealth v. Dedominicus, 42 Mass. App. Ct. 76, 79 (1997) (during pat frisk of robbery suspect officer felt "hard" object, reached in and unfolded wad of bills — justified as protective search).

§ 17.5 THE VALIDITY OF THE ARREST

(*See also supra* § 17.4B(2), defining an arrest and distinguishing it from an investigatory stop.)

§ 17.5A. THE STANDARD OF PROBABLE CAUSE

The Fourth Amendment and article 14 require that every arrest be based on probable cause.[120]

Probable cause to arrest exists when, at the moment of arrest, the facts and circumstances known to the police officer were sufficient to warrant a person of reasonable caution in believing that the defendant had committed or was committing a crime.[121]

The degree of suspicion required for probable cause is greater than the informed guess that may warrant an investigative stop but less than evidence sufficient to warrant a conviction.[122] In some cases, it has been characterized as the conclusion that it is "more probable than not" that the suspect has committed a crime.[123] The touchstone of probable cause is "fair probability" from the "totality of the circumstances,"[124] and the courts have made clear that the standard is to be applied in a practical and nontechnical fashion.[125]

The standard of probable cause is objective, focusing on the reasonable inferences that may be drawn from the facts and not on the good faith or subjective belief of the arresting officer.[126]

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[120] *See* Commonwealth v. Bottari, 395 Mass. 777, 783 (1985) (art. 14 requires probable cause for valid arrest); Wong Sun v. United States, 371 U.S. 471, 479 (1963) (Fourth Amendment). See Kaupp v. Texas, 538 U.S. 626 (2003) (arrest without probable cause).

[121] Commonwealth v. Paquette, 440 Mass.121, 133 (2003) (quoting Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992).

[122] Commonwealth v. Gallant, 452 Mass 535,542 (2009).

[123] *See, e.g.,* Commonwealth v. Pietrass, 392 Mass. 892, 898 (1984) (quoting Commonwealth v. Cruz, 373 Mass. 676, 685 (1977)).

[124] *See* Illinios v. Gates, 462 U.S. 213, 238 (1983) (abandoning two-pronged test of *Aguilar-Spinelli* in favor of "totality-of-circumstances analysis" for evaluating hearsay from anonymous informants).

[125] *See, e.g.*, Brinegar v. United States, 338 U.S. 160, 176 (characterizing probable cause as a "practical nontechnical conception"). *See also* Commonwealth v. Federici, 427 Mass. 740, 747 (1998) (NH police had probable cause to arrest murder suspect with cumulative information at least for assault with deadly weapon).

[126] See Devenpeck v. Alford, 543 U.S. 146 (2004) (arrest for one crime invalid but probable cause for another offense justifies arrest without regard to officer's subjective belief); See also Commonwealth v. Kotlyarevsky, 59 Mass. App. Ct. 240, 243-244 (2003) (no grounds to arrest for conspiracy but sufficient probable cause for arrest on drug violation); Commonwealth v. Hason, 387 Mass. 169, 175 (1982). Although the standard is that of the reasonable person, the experience of the officer may enable her to draw conclusions that the layperson may not. *See* Commonwealth v. Irwin, 391 Mass. 765, 769 (1984) (officer trained in detection of marijuana by sight). *See also* Commonwealth v. Ferguson, 11 Mass. App. Ct. 894, 894 (1980) (court may credit officer's experience reaching probable-cause conclusion); Commonwealth v. Chavis, 41 Mass. App. Ct. 912 (1996) (search of suspect justified not as protective search but by probable cause and exigent circumstances).

1. Personal Observations of the Police Officer

The information in the officer's possession must link the particular suspect to the crime. Probable cause is not demonstrated by an isolated showing of mere presence at the crime scene,[127] or flight from the police,[128] or implausible, evasive, or false answers to police questions.[129] Furtive actions taken at the approach of a police officer may be an important ingredient in the determination of probable cause.[130] However,

[127] *See* United States v. Di Re, 332 U.S. 581, 593 (1948) (presence in car in which another suspect was arrested in possession of counterfeit gasoline coupons insufficient to justify arrest). *See also* Commonwealth v. Sampson, 20 Mass. App. Ct. 970, 971 (1985) (observation of defendant seated next to gaming suspect who acted furtively on seeing officer not sufficient for probable cause to believe defendant engaged in illegal gambling). Compare Maryland v. Pringle, 540 U.S. 366, 373-374 (2003) (sufficient probable cause to arrest passengers as well as driver for drug possession); Commonwealth v. Fernandez, 57 Mass. App. Ct. 562, 567 (2003) (manner of drug activity raised "fair inference" that passenger was involved). *Cf.* Ybarra v. Illinios, 444 U.S. 85, 96 (1979) (warrant to search tavern for drugs did not justify patdown search of patrons).

[128] *Cf.* Commonwealth v. Borges, 395 Mass. 788, 796 (1985) (flight after initial illegal arrest insufficient to establish probable cause for subsequent arrest). However, flight can be an important factor in the totality of the circumstances leading to a conclusion of probable cause. *See* Commonwealth v. Hernandez, 448 Mass. 711, 716 (2007) (flight from approach of officers turns reasonable suspicion of drug activity into probable cause to arrest); Commonwealth v. Battle, 365 Mass. 472, 476 (1974) (flight of suspect plus throwing away package that appeared to contain heroin sufficient for probable cause). See also Commonwealth v. Sweezy, 50 Mass. App. Ct. 48, 52 (2000) (attempted flight of suspect at approach of officer);

[129] *See* Commonwealth v. Dellinger, 383 Mass. 780, 783 (1981) (sufficient suspicion to justify stop of car following truck carrying valuable silver shipment but "inferably untruthful" responses to officer's questions did not convert suspicion into probable cause). *But see* Commonwealth v. Riggins, 366 Mass. 81, 88 (1974) ("Implausible answers to police questions will, with other facts, support a finding of probable cause to search"). *See also* Commonwealth v. Modica, 24 Mass. App. Ct. 334, 339 (1987) ("inconsistent incredible answers" to officer plus officer's knowledge of crime added up to probable cause).

[130] *See, e.g.*, Commonwealth v. Kennedy, 426 Mass. 703, 708 (1998) (viewing exchange between suspect and operator of vehicle as a "silent movie" witnessed through eyes of an experienced officer; although no evidence of "furtive" movement, facts sufficient for probable cause); Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992) (experienced officer in high-crime area sees suspect pull something from waistband, hand it "furtively" to taxi passenger, and receive money; sufficient probable cause to arrest for drug sale); But see *Commonwealth v. Cruz*, 459 Mass. 459, 476 (2011) (after decriminalization of simple possession odor of burnt marijuana does not give rise to probable cause of criminal activity); Commonwealth v. Levy, 459 Mass. 1010 (2011) (insufficient evidence of drug sale distinguishing Santaliz); Commonwealth v. Franco, 419 Mass. 635 (1995) (occupant of apartment attempting to leave when officers arrived to arrest another, delay in answering door, and strong smell of chemical used in cocaine processing provided sufficient probable cause); Commonwealth v. Rivera, 27 Mass. App. Ct. 41 (1989) (as officers approached suspect in area of high drug activity, suspect shoved plastic baggie into front of pants; sufficient probable cause to arrest for drug possession); Commonwealth v. Hill, 49 Mass. App. Ct. 58 (2000) (quick transaction through automobile window in high-crime area and suspect admitted she received ten-dollar bill-adequate probable cause); *See also* Commonwealth v. Rogers, 38 Mass. App. Ct. 395, 402 (1995) (suspects in rape and robbery matching general description close to scene of crime discarded ATM card as police approached where ATM card had been one of stolen items — sufficient probable cause); Commonwealth v. Benitez, 37 Mass. App. Ct. 722, 723–24 (1994) (suspect receives plastic bag and goes to car and places bag in groin area — sufficient

activity observed by a police officer that is completely consistent with innocence will not lead to probable cause simply because the officer suspects that it is criminal.[131] If several officers are working together in a cooperative investigation, the information possessed by each of the officers is treated as if it were possessed by all.[132]

2. Probable Cause Based on Informant's Tip

If probable cause to arrest is based wholly or in part on an informant's tip, the prosecution must demonstrate that the tip was trustworthy and not a fabrication or simply the result of a casual rumor.[133] Under article 14 such a showing must include two elements drawn from *Aguilar v. Texas* [134] and *Spinelli v. United States*:[135] (1) Some of the underlying circumstances from which the informant concluded that the defendant had committed the crime for which the arrest was made (the basis of knowledge test);

probable cause). *Compare* Commonwealth v. Wedderburn, 36 Mass. App. Ct. 558, 562 (1994) (officer sees one man hand something to suspect who drops "what appeared to be a plastic bag" on approach — insufficient for probable cause). *See also* Commonwealth v. Albert, 51 Mass. App. Ct. 377, 380-381 (2001) (apparent drug transaction involving truck with prior connection to drugs and known drug user); Commonwealth v. Gant, 51 Mass. App. Ct. 314, 320 (2001) (suspicious transaction, evasive conduct on approach of police and dropping of item exchanged deemed sufficient); Commonwealth v. Allain, 36 Mass. App. Ct. 595, 602 (1994) (viewing hand-rolled cigarettes pinched at both ends — sufficient probable cause).

[131] See Commonwealth v. Keefner, 461 Mass. 507 (2012) (no probable cause of possession with intent); *Commonwealth v. Landry*, 438 Mass 206,212 (2002) (no probable cause to arrest for possession of needles after suspect showed membership in needle exchange program). *Compare* Commonwealth v. Alabarces, 12 Mass. App. Ct. 958 (1981), *opinion approved on further appellate review*, 385 Mass. 1012 (1982) (suspect exchanged something with another person for money and walked away when officers approached; insufficient to establish probable cause for drug arrest) *and* Commonwealth v. Ortiz, 376 Mass. 349, 354 (1978) (suspect known to police as drug user engaged in similar transaction in area known for drug activity; sufficient to establish probable cause). *See also* Commonwealth v. Levy, 459 Mass. 1010 (2011) (insufficient evidence of drug sale); Commonwealth v. Alvarado, 420 Mass. 542, 548–49 (1995) (no probable cause when officer saw suspect placing plastic bag down front of his pants, but other factors gave rise to probable cause); Commonwealth v. Reddington, 395 Mass. 315, 321 (1985) (observing suspect load "something" into trunk of car after phone call to suspect by informant alerting suspect that police search was imminent; insufficient for probable cause to search car); Commonwealth v. Couture, 407 Mass. 178 (1990) (information that suspect was in possession of firearm in public without evidence that possession was illegal does not give rise to probable-cause); Commonwealth v. Brookins, 416 Mass. 97, 104 (1993) (possession plus firing of weapon and flight give rise to probable cause of unlawful carrying).

[132] Illinois v. Andreas, 463 U.S. 765, 771-772 n.5 (1983). *See* Commonwealth v. Quinn, 68 Mass. App. Ct. 476, 481 (2007) (officer effecting stop did not have information about fresh tire tracks leading from scene-information of other officers included); Commonwealth v. Zirpolo, 37 Mass. App. Ct. 307, 311 (1994) (officers working together on OUI incident). *But cf.* Commonwealth v. King, 67 Mass. App. Ct. 823, 831 (2006) (collective knowledge doctrine does not allow one officer to testify at suppression hearing about what another officer saw).

[133] *See* Spinelli v. United States, 393 U.S. 410, 416 (1969) (magistrate must be able to "know that he is relying on something more than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation").

[134] 378 U.S. 108 (1964).

[135] 393 U.S. 410 (1969).

and (2) some of the underlying circumstances to show that the informant was credible or the information reliable (the veracity test).[136] Although the Supreme Court has abandoned the *Aguilar-Spinelli* test in favor of an inquiry into the totality of the circumstances,[137] under article 14 both prongs are necessary to establish probable cause.[138]

The *Aguilar-Spinelli* test is also, and more often, applied to search warrant affidavits[139] and is addressed in detail *infra* at § 17.8B(2).

3. Identification and Probable Cause

If the informant is a victim or eyewitness of a crime a separate problem arises in deciding whether the police had probable cause to arrest.[140] The description of a suspect may be so general that it is difficult to demonstrate probable cause as to a particular individual.[141] In such cases the specificity of the description, the nature of the area in which the crime occurred, and the timing of the arrest in relation to the occurrence of the crime are relevant to the determination of probable cause.[142]

§ 17.5B. AUTHORITY TO ARREST/ARREST WARRANTS

1. Generally

A police officer has the right to arrest a person for a felony or misdemeanor pursuant to a valid arrest warrant.[143] In the absence of a warrant, an officer may arrest a person in a public place[144] whom she has probable cause to believe has committed a

[136] *See* Aguilar v. Texas, 378 U.S. 108, 114 (1964).

[137] Illinois v. Gates, 462 U.S. 213 (1983).

[138] *See* Commonwealth v. Robinson, 403 Mass. 163, 165 (1988) (characterizing both prongs as "vital") *(quoting* Commonwealth v. Avery, 365 Mass. 59 (1974)). *See also* Commonwealth v. Upton, 394 Mass. 363, 376 (1985) ("each prong of the *Aguilar-Spinelli* test presents an independently important consideration").

[139] *Aguilar* and *Spinelli* dealt with the sufficiency of search warrant affidavits. The same test applies to all probable-cause determinations based on tips from an informant including arrest warrant affidavits and warrantless arrests. *See* Commonwealth v. Robinson, 403 Mass. 163, 164 (1988) (warrantless arrest); Commonwealth v. Bottari, 395 Mass. 777, 783 (1985) (same); *Commonwealth v. Brown*, 57 Mass. App. Ct. 326, 328-329 (2003) (same); Commonwealth v. Olivares, 30 Mass. App. Ct. 596, 598 (1991) (warrantless arrest).

[140] *See* LAFAVE, SEARCH AND SEIZURE § 3.4(c) (4th ed. 2004).

[141] *See* Commonwealth v. Jackson, 331 A.2d 189, 191 (Pa. 1975) ("descriptions equally applicable to large numbers of people will not support a finding of probable cause").

[142] *See* Commonwealth v. Gagne, 27 Mass. App. Ct. 425, 429 (1989) (specific description of suspect including ring and suspect arrested within 700 feet of crime scene); Commonwealth v. Carrington, 20 Mass. App. Ct. 525, 529 (1985) (nature of area, description of suspect, early hour, "barely" enough to establish probable cause).

[143] G.L. c. 41, §§ 95, 98. An arrest is justified even if the officers do not have an arrest warrant in their possession as long as they have actual knowledge of the existence of an outstanding valid arrest warrant. Commonwealth v. Walker, 370 Mass. 548, 560 (1976). Cf. *Commonwealth v. Lester L.*, 445 Mass. 250, 256-257 (2005) (properly issued complaint carries with it a finding of probable cause to arrest in that the judge signing it must make such finding).

[144] A warrant is ordinarily required for arrest inside a home as detailed *infra* in this subsection.

felony.[145] Unless otherwise provided by statute the authority to make a warrantless arrest for a misdemeanor extends only to an offense involving a breach of the peace that is committed in the officer's presence.[146]

When executing an arrest warrant the officer's authority is statewide.[147] Without a warrant the right to arrest for a misdemeanor extends only to the boundaries of the officer's jurisdiction[148] unless the officer is in fresh and continued pursuit of a suspect who has committed an offense in the officer's presence within the officer's jurisdiction.[149] However, a police officer may arrest a person suspected of a felony if

[145] *See, e.g.,* Commonwealth v. Hason, 387 Mass. 169, 173 (1982) (dicta).

[146] *See* Muniz v. Mehlman, 327 Mass. 353, 354–57 (1951) (right to arrest for misdemeanor only if offense was committed in officer's presence). *But see* Commonwealth v. Zirpolo, 37 Mass. App. Ct. 307, 311 (1994) (offense need not have been committed in arresting officer's presence if two officers working together). *See also, e.g.*, Commonwealth v. Gorman, 288 Mass. 294, 299 (1934) (operating motor vehicle under influence involves breach of peace). A warrantless arrest is also justified if the officer has probable cause to believe that a person has violated a court order to vacate the marital home or a restraining order issued to prevent family violence. G.L. c. 276, § 28. *But see* Commonwealth v. Jacobsen, 419 Mass. 269 (1995) (G.L. c. 209A gives authority to arrest on probable cause only if crime of abuse has been committed and threat must be of imminent and serious physical harm). See also Richardson v. City of Boston, 53 Mass. App. Ct. 201, 207-208(2001) (right to arrest under 209A upon report to police by victim). A deputy sheriff may stop a car for a civil traffic violation but has no authority to arrest the driver for a misdemeanor not involving a breach of the peace. Commonwealth v. Baez, 42 Mass. App. Ct. 565, 569 (1997). The requirement that the misdemeanor involve a breach of the peace is not commanded by the fourth amendment. Atwater v. City of Lago Vista, 532 U.S. 318 (2001). And the arrest is valid under the fourth amendment even if it is contrary to a policy not to arrest under state law for that offense. Virginia v. Moore, _ U.S. _, 128 S. Ct. 1598, 1607 (2008). But see Commonwealth v. Hernandez, 456 Mass. 528,533 (2010) (refusing to scrap exclusionary rule for arrest outside of officer's authority).

[147] *See* G.L. c. 41, § 95 (right to arrest "in any place in the Commonwealth"). If the arrest is made outside the Commonwealth, the law of the state in which the arrest is made will apply. *See* Commonwealth v. Gullick, 386 Mass. 278, 281 (1982) (warrantless arrest by Massachusetts state troopers in New Hampshire).

[148] *See* Commonwealth v. Grise, 398 Mass. 247, 249 (1986) (observation of motorist driving erratically and arrest for operating under influence occurring outside arresting officer's jurisdiction; arrest invalid). *But see* Commonwealth v. Limone, 460 Mass. 834,842 (2011) (Somerville officer justified in detaining OUI suspect in Woburn until arrest by Woburn police). *Compare* Commonwealth v. Morrissey, 422 Mass. 1 (1996) (stop by officer outside his jurisdiction at radio request of proper authority justified — distinguishing *Grise*). *See also* Commonwealth v. Savage, 430 Mass. 341, 345-346 (1999) (NH trooper with report of erratic driver at border-arrest in Mass. deemed invalid applying *Grise* and distinguishing *Morrisey*). *But see* Commonwealth v. Twombly, 435 Mass. 440 (2001) (civil violations of speeding and improper passing pose sufficient risk to allow for extraterritorial arrest under statute "in preservation of the peace"); Commonwealth v. Callahan, 428 Mass. 335, 338 (1998) (arrest in Mass. of suspect by NH officer valid with authority of border town pursuant to statute); Commonwealth v. Nicholson, 56 Mass. App.Ct. 911,912 (2002) (statute allows for swearing in police from neighboring town as special officer - G.L.C. 41§ 99). Campus police as special State police officers have authority to arrest on the campus and in the environs to preserve peace and protect property. Commonwealth v. Young, 64 Mass. App. Ct. 586,588 (2005). See Commonwealth v. Hernandez, 456 Mass. 528,533 (2010) (arrest by campus police off campus and without nexus requires exclusion).

[149] The common law recognized the authority to make an extraterritorial arrest on fresh and continued pursuit of a suspected felon where the suspect had committed the offense within the officer's presence and jurisdiction. *See* Commonwealth v. Grise, 398 Mass. 247, 249 (1986).

the officer has probable cause that "a felony had been committed and that the person arrested committed it."[150] A person other than a properly appointed police officer may arrest a person as a private citizen only if the arrestee has in fact committed a felony.[151] A private citizen may not arrest a person who has committed a misdemeanor. [151.5]

2. Warrantless Arrest in the Home

A warrantless arrest may be made in a public place.[152] However, the police may not enter a suspect's home in order to make an arrest in the absence of a warrant, consent, or exigent circumstances.[153] An arrest warrant is sufficient to justify an entry

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By statute the rule now applies to any offense "committed in [the officer's] presence within his jurisdiction for which he would have the right to arrest within his jurisdiction without a warrant." G.L. c. 41, § 98A. *See* Commonwealth v. Owens, 414 Mass. 595, 599–600 (1993) (statute applied to Quincy officer who observed suspicious activity of suspect driver of vehicle and received information of outstanding felony warrants for owner of vehicle). *Compare* Commonwealth v. LeBlanc, 407 Mass. 70, 75 (1990) (pursuit of vehicle that ran red light in one town did not justify ultimate arrest for OUI in adjacent town); Commonwealth v. O'Hara, 30 Mass. App. Ct. 608, 609–10 (1991) (speeding and crossing center line justified pursuit and OUI arrest in neighboring town); *Commonwealth v. Riedel*, 76 Mass. App. Ct. 911, 912 (2010) (sufficient evidence of probable cause for OUI even though officer did not conclude so prior to extraterritorial stop). Commonwealth v. Zirpolo, 37 Mass. App. Ct. 307, 311 (1994) (fresh and continued pursuit of OUI suspect justified extraterritorial arrest).

[150] Commonwealth v. Claiborne, 423 Mass. 275, 280 (1996) (quoting Commonwealth v. Harris, 11 Mass. App. Ct. 165, 172 (1981)).

[151] Commonwealth v. Claiborne, 423 Mass. 275, 281 n.4 (1996). A private citizen may not make an arrest for a misdemeanor. *See* Commonwealth v. Savage, 430 Mass. 341, 346 (1999) (arrest by NH trooper of OUI suspect in Mass. not valid as citizen's arrest because first offense not felony). See also Commonwealth v. Grise, 398 Mass. 247, 252 (1986) (refusing to recognize private person's authority to arrest for OUI).

[151.5] See Commonwealth v. Limone, 460 Mass. 834,841 n. 7 (2011) (noting rule).

[152] *See* United States v. Watson, 423 U.S. 411 (1976) (warrantless arrest in restaurant open to public upheld). *See* also Commonwealth v. Celestino, 47 Mass. App. Ct. 916, 917 (1999) (warrantless arrest of drug suspect at bus stop).

[153] *See* Payton v. New York, 445 U.S. 573 (1980) (warrantless nonconsensual entry into suspect's home to make routine felony arrest held unconstitutional); Commonwealth v. Forde, 367 Mass. 798, 806 (1975) (plurality opinion) (warrantless entry into dwelling to arrest must be justified by exigent circumstances). The same principle applies to the home of a third party where the defendant has permission of the owner to stay overnight. Minnesota v. Olsen, 495 U.S. 91 (1990). *See* Commonwealth v. Derosia, 402 Mass. 284, 286 (1988) *(Payton* and *Forde* apply to arrest made in home of third party where suspect was lawful visitor).

A doorway arrest requires exigent circumstances. *Cf.* United States v. Santana, 427 U.S. 38, 42 (1976) (characterizing threshold of suspect's house as "public" and holding officers justified by exigent circumstances in arresting suspect inside house after she retreated there). The court distinguished *Santana* in Commonwealth v. Marquez, 434 Mass. 370, 376 (2001) (doorway to hall not public place when suspect answered police knock). The court in *Marquez* stated that exigent circumstances were necessary to justify a warrantless doorway arrest. *Marquez*, supra, at n.5. See Commonwealth v. Street, 56 Mass. App. Ct. 301, 307 n.11 (2002) (rejecting argument that doorway arrest without warrant or exigent circumstances was valid).

The officers may not cause the suspect to leave the privacy of his home by force or deception in order to avoid the requirements of *Payton. See, e.g.*, United States v. Maez, 872 F.2d 1444, 1450–51 (10th Cir. 1989) (officers ordered suspect to exit home at gunpoint). *See*

into the arrestee's home if the officers have reason to believe that the suspect is there[154] but will not justify the entry into a third-party's home to search for the subject of the warrant.[155] A person whom the officers have a warrant to arrest may not complain of the entry into a third party's home to arrest him.[156]

The police may enter a dwelling to make a warrantless arrest if they have probable cause and there are exigent circumstances.[157] Generally, exigent circumstances exist only where there is a "compelling need for official action and no time to obtain a warrant."[158] The burden of justifying the warrantless entry is on the prosecution and the standard for demonstrating exigent circumstances has been characterized as "strict."[159] The court has enunciated several factors relevant to a determination of exigent circumstances,[160] including inter alia the nature and gravity of

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also Commonwealth v. Sepulveda, 406 Mass. 180, 182 (1989) ("... ruses must be designed to elicit consensual entry."). *Cf.* Commonwealth v. Ramos, 430 Mass. 545 (2000) (police used ruse and threats to force suspect to leave house).

[154] See *Payton v. New York*, 445 U.S. 573,603 (1980) (arrest warrant carries with it limited authority to enter suspect's home when there is reasonable belief suspect is inside). See also *Commonwealth v. Silva*, 440 Mass. 772, 779 (2004) (adopting "reasonable belief" standard under art. 14). Compare *Commonwealth v. Webster*, 75 Mass. App. Ct. 247, 253 (2009) (entry invalid when officers had reasonable belief that suspect lived there but no evidence that he was there at time of entry). If the entry is valid but the officers do not locate the suspect, they may not remain inside the premises but must secure it from the outside. Id.

[155] Such an entry, absent consent or exigent circumstances, must be accompanied by a search warrant in order to protect the privacy interests of the third party, and evidence seized as a result of such an entry may not be used against the third party. *See* Steagald v. United States, 451 U.S. 204 (1981) (entry with arrest warrant for nonresident, and subsequent seizure of drugs and arrest of residents violated residents' Fourth Amendment rights).

[156] Commonwealth v. Allen, 28 Mass. App. Ct. 589, 593 (1990) (requiring more than an arrest warrant when the suspect is in the home of a third party "would produce an unacceptable paradox").

[157] *See, e.g.,* Commonwealth v. Pietrass, 392 Mass. 892, 897–98 (1984) (probable cause and exigent circumstances necessary for warrantless entry of dwelling to arrest suspect). See also *Commonwealth v. Ricci*, 57 Mass. App. Ct. 155, 167 (2003) (exigency when cops saw suspect attempting to dispose of bag from upstairs window).

[158] Michigan v. Tyler, 436 U.S. 499, 509 (1978).

[159] Commonwealth v. Forde, 367 Mass. 798, 800 (1975). *See* Commonwealth v. Kiser, 48 Mass. App. Ct. 647, 648 (2000) (calling exception to warrant for entry into home to arrest "narrow and jealously guarded").

[160] A plurality of the Supreme Judicial Court in Commonwealth v. Forde, 367 Mass. 798 (1975), adopted the factors set out in Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), for testing if exigent circumstances justify the warrantless entry of a residence: (1) whether the crime was a violent one; (2) whether there was a showing that the suspect was reasonably believed to have been armed; (3) whether there was a clear showing of probable cause; (4) whether there was a strong reason to believe the suspect was on the premises; (5) whether there was a likelihood that the suspect would escape if not swiftly apprehended; (6) whether the entry was made peaceably; and (7) whether the entry was made at night. In Commonwealth v. Pietrass, 392 Mass. 892 (1984), the court added to the list of factors the amount of time it would take to obtain a warrant. See also *Commonwealth v. Tyree*, 455 Mass. 676, 685-692 (2010) (no adequate exigency under *Forde* analysis); *Commonwealth v. Molina*, 439 Mass. 206, 211 (2003) (same); *Commonwealth v. McAfee*, 63 Mass. App. Ct. 467, 480 (2005) (same); *Commonwealth v. Street*, 56 Mass. App. Ct. 301, 307-308 (2003). Compare *Commonwealth v. Rodriguez*, 450 Mass. 302, 310 (2007) (no time to get warrant where

the offense,[161] the possibility of violence[162] or the escape of the suspect,[163] the manner in which entry is made, and the amount of time available to get a warrant. In some cases the courts have also considered the likelihood that evidence may be destroyed or removed if the arrest is delayed.[164]

"situation developing unexpectedly"); *Commonwealth v. Colon*, 449 Mass. 207, 218 (2007) (sufficient exigency); *Commonwealth v. Dejarnette*, 75 Mass. App. Ct. 88, 94 (2009) (same); *Commonwealth v. Saunders*, 50 Mass. App. Ct. 865 (2001) aff'd, 435 Mass. 691, 696 (2002) (unarmed robbery suspect retreats to housing project – sufficient exigency though building surrounded).

[161] If the crime for which the officers have probable cause is minor, the circumstances will not be so exigent as to justify a warrantless entry into the home. *See* Welsh v. Wisconsin, 466 U.S. 740 (1984) (warrantless entry to arrest person suspected of driving while intoxicated not justified by exigent circumstances). See also Commonwealth v. Kirschner, 67 Mass. App. Ct. 836,843 (2006) (entry into back yard not justified by probable cause of fireworks complaint). *But cf.* Illinois v. McArthur, 531 U.S. 326 (2001) (detention of marijuana suspect outside of home while warrant obtained deemed reasonable under fourth amendment). Police may enter a residence without a warrant to arrest for a misdemeanor involving a breach of the peace committed in the officers' presence. Commonwealth v. Kiser, 48 Mass. App. Ct. 647, 652 (2000) (suspect pushed officer but arrest did not follow immediately). In *Kiser* the pushing of the officer was in response to a crossing of the threshold that the court called *per se* illegal. *Id.* at 652 n.2.

[162] A court is more likely to find exigent circumstances where there is reason to believe that the officers' safety or that of others may be jeopardized by the delay attendant on obtaining warrant. *See* Commonwealth v. Bradshaw, 385 Mass. 244, 255 (1982) (evidence of murder suspect's violent proclivities). *See also* Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224 (1992) (sufficient exigent circumstances justifying peaceable entry of home to arrest armed murder suspect); Commonwealth v. Donoghue, 23 Mass. App. Ct. 103, 108 (1986) (officers not required to stake out apartment of suspect in violent knife assault). If there is no evidence of danger, the opportunity of the officers to "stake out" the premises and secure a warrant may result in a finding that no exigency existed. *See* Commonwealth v. Huffman, 385 Mass. 122, 126–27 (1982) (officers who witnessed suspect packaging marijuana had no right to enter his apartment without first seeking warrant). *Compare* Commonwealth v. Kiser, 48 Mass. App. Ct. 647, 651 (2000) (loud party not sufficient exigency to enter without warrant); Commonwealth v. Midi, 46 Mass. App. Ct. 591 (1999) (no right to enter to arrest domestic violence suspect in absence of imminent threat to victim or volatility of suspect); Commonwealth v. Boswell, 374 Mass. 263, 269–70 (1978) (officers seeking to arrest armed robbery suspect not required to stake out apartment and obtain warrant). *Cf.* Commonwealth v. Young, 382 Mass. 448, 457 (1981) (officers following trail of blood from murder victim to house next door do not need warrant to enter apartment to investigate).

[163] However, if the crime is a serious one and the officers are in hot pursuit of the suspect they may make a forcible entry of the premises to effect the arrest. *See* Warden v. Hayden, 387 U.S. 294 (1967) (officers justified in entering house without warrant five minutes after person suspected of armed robbery which had just occurred). *See also* United States v. Santana, 427 U.S. 38 (1976) (entry into drug suspect's home to arrest justified where suspect retreated inside as officers approached); *Commonwealth v. Garner*, 59 Mass. App. Ct. 350, 366 (2003) (hot pursuit of suspect in shooting); Commonwealth v. Acosta, 416 Mass. 279, 282 (1993) (suspect's attempted escape).

[164] *See* Commonwealth v. DiSanto, 8 Mass. App. Ct. 694, 700 (1979), *cert. denied*, 449 U.S. 855 (1980); Commonwealth v. Kiser, 48 Mass. App. Ct. 647, 651 (2000) (Applying *DiSanto* factors disturbance of loud party not sufficient in absence of violent fighting) (including potential destruction of evidence as factor). An entry and *search* to prevent the destruction or removal of evidence is addressed *infra* at § 17.9C(3).

Exigent circumstances will not justify a warrantless entry into a dwelling if the officers have created the exigency.[165] The officers will be held to have created the exigency if the exigent circumstances were reasonably foreseeable.[166] The crucial factor in deciding whether the exigency was foreseeable is the lapse of time between the officers' awareness that there is probable cause to arrest and the exigent circumstances.[167] The Supreme Court has held that the exigent circumstances exception will apply unless the "officers gain entry to premises by means of an actual or threatened violation of the Fourth Amendment." [167.5]

§ 17.6 ROADBLOCKS

In most cases, a seizure of the individual requires some level of suspicion that the person seized has committed or is about to commit a crime.[168] However, the courts have upheld brief detentions without individualized suspicion when necessary to accomplish particularly important purposes.[169] The reasonableness of such stops without suspicion is assessed by a balancing of all of the relevant factors, including the weight of the government's interest, the nature and extent of the intrusion on the individual's privacy, and the effectiveness of the procedure in advancing the

[165] See *Commonwealth v. Molina*, 439 Mass. 206, 211 (2003) (exigency may have existed on arrival of police at suspect's apartment but probable cause existed well prior and officers should have obtained warrant). See also *Commonwealth v. McAfee*, 63 Mass. App. Ct. 467, 477-478 (2005) (officers created exigency by going to suspect's door).

[166] *See* Commonwealth v. Forde, 367 Mass. 798 (1975). In *Forde* the police arrested a suspect outside the defendant's apartment building on probable cause that he had just purchased marijuana from the defendant. Three hours after the arrest, the officers overheard the suspect tell a companion to warn the defendant. The court struck down the subsequent warrantless entry into the defendant's apartment because the police could have foreseen at the time of the arrest that someone would attempt to warn the defendant. *Ford, supra*, 367 Mass. at 801. See also Commonwealth v. Molina, 439 Mass. 206, 211-212 (2003) (exigent circumstances reasonably foreseeable – warrant required); Commonwealth v. McAfee, 63 Mass. App. Ct. 467, 477-478 (2005) (by going to door officers created exigency).

[167] See e.g. Commonwealth v. Molina, 439 Mass. 206, 211-212 (2003) (sufficient timefrom moment of probable cause to secure warrant – entry invalid). Compare Commonwealth v. Garner, 59 Mass. App. Ct. 350, 366-367 (2003) (hot pursuit of shooting suspect justified warrantless entry).

[167.5] Kentucky v. King, _U.S._, 131 S.Ct. 1849, 1862 (2011).

[168] *See, e.g.*, Commonwealth v. Bottari, 395 Mass. 777, 783 (1985) (probable cause necessary for valid arrest under art. 14). See *also* United States v. Sokolow, 490 U.S. 1 (1989) (reasonable suspicion necessary for brief detention of airline passenger fitting drug courier profile).

[169] For example, all persons entering the United States at the border or its functional equivalent may be stopped briefly and questioned about citizenship. *See* Carroll v. United States, 267 U.S. 132, 154 (1925) (dicta). A limited routine search is also permissible. United States v. Ramsey, 431 U.S. 606 (1977) (probable cause not necessary for search of mail arriving at international border). A longer detention and more intrusive search at the border require at least reasonable suspicion. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985) (16-hour warrantless detention of person suspected of carrying narcotics in stomach deemed reasonable under circumstances). *See also* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (permanent immigration checkpoint stop of vehicles travelling from border area justified).

government's purposes.[170] Applying these principles, the Supreme Court has upheld the use of permanent immigration checkpoints close to the border at which all vehicles are stopped and the occupants questioned to determine whether they are in the country legally[171] but has struck down random stops by the border patrol of vehicles near the border as unduly intrusive and unlikely to be effective in stemming the flow of undocumented aliens.[172] Similarly, in *Delaware v. Prouse*[173] the Supreme Court disapproved the random stop of an automobile by police officers to check the registration of the vehicle and the license of the driver, while suggesting that the stop of *all* vehicles at a police roadblock may be constitutionally permissible.[174] The Supreme Court has approved the use of sobriety checkpoints because of the overriding interest in highway safety.[175] But roadblocks for the detection of narcotics have been struck down because they are for the purpose of investigating crime.[175.5]

The Supreme Judicial Court has upheld the use of police roadblocks set up to detect drunk drivers but has imposed strict constitutional limits on the location and conduct of such stops.[176] Sobriety checkpoints must: (1) be conducted pursuant to a plan devised by police supervisory personnel rather than officers in the field in order to protect against arbitrary intrusions on the privacy of motorists;[177] (2) be placed at a site chosen on the basis of neutral criteria that insure safety and minimize inconvenience;[178]

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[170] *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 554–64 (1976) (applying balancing test from Camara v. Municipal Court, 387 U.S. 523 (1967)).

[171] United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

[172] *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (random stops without "reasonable suspicion" violate Fourth Amendment).

[173] 440 U.S. 648 (1979).

[174] *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979). *See also* Brown v. Texas, 443 U.S. 47, 51 (1979) ("the Fourth Amendment requires that a seizure must be based on specific objective facts . . . or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers").

[175] Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (balancing magnitude of drunk driving problem against "slight" intrusion on motorist of brief stop at checkpoint).

[175.5] City of Indianapolis v. Edmond, 531 U.S. 32 (2000). See also Commonwealth v. Rodriguez, 430 Mass. 577, 587 (2002) (roadblock to detect drug activity invalid under art.14) Compare Illinois v. Lidster, 540 U.S. 419 (2004) (stop for purpose of seeking information about fatal hit and run and not to investigate for criminal activity of persons stopped can be reasonable under fourth amendment).

[176] *Compare* Commonwealth v. Shields, 402 Mass. 162 (1988) (state police sobriety checkpoint satisfied requirements of Fourth Amendment and art. 14) *and* Commonwealth v. Trumble, 396 Mass. 81 (1985) (same) *with* Commonwealth v. Amaral, 398 Mass. 98 (1986) (DWI roadblock failed to satisfy constitutional standards) *and* Commonwealth v. McGeoghegan, 389 Mass. 137 (1983) (same). *See also* Commonwealth v. Cameron, 407 Mass. 1005 (1990) (suppressing evidence obtained in roadblock extended beyond city's written time limits); Commonwealth v. Anderson, 406 Mass. 343 (1989) (sobriety checkpoint extended beyond time limit in written plan violated art. 14).

[177] *See, e.g.*, Commonwealth v. Amaral, 398 Mass. 98, 100 (1986) ("Administrative personnel using carefully established standards and neutral criteria should determine the time and location of roadblocks and the procedures to be followed"). See also Commonwealth v. Murphy, 454 Mass. 318,328-329 (2009) (written guidelines supplemented by written directive adequately limits intrusion of stop).

[178] *See* Commonwealth v. Trumble, 396 Mass. 81, 92 (1985) (affirming validity of state police guidelines for site selection). For example, selecting a site based on evidence that it has

(3) select vehicles to be stopped nonarbitrarily;[179] (4) be sufficiently illuminated and identified so as to protect the safety and reduce the fear of oncoming motorists;[180] and (5) be limited to brief questions and visual inspection of the interior of the vehicle.[181] The court will also consider whether the roadblock was conducted pursuant to statutory or regulatory authority and whether there was advance notice of the roadblock by publication in the media.[182] However, the procedures used need not be the least intrusive means available to accomplish the purpose of reducing the number of drunk drivers on the road.[183]

Roadblocks conducted for other purposes may also be reasonable,[184] but the purpose must be substantial, the procedures neutral, and the intrusion minimal. The Supreme Judicial Court has barred roadblocks for the purpose of searching for evidence of drug trafficking on this basis,[185] and has also suggested that roadblocks to check licenses and registrations will violate article 14 because the state's interest is not sufficiently weighty.[186]

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been a "problem area" is valid. *Trumble, supra. But see* Commonwealth v. Donnelly, 34 Mass. App. Ct. 953, 954 (1993) (site selection guidelines require "prior alcohol-related incidents," but incidents here were two years old; roadblock deemed invalid).

[179] *See* Commonwealth v. McGeoghegan, 389 Mass. 137, 143 (1983). See also Commonwealth v. Murphy, 454 Mass. 318,327 (2009) (discretion to direct motorist to secondary screening upon reasonable suspicion of OUI does not invalidate stop); Commonwealth v. Swartz, 454 Mass. 330,336 (2009) (reasonable suspicion of other crime pursuant to guidelines allows for secondary screening).

[180] Commonwealth v. Trumble, 396 Mass. 81, 95 (1985) (Abrams, J., concurring) ("These must exist '(1) a checkpoint or roadblock selected for its safety and visibility to oncoming motorists; (2) adequate advance warning signs, illuminated at night, timely informing approaching motorists of the nature of the impending intrusion; (3) uniformed officers and official vehicles in sufficient quantity and visibility to 'show . . . the police power of the community'; and (4) a predetermination by policymaking administrative officers of the roadblock location, time, and procedures to be employed, pursuant to carefully formulated standards and neutral criteria") (quoting State v. Hillesheim, 291 N.W.2d 314, 318 (Iowa 1988).

[181] *See* Commonwealth v. Trumble, 396 Mass. 81, 89 and appendix at 93 (1985)(approving state police guidelines allowing brief stop for momentary questioning and requiring "articulable sign of possible intoxication" to justify further detention). See *Commonwealth v. Murphy*, 454 Mass. 318, 328-329 (2009) (state police guidelines, following *Trumble*, leaving discretion to order secondary screening does not violate art. 14).

[182] *See* Commonwealth v. McGeoghegan, 389 Mass. 137, 143 (1983).

[183] *See* Commonwealth v. Shields, 402 Mass. 162, 165–66 (1988).

[184] The Supreme Court has assumed the validity of roadblocks conducted to check licenses and registrations. *See* Texas v. Brown, 460 U.S. 730, 739 (1983). But see Commonwealth v. Carkhuff, 441 Mass. 122, 126 (2004) (order to stop all vehicles on road along reservoir to prevent terrorist acts not valid roadblock). Compare Commonwealth v. Grant, 57 Mass. App. Ct. 334, 340 (2003) (emergency roadblock on only access from violent crime scene to apprehend suspects in shooting deemed reasonable under fourth amendment and art.14).

[185] *See* Commonwealth v. Rodriguez, 450 Mass. 577, 584 (2000) (roadblocks to interdict drug traffic on highways deemed unreasonable). Cf. Commonwealth v. Shields, 402 Mass. 162, 167 (1988) (rejecting the argument that seizures without suspicion will be allowed in other contexts).

[186] Commonwealth v. Shields, 402 Mass. 162, at n.3 (1988).

PART III: SEARCHES

§ 17.7 THRESHOLD ISSUES

In *Katz v. United States* [187] the Supreme Court shifted the focus of Fourth Amendment analysis: areas of privacy were no longer defined by property interests but by an individual's "legitimate expectation of privacy." This principle, applicable under the Fourth Amendment and article 14, has resulted in two threshold lines of inquiry. *First*, a court will apply constitutional protection only to an intrusion on a reasonable expectation of privacy. *Second*, even though someone's privacy may have been invaded, a criminal defendant does not have standing to invoke constitutional protection without showing that the government's action intruded on his own privacy. The court has recently made clear that the fourth amendment also protects a person's possessory interests in his property from physical intrusion.[187.5]

§ 17.7A. DOES THE DEFENDANT HAVE STANDING?

1. Fourth Amendment Standards

Prior to the decision in *Rakas v. Illinois* [188] a defendant charged with an offense that required a showing of possession of evidence was deemed to have "automatic standing" to contest the legality of the search or seizure that netted that evidence.[189] Otherwise, if the defendant was "legitimately on the premises" where a search took place or had an ownership or possessory interest in the place searched or the item seized, he was allowed to seek suppression of the evidence.[190] However, in *Rakas* and subsequent cases [191] the U.S. Supreme Court overruled the automatic standing rule and made clear that a defendant has standing only if he can show that the search or seizure

[187] 389 U.S. 347 (1967). *See also* Commonwealth v. D'Onofrio, 396 Mass. 711, 714 (1984) (search or seizure occurs only when government intrudes on reasonable expectation of privacy).

[187.5] See United States v. Jones, 565 U.S._ (2012) (Installation by police of G.P.S. device on suspect's vehicle) ("…the *Katz* reasonable–expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test") (emphasis in original).

[188] 439 U.S. 128 (1978).

[189] *See* Jones v. United States, 362 U.S. 257 (1960). In *Jones* the defendant was present when the police searched his friend's apartment and found narcotics. The defendant was charged with possession of the narcotics. The court held that he had standing reasoning that "no just interest of the Government" would be hampered by permitting a person "legitimately on the premises" to challenge the legality of the search when its fruits are to be used against him. *Jones*, *supra*, 362 U.S. at 267.

[190] *See* Jones v. United States, 362 U.S. 257 (1960); Mancusi v. DeForte, 392 U.S. 364 (1968); Commonwealth v. Sandler, 368 U.S. 729 (1975); Commonwealth v. Lanoue, 356 Mass. 337 (1969). *Cf.* Commonwealth v. Genest, 371 Mass. 834 (1977) (no need to decide if presence on premises at time of search establishes standing because of conclusion that warrant was valid).

[191] *See, e.g.*. United States v. Salvucci, 448 U.S. 83 (1980).

intruded on his legitimate expectations of privacy.[191.5] Thus, for example, a defendant who had concealed his drugs in his girlfriend's purse with her consent was held to have no standing to contest the search of the purse even though he asserted his interest at the time of the search.[192]

2. Article 14 Standards

Unlike its federal counterpart, the Supreme Judicial Court has been reluctant to deprive criminal defendants of the right to challenge searches and seizures on the procedural ground that they lacked standing.[193] In *Commonwealth v. Amendola*[194] the Supreme Judicial Court explicitly recognized the automatic standing rule under article 14. Thus if a defendant is charged with a crime in which possession of the seized evidence is an essential element of guilt, the defendant has standing to attack the search for and seizure of the evidence.[195] But the seizure must result from a search in the

[191.5] The U.S. Supreme Court has recently held that the fourth amendment protects not only privacy but possessory interests as well. Thus the installation of a G.P.S. device on a suspect's vehicle is a 'search' under the fourth amendment. Jones v. U.S., 565 U.S._ (2012) (…"the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.") (emphasis in original).

[192] Rawlings v. Kentucky, 448 U.S. 98 (1980). The decision in *Rawlings* seems to eliminate ownership of the item as a source of standing. The Supreme Court failed to recognize that a person should reasonably be able to share his possessions with another without giving up his privacy rights vis-à-vis the government. *Compare* Minnesota v. Olson, 495 U.S. 91 (1990) (overnight guest had legitimate expectation of privacy in home of third party).

[193] A defendant has standing to contest a search if "she has either a possessory interest in the place searched or in the property seized or if she was present when the search occurred." Commonwealth v. Williams, 453 Mass. 203, 209 (2010) (deciding defendant had standing because of possessory interest in her papers). But see Commonwealth v. Bryant, 447 Mass. 494 (2006) (no standing to attack search of computer files of law firm defendant worked for): Commonwealth v. Gomes, 59 Mass. App. Ct. 332 (2003) (no standing to challenge police entry into home by defendant who was not resident or overnight guest); Commonwealth v. Santoro, 406 Mass. 421 (1990) (no standing where defendant neither was present at search nor had interest in property).

See, e.g., Commonwealth v. Manning, 406 Mass. 425 (1990) (suggesting that "target standing" inapplicable under the Fourth Amendment may be recognized under art. 14 if police intended by illegally arresting third party to obtain incriminating evidence against defendant). However, target standing will not be recognized in the absence of serious police misconduct or unfairness. Commonwealth v. Waters, 420 Mass. 276, 278 (1995); Commonwealth v. Scardamaglia, 410 Mass. 375, 380 (1991); Commonwealth v. Price, 408 Mass. 668, 673 (1990).

[194] 406 Mass. 592 (1990). In *Amendola* the police searched two automobiles, finding narcotics in one and a scale in the other. The defendant disclaimed any interest in the drugs, the scale, or the automobiles, and the trial court denied his motion to suppress. The Supreme Judicial Court held that the defendant had automatic standing to challenge the search of the car in which the drugs were found but that he had to show a legitimate expectation of privacy in the automobile in which the scale was found because the possession of the scale was not an essential element of the offense.

[195] *Id.* There are two requirements in attacking the seizure of evidence or contraband. First, the defendant must have standing and second, there must have been a search in the constitutional sense; that is, an intrusion into the defendant's reasonable expectation of privacy. See § 17.6B, infra. See also Commonwealth v. Williams, 453 Mass. 203, 208-209 (2009). If the defendant has automatic standing, he need not show an intrusion upon his reasonable expectation of privacy, but there must still be a search intruding on someone's privacy.

constitutional sense that is an intrusion on someone's reasonable expectation of privacy. [195.5] In *Commonwealth v. Franklin* [196] the court held that a defendant had standing to attack the search of an apartment even though he denied having ever been there before the day of the search since the prosecution had presented ample evidence to the contrary.[197] The court explained:

> We think that to allow the prosecution the benefit of its witnesses' testimony for purpose of establishing probable cause and then to ignore that testimony when it might aid the defendant in establishing standing would be inconsistent with this court's general effort to insure fairness at every stage of a defendant's trial.[198]

Similarly, in the context of motor vehicle searches the Supreme Judicial Court has been expansive in its interpretation of standing.[199]

Commonwealth v. Mubdi, 456 Mass. 385, 394 (2010) (reasonable expectation of privacy in interior portions of automobile not accessible to view from outside); Commonwealth v. Frazier, 410 Mass. 235, 243 (1991) (automatic standing applies to drugs seized from friend's handbag despite fact that defendant had no possessory interest nor was present at time of search); Commonwealth v. Ware, 75 Mass. App. Ct. 220, 231 (2009) (defendant charged with constructive possession may challenge the search of codefendant's home even though not present during search). There is an exception to the automatic standing rule "where the defendant had no right to be in the house or automobile where the evidence was found." Commonwealth v. Mubdi, supra, at 394 n.8. See Commonwealth v. Carter, 424 Mass. 409, 411 (1997) (*Amendola* does not extend to search of porch area to which defendant had no connection). See also Commonwealth v. Garcia, 34 Mass. App. Ct. 386, 390 (1993) (drug distribution charge does not confer automatic standing because possession not element of offense). Commonwealth v. Albert, 51 Mass. App. Ct. 377, 380 (2001) (defendant charged with conspiracy to traffic in cocaine has no standing to challenge search directed at his co-conspirator). Cf. Commonwealth v. Rise, 50 Mass. App. Ct. 836, 842 (2001) (search warrant for entire building but murder defendant lacked standing to challenge the search of separate apartment).

[195.5] Commonwealth v. Mubdi, 456 Mass. 385,394(2010)(reasonable expectation of privacy in interior of automobile not visible from outside).

[196] 376 Mass. 885 (1978).

[197] Commonwealth v. Franklin, 376 Mass. 885, 900–02 (1978).

[198] Commonwealth v. Franklin, 376 Mass. 885, 900 (1978). *Cf.* Commonwealth v. Sandler, 368 Mass. 729 (1975) (defendant had standing to challenge warrantless search of barn leased to defendant despite disclaimer of interest in barn or goods stored there). *See also* Commonwealth v. Mattos, 404 Mass. 672, 680 (1989) (no standing where defendant neither lived in premises nor was present at time of search); Commonwealth v. Santoro, 406 Mass. 421 (1990) (no standing to object to search of premises where defendant was not present during search nor had any interest in premises).

[199] *See* Commonwealth v. Mubdi, 456 Mass. 385,394 (2010) (automatic standing to challenge search of car in which defendant had no expectation of privacy); Commonwealth v. Podgurski, 386 Mass. 385 (1982). In *Podgurski* a police officer without probable cause stuck his head inside the open door of a van and saw two men cutting up hashish. In ruling the search illegal, the court rejected the argument that a "mere passenger" lacked standing under *Rakas* to challenge the officer's actions. *See also* Commonwealth v. King, 389 Mass. 233 (1983) (passenger in station wagon charged with possession of items found in closed bags and glove compartment had standing to challenge search). *But see* Commonwealth v. Page, 42 Mass. App. Ct. 943 (1997) (suspect who drove victim to hospital in her car had no standing to challenge search of vehicle at hospital); *Cf.* Commonwealth v. Simmons, 383 Mass. 46 (1981) (police accompanied rape victim to driveway of defendant's mother's property for purposes of

If the Commonwealth can prove that the defendant abandoned the property prior to a search or seizure, the defendant will not have standing to challenge the intrusion.[200] However counsel should be alert to claims of an abandonment that was triggered by a prior intrusion.[201]

Defendant's testimony at suppression hearing: If standing is at issue, counsel should set forth by affidavit as many factual connections between the defendant and the area searched or items seized as possible to establish a reasonable expectation of privacy. Counsel must then be prepared to present testimony at the hearing on the motion keeping in mind that any testimony by the defendant that may establish his connection to the area searched is not admissible at trial except for impeachment.[202] It is important that the defendant understand this principle because a client who denies any knowledge of how the evidence got where it was found may undercut his standing and defeat the motion to suppress from the outset.[203]

§ 17.6B. WAS THERE A "SEARCH" VIOLATING A REASONABLE EXPECTATION OF PRIVACY?

The concept of "reasonable expectation of privacy" is critical in defining both what constitutes a search and when a warrant is required. The touchstone of this constitutional analysis is the two-pronged test that has emerged from *Katz v. United States.*[204] *First*, has the person demonstrated an actual subjective expectation of privacy in the area searched or the item seized? *Second*, is this expectation one that society is prepared to recognize as reasonable?[205] The first question is one of fact and the findings

identifying car; remanded for hearing on issue of defendant's expectation of privacy in area where car was stored).

[200] *See* Commonwealth v. Lanigan, 12 Mass. App. Ct. 913 (1983) (defendant who learned that police had padlocked door of his two-week rental apartment and fled to Arizona for several months had no standing to challenge warrantless search). *See also* Commonwealth v. Jackson, 384 Mass. 572 (1981) (in-custody defendant who told other residents of rented apartment to move out and remove his belongings had no standing to contest warrantless search of apartment conducted after time for which rent had been paid). *Compare* Commonwealth v. Small, 28 Mass. App. Ct. 533, 535 (1990) (airline passenger who fled terminal without claiming luggage not deemed to have abandoned luggage).

[201] *Cf.* Commonwealth v. Rodriguez, 456 Mass. 578,587 (2010) (drugs dropped after illegal stop subject to suppression); Commonwealth v. O'Laughlin, 25 Mass. App. Ct. 998 (1988) (no abandonment when suspect pursued by police threw heroin-laden jacket from window of car shortly before fleeing from car on foot).

[202] Commonwealth v. Franklin, 376 Mass. 885, 900 n.16 (1978); Commonwealth v. Harris, 364 Mass 236, 238–40 (1973); Simmons v. United States, 390 U.S. 377 (1968). *Cf.* Commonwealth v. Rivera, 425 Mass. 633, 638 (1997) (affidavit of defendant attached to motion to suppress may be used to impeach and does not violate right to remain silent); Commonwealth v. Mubdi, 456 Mass. 385,389 n.4 (2010) (same).

[203] *See, e.g.*, Commonwealth v. Royce, 20 Mass. App. Ct. 221, 224–25 (1985) (access to locker). *Cf.* Commonwealth v. Amendola, 26 Mass. App. Ct. 713, 717–18 n.6 & 8 (1988) (defendant's statements at suppression hearing have no bearing on Commonwealth's case in chief).

[204] 389 U.S 347 (1967) (warrant required before government can intercept conversation in phone booth). But see United States v. Jones, _U.S._, 132 S.Ct.945 (2012) (property right also protected under fourth amendment).

of the trial court will not be disturbed unless "clearly erroneous." The second is an issue of law subject to appellate court review.[206]

The concept of reasonable expectation of privacy is philosophically fluid, fact sensitive, and subject to differing federal and state constitutional standards. The following survey will highlight factors that have been deemed important in prior cases.

1. Intrusions into the Human Body

The most extreme intrusion on the privacy and dignity of the individual is the intrusion into the human body. Such intrusions warrant the utmost constitutional protection: some bodily intrusions will be deemed unreasonable no matter what procedural protections are afforded the defendant,[207] and others will be invalid in the absence of an adversary hearing. In each case the court will balance the nature and

[205]See Commonwealth v. Williams, 453 Mass. 203, 208 (2009). With respect to whether the expectation is reasonable the court cited several factors for consideration, "including the character of the location involved; whether the defendant owned or had property rights in the area at issue; whether the defendant controlled access to the area; and whether the area was freely accessible to others." Id. See also *In re Grand Jury Subpoena*, 454 Mass. 685, 693 (2009) (neither prong is met for phone calls from jail by pre-trial detainee under fourth amendment or art.14 when there is notice); *Commonwealth v. Kaupp*, 453 Mass. 102, 107 (2009) (no privacy interest in computer files accessible to network users); *Commonwealth v. Perkins*, 450 Mass. 834 (2008) (no privacy interest in soda can left behind by detainee after interrogation because of rule against such possession in cell); *Commonwealth v. Bly*, 448 Mass. 473, 491-492 (2007) (no subjective expectation of privacy in water bottle or cigarette butt left by inmate in interrogation room); *Commonwealth v. Mallory*, 56 Mass. App. Ct. 153, 159 (2002) (no reasonable expectation of privacy in room where suspect stayed in view of free access by other residents of home); *Commonwealth v. Starr*, 55 Mass. App. Ct. 590 (2002) (no privacy interest in license plate or registry records). Commonwealth v. Morrison, 429 Mass. 511, 514 (1999) (overnight guest of a lawful occupant generally has reasonable expectation of privacy in occupant's premises, but not here where subject to valid protective order); Commonwealth v. Carter, 424 Mass. 409, 411 (1997) (visitor to tenant on first floor had no reasonable expectation of privacy on second floor exterior porch); Commonwealth v. Berry, 420 Mass. 95, 106 (1995) (no reasonable expectation of privacy in package of cigarettes and matches left by suspect on counter of police station); Commonwealth v. Sparks 433 Mass. 654, 659 (2001) (no reasonable expectation of privacy in soles of shoes). *See also* Commonwealth v. Buccella, 434 Mass. 473 (2001) (no expectation of privacy in student's handwriting but schoolwork submitted by student deemed protected). Commonwealth v. Bloom, 18 Mass. App. Ct. 951 (1984) (under *Katz* toilet stalls in public restroom may be protected but not "open urinal area"). Cf. *Commonwealth v. Connolly*, 454 Mass. 808, 824, n.3 (2009) (no need to decide whether installation of GPS tracking device inside auto is search under art.14). Under the fourth amendment the use of a G.P.S. device attached to an auto is a search. United States v. Jones, _U.S._,132 S. Ct. 945 (2012) (relying on property interest not privacy).

[206] Commonwealth v. Cadoret, 388 Mass. 148, 150 (1983). See *Commonwealth v. Porter P.*, 456 Mass. 254, 259 (2010) (art.14 may protect more than fourth amendment); *Commonwealth v. Montanez*, 410 Mass. 290, 301 (1991) ("In examining the..question under article 14, we do not necessarily reach the same result as under Fourth Amendment analysis.")

[207] *See, e.g.*, Winston v. Lee, 470 U.S. 753 (1985) (surgical removal of bullet imbedded one inch in defendant's body). In *Winston* the court recognized explicitly that the greater the privacy interest at stake the greater was the showing needed by the state. *Winston, supra*, 470 U.S. at 767. *Cf.* Rochin v. California, 342 U.S. 165 (1952) (pill-swallowing arrestee illegally victimized by police efforts to force open mouth and subsequent efforts to induce vomiting by use of emetic, violating due process).

degree of the intrusion against the government's need for the evidence to determine whether the search was reasonable.[208] Thus, under the fourth amendment a person detained with the general jail population after arrest may be subjected to a visual strip search without suspicion that contraband will be found. [208.5] The warrantless taking of a blood sample from a suspected drunk driver was upheld because the evidence was evanescent,[209] but in Massachusetts an adversary hearing is required to compel an indicted defendant to provide a blood sample for identification purposes.[210] Even an

[208] *See, e.g.*, Winston v. Lee, 470 U.S. 753, 760 (1985) (stating balancing test); Rodriquez v. Furtado, 410 Mass. 878 (1991). In *Rodriquez*, the court stated that future body cavity searches should require "a strong showing of particularized need supported by a high degree of probable cause." *Rodriquez, supra*, 410 Mass. at 889. The probable cause must be specific to the body cavity and the warrant must be issued by a judge, not merely a magistrate. However, the Supreme Judicial Court has approved the visual body cavity search of an arrestee after booking without a warrant where the police had probable cause to search for drugs. Commonwealth v. Thomas, 429 Mass. 403, 408–409 (1999). But see Commonwealth v. Prophete, 443 Mass. 548, 558 (2005) (order to remove clothing to "last layer" not a strip search) See also Commonwealth v. Ramirez, 56 Mass. App. Ct. 317, 323 (2002) (no probable cause to justify strip search). Compelling samples of DNA requires an adversary hearing with respect to a defendant or third parties and a finding of probable cause that the results will reveal evidence relevant to the defendant's guilt. Commonwealth v. Draheim, 447 Mass.113, 118-119 (2006). Other factors such as the seriousness of the crime, the importance of the evidence and the effectiveness of less intrusive means are also considered. Id. at 120. Cf. In re Jansen, 444 Mass. 112, 120-121 (2005) (no art. 14 issue when samples of DNA are acquired by private investigator until government decides to proceed against suspect).

And the court has upheld under the Fourth Amendment and art. 14 the compelled production of blood samples of certain convicted felons for a DNA data bank. Landry v. Attorney General, 429 Mass. 336, 346–347 (1999). *See also* Commonwealth v. Miles, 420 Mass. 67, 83 (1995) (ex parte preindictment order compelling suspect to submit to body examination for evidence of poison ivy — no hearing required because condition temporary).

[208.5] Florence v. Bd. of Chosen Freeholders of County of Burlington, _.U.S._,132 S.Ct. 1510 (2012). Art.14 requires that a strip search be based on probable cause. Commonwealth v. Thomas, 429 Mass.403 (1999). Cf. See Commonwealth v. Banville, 457 Mass. 530,540 n.2 (2010) (genital swab and combing of pubic hair justified as search incident to arrest).

[209] Schmerber v. California, 384 U.S. 757 (1966).

[210] Commonwealth v. Trigones, 397 U.S. 633, 640–41 (1986) (hearing "provides even more protection than do search warrant procedures"). *See* Commonwealth v. Williams, 439 Mass. 678 (2003) (court shall consider seriousness of crime, importance of evidence, and availability of less intrusive means before ordering extraction of blood, hair and saliva samples). See also Commonwealth v. Maxwell, 441 Mass. 773, 780 (2004) (following *Trigones*); Commonwealth v. Arroyo, 442 Mass. 135 (2004) (same); In the Matter of Lavigne, 418 Mass. 831, 836 (1994) (warrant to seize sample of suspect's blood prior to charge or arrest valid in view of probable cause that suspect committed offense and that blood found at scene relevant to murder investigation—suspect entitled to notice and hearing). Before the grand jury can issue an order for blood samples there must be "a reasonable belief… that a blood sample will provide test results that will significantly aid the grand jury in their investigation of circumstances in which there is good reason to believe a crime has been committed." In the Matter of Grand Jury Investigation, 427 Mass. 221, 226 (1998) (allowing order for samples from father and brother of pregnant autistic and incompetent woman). *Cf.* Commonwealth v. Downey, 407 Mass. 472, 477 (1990) (grand jury order compelling defendant to submit to blood test prior to arrest or indictment was sufficient to justify detention for testing); Commonwealth v. Russo, 30 Mass. App. Ct. 923, 925 (1991) (drawing of blood by hospital personnel after motor vehicle accident in which defendant was injured does not implicate Fourth Amendment).

adversary hearing is not enough to justify the surgical removal of a possibly incriminating bullet from the body of the defendant.[211] Blood and urine drug testing of public employees has been treated differently under the federal and state constitutions.[212]

2. Communications

An individual has a reasonable expectation of privacy in her private conversations, especially in the context of electronic eavesdropping.[213] Massachusetts places a higher value on the privacy of conversations than does the federal system.[214] The state's statutory framework restricts electronic eavesdropping to the investigation of certain designated offenses involving a nexus to organized crime and sets out strict warrant requirements.[215] However, the statute does not apply to one-party consent

[211] *See* Winston v. Lee, 470 U.S. 753 (1985). In applying the balance in *Winston*, the court emphasized the fact that the government had other evidence than the bullet to support its case against the defendant.

[212] *See infra* § 17.9H(5).

[213] *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967). The conversations must be private to be protected. *Commonwealth v. Rodriguez*, 450 Mass. 302, 309 (2007) (assuming as protected defendant's conversation with another who was staying in wiretapped home of third party). *Compare* Commonwealth v. Blood, 400 Mass. 61, 68–71 (1987) (conversations conducted in private home protected) *and* Commonwealth v. Price, 408 Mass. 668, 672–73 (1990) (defendant had no reasonable expectation of privacy in conversations regarding business transactions conducted at arm's length with persons he had just met in motel room rented to another). *See also* Commonwealth v. Cote, 407 Mass. 827, 835 (1990) (no reasonable expectation of privacy in telephone messages left with answering service when defendant used phone lines of another company). The court in *Cote* suggested that messages left with an answering service from the defendant's own telephone line would be protected. The court distinguished *Blood* reasoning that the conversations there were surreptitiously recorded. *Cote, supra*, 407 Mass. at 835–36.

The fact that the conversations were illegally intercepted does not mean that they will necessarily be suppressed. See *Commonwealth v. Rivera*, 445 Mass. 119, 127 (2005) (audio of surveillance equipment installed by convenience store owner and provided to police in murder investigation not subject to exclusion under statute). See also *Commonwealth v. Santoro*, 406 Mass. 421, 424 (1990) ("The Legislature has left it to the courts to decide whether unlawfully intercepted communications must be suppressed.")

[214] *See* Commonwealth v. Vitello, 367 Mass. 224, 247 (1975) (if state regulatory scheme imposes stricter standard than federal requirements motion to suppress must be judged by that standard). *Cf.* Commonwealth v. Jarabek, 384 Mass. 293 (1981) (state exemption for federal agents working on federal investigation not applicable to combined federal-state investigation leading to state prosecution). *Compare* Commonwealth v. Gonzalez, 421 Mass. 313, 317 (1997) (exemption for federal investigation applies where local police involvement was minimal). See also Commonwealth v. Brown, 456 Mass. 708,715 (2010) (reaffirming *Gonzalez*).

[215] *See* G.L. c. 272, § 99. Pursuant to the statute a warrant will not issue without a showing that other investigative measures have failed or would be unlikely to succeed. G.L. c. 272, § 99E(3). The warrant will not issue in the absence of a showing of "reasonable suspicion that interception would disclose or lead to evidence of a designated offense in connection with organized crime." Commonwealth v. Thorpe, 384 Mass. 271, 281 (1981), *cert. denied*, 454 U.S. 1147 (1982). *See* Commonwealth v. D'Amour, 428 Mass. 725, 737 (1999) (finding probable cause that suspected offense was connected to organized crime by reference to "teamwork between co-conspirators" to murder). Cf. Commonwealth v. Crowley, 43 Mass. App. Ct. 919,

conversations involving the investigation of a designated offense.[216] In such cases, art. 14 generally requires that a warrant issue to authorize the surreptitious transmission of a conversation in a private home; one party consent is ineffective.[217] And illegally taped conversations may not be used even for impeachment purposes.[218] However, the Supreme Judicial Court has held that where the police eavesdropped on a telephone call via an extension phone with the consent of one of the speakers, no warrant was necessary because there is no expectation of privacy in telephone conversations.[218.5]

3. Residence

Both the Fourth Amendment and article 14 explicitly grant warrant protection to a person's house and the residence has been accorded the highest degree of protection from warrantless intrusions.[219] This protection extends to virtually any

920 (1998) (no exclusion for communications unlawfully intercepted by private party). *See* Commonwealth v. Eason, 427 Mass. 595 (1998) (use of telephone extension to eavesdrop not covered by statute).

The court has authority under c.272 §99F to conduct a de novo review to decide if there had been probable cause to issue the warrant, including the entire record rather than just the warrant application. *Commonwealth v. Long*, 454 Mass. 542,555 (2009) (officer/affiant omitted many statements from phone calls monitored from jail to obtain warrant for wiretap of visitors' booth phone).

[216] G.L. c. 272, § 99B(4) ("if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party"). See Commonwealth v. Tavares, 459 Mass. 189, 303 (2011) (affidavit insufficient to establish nexus between offense and organized crime). *See also* Commonwealth v. Penta, 423 Mass. 546, 553 (1996) (officers may seek warrant pursuant to c. 276, § 1 or common law to intercept one-party consent conversations).

[217] Commonwealth v. Blood, 400 Mass. 61, 68–71 (1987).

[218] Commonwealth v. Fini, 403 Mass. 567 (1988). But see *Commonwealth v. Rivera*, 445 Mass.119,127 (2005) (not all illegally intercepted communications will be suppressed-here statements recorded privately on convenience store equipment and provided to police in murder investigation).

[218.5] Commonwealth v. Eason, 427 Mass. 595, 599-600 (1998). See In re Grand Jury Subpoena, 454 Mass. 685,693 (2009) (no privacy interest in phone calls made by detainee where there was notice).

[219] A person's home is protected explicitly under the fourth amendment and article 14. Commonwealth v. Porter P., 456 Mass. 254, 260 (2010) (juvenile's room shared with his mother in transitional shelter protected even though shelter staff had ultimate control). And the right extends to overnight guests in the home even though the host maintains ultimate control over the premises. Minnesota v. Olson, 495 U.S. 91, 96-97 (1990). Compare Commonwealth v. Williams, 453 Mass. 203,211-212 (2009) (no reasonable expectation of privacy in basement of building owned by mother occupied without her consent despite some short period of awareness by mother). The extent of the guest's control over access to the room in which he is staying may affect the nature of the defendant's expectation. See Commonwealth v. Colon, 449 Mass.207, 213-215 (2007) (suggesting that defendant's expectation of privacy in girlfriend's apartment was diminished by fact that others had access to same area); Commonwealth v. Mallory, 56 Mass. App. Ct. 153, 159 (2002) (characterizing defendant's expectation in room where he slept with freeaccess to others as "very limited"). See generally Kyllo v. United States, 553 U.S. 27 (2001) (thermal imaging device aimed at private home deemed a search because it detects activities within home).

enclosure that functions as a dwelling including apartments and motel rooms[220] and to areas outside the interior living quarters, such as hallways, if they are inaccessible to all but the defendant's invitees.[221] However, areas outside the living quarters from which the defendant may not exclude uninvited visitors do not support a reasonable expectation of privacy.[222]

4. Curtilage Versus Open Fields

The area immediately surrounding the house has historically been accorded the same status as the dwelling, at least when enclosed by fence or shrubbery. However, it still remains subject to the "expectation of privacy" analysis. The U.S. Supreme Court has defined the curtilage as the "area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life."[223] In deciding whether an area is within the curtilage of the dwelling, the court will examine several factors including the proximity to the house, the use to which the individual has put the area, and the homeowner's ability to restrict access.[224] For example, a fenced-in backyard

[220] *See, e.g.,* Commonwealth v. Porter P., 456 Mass. 254,260 (2010)(room in transitional shelter) *See* also Commonwealth v. Brown, 32 Mass. App. Ct. 649, 651 (1992) (invitee to motel room has sufficient expectation of privacy to challenge search). But see Commonwealth v. Netto, 438 Mass. 686,698 (2003) (reasonable expectation of privacy depends on check-out time). And abandonment terminates the guest's privacy right in the area. Id at 699. See also Commonwealth v. Molina, 459 Mass. 819, 829 (2011) (no reasonable expectation of privacy in paid-up motel room locked by manager for rules violation).

[221] *See* Commonwealth v. Hall, 366 Mass. 790, 795 (1975). *Compare* Commonwealth v. Dora, 57 Mass. App. Ct. 141,147-148 (2003) (no reasonable expectation of privacy in common area of multifamily apartment building shared with many other tenants). *See also* Commonwealth v. Alvarez, 422 Mass. 198, 209 (1996) (expectation of privacy making insertion of key in lock a search, but reasonable suspicion is all that is required). But see Commonwealth v. DeJesus, 439 Mass.616, 627 n.10 (2003) ("Inserting a key into a lock and turning it to see whether it fits cannot be construed as a warrantless search…").

[222] *See, e.g.,* Commonwealth v. Dora, 57 Mass. App. Ct. 141, 147-148 (2003) (no reasonable expectation of privacy in common area of 120-unit apartment building) Commonwealth v. Montanez, 410 Mass. 290, 303–04 (1991) (no reasonable expectation of privacy in area above ceiling in hallway in front of suspect's apartment); Commonwealth v. Serbagi, 23 Mass. App. Ct. 57 (1986) (police presence on grassy common area owned by all members of condominium building so as to provide vantage point into drug suspect's living room); Commonwealth v. Pietrass, 392 Mass. 892, 900–02 (1984) (police observations into house from unlocked front porch might be valid if "the porch was one that a visitor would naturally expect to pass through to gain access to the front door" but not "if the porch were the real front door"); Commonwealth v. Dinnall, 366 Mass. 165 (1974) (police presence in common hallway of apartment building open to all). *But cf.* Commonwealth v. Panetti, 406 Mass. 230 (1990) (art. 14 prohibits eavesdropping from areas in which neither tenant nor public has right to be: here crawl space under defendant's apartment).

[223] Oliver v. United States, 466 U.S. 170, 180 (1984).

[224] *See, e.g.,* Commonwealth v. Simmons, 392 Mass. 45 (1984) (driveway of home only a "semiprivate area"); Commonwealth v. A Juvenile (No.2), 411 Mass. 157, 160–61 (1991) (entry by officers onto driveway of suspect's home to inspect automobile violated no reasonable expectation of privacy following *Simmons*); Commonwealth v. Thomas, 358 Mass. 771 (1971) (curtilage in modern urban apartment house much more limited than in rural dwelling subject to one owner's control). *See also* Commonwealth v. Frazer, 10 Mass. App. Ct. 429 (1980) (narrow alleyway between apartment buildings not part of curtilage).

designed for family activities almost certainly would be considered a part of the curtilage, while a front porch may not if the mailman or other visitors would normally enter on it.[225]

The "curtilage" has always been contrasted with "open fields" in which the owner is deemed to have no reasonable expectation of privacy.[226] Fencing in or posting "no trespassing" signs around a field or wooded area remote from the dwelling will not protect the property owner from warrantless police entries because such a subjective expectation of privacy is not recognized as "legitimate."[227] However, the Supreme Judicial Court has indicated that the "open fields" doctrine may not be applicable under article 14.[228]

Garages, barns, and other outbuildings generally will be accorded protection from warrantless entry by police if the owner or occupier takes reasonable steps to protect privacy. However, they are more vulnerable than dwellings to observation through windows, cracks in walls, and other openings by investigators who make their observations from an area that is not protected.[229]

5. Semiprivate Areas

Although a person may have no reasonable expectation of privacy in areas to which he does not control access (such as the common areas of apartment buildings), constitutional protection may extend to areas in which a group or category of persons are admitted but from which the police are excluded.[230] Thus the members of an after-

[225] *See* Commonwealth v. Fernandez, 458 Mass.137, 147 (2010) (driveway next to suspect's apartment fenced from neighboring yard deemed within curtilage); Commonwealth v. Straw, 422 Mass. 756, 759 (1996) (fenced-in backyard is "an area enjoying full fourth amendment protection from search by the authorities"). See also Commonwealth v. Hurd, 51 Mass. App. Ct. 12 (2001) (reasonable expectation of privacy in animal cage in partially enclosed backyard). *Cf. Compare* Commonwealth v. McCarthy, 428 Mass 871, 876 (1999) (visitor's parking space outside apartment building not within curtilage applying factors from United States v. Dunn, 480 U.S. 294, 301 (1987)). Commonwealth v. Pietrass, 392 Mass. 892, 900–02 (1984) (discussing whether front porch supports reasonable expectation of privacy); Commonwealth v. Panetti, 406 Mass. 230 (1990). *But cf.* California v. Ciraolo, 476 U.S. 207 (1986) (no reasonable expectation of privacy in fenced-in backyard from naked eye observations from airplane); Commonwealth v. One 1985 Ford Thunderbird Automobile, 416 Mass. 603, 607 (1993) (over flight by police helicopter of backyard pool at nonintrusive elevation did not invade reasonable expectation of privacy — no search under Fourth Amendment or art. 14).

[226] *See* Hester v. United States, 265 U.S. 57 (1924) (Fourth Amendment not intended to apply to open fields regardless of property rights).

[227] Oliver v. United States, 466 U.S. 170, 181–84 (1984).

[228] *See* Commonwealth v. John G. Grant & Sons Co. Inc., 403 Mass. 151, 160 (1988) (noting that "court has not adopted a parallel principle under art. 14"); Commonwealth v. Panetti, 406 Mass. 230 (1990).

[229] *See* United States v. Dunn, 480 U.S. 294 (1987) (barn apparently used for business purposes not within curtilage of nearby home so as to support reasonable expectation of privacy).

[230] *E.g.*, Commonwealth v. Cadoret, 388 Mass. 148 (1983). *But see* Commonwealth v. Yehudi Y., 56 Mass.App. Ct. 812,817 (2002) (no reasonable expectation of privacy in area of home where public was allowed free access for purpose of buying drugs); Commonwealth v. Welch, 420 Mass. 646, 654 (1995) (no reasonable expectation of privacy in fire department's "Lieutenants' Room" where defendant had a locker).

hours social club were held to have a reasonable expectation of privacy in the club premises in view of the club's enforcement of its admission policy.[231] Clandestine observations by police of an "open urinal area" in a public restroom have been upheld but the toilet stall area may be off limits to similar surveillance.[232]

6. Commercial Premises

Business premises as well as residences are subject to the requirements of the Fourth Amendment and article 14,[233] but employees may not have a reasonable expectation of privacy in certain areas of the premises.[234] An employee however, does have a privacy interest in an office and especially in areas of the office that are repositories of personal effects such as desk drawers or file cabinets.[235]

Searches that are unrelated to a criminal investigation may occur on commercial property. Work-related searches are addressed *infra* at § 17.9H(3). Administrative inspections are addressed *infra* at § 17.9G.

7. Automobiles

The United States Supreme Court has viewed the legitimate expectation of privacy in automobiles as significantly less than in dwellings because of the mobility of the vehicle, the exposure of its interior to public view, and the fact that the use of the automobiles is pervasively regulated.[236] However, the physical intrusion into an

[231] Commonwealth v. Cadoret, 388 Mass. 148 (1983). *But see* Commonwealth v. D'Onofrio, 396 Mass. 711 (1986) (police officer who gained admittance to same club by ruse exposed club's lax admission policy; defendant's expectation of privacy held unreasonable).

[232] Commonwealth v. Bloom, 18 Mass. App. Ct. 951 (1984).

[233] *See, e.g.,* Mancusi v. DeForte, 392 U.S. 364 (1968) (union employee's office shared with others enjoyed Fourth Amendment protection). *See also* Commonwealth v. Lee, 32 Mass. App. Ct. 85 (1992) (reasonable expectation of privacy in basement of supermarket). However, "one seeking to protect privacy in a commercial location must take affirmative steps to bar the public from the area they wish to keep private." Commonwealth v. Krisco Corp., 421 Mass. 37, 41 (1995) (reasonable expectation of privacy in dumpster located in fenced alley next to business premises). *But see* Commonwealth v. Zuluaga, 43 Mass. App. Ct. 629, 638 (1997) (no privacy interest in basement storage room with shared access by other commercial and residential tenants).

[234] See, e.g., Nelson v. Salem State College, 446 Mass. 525, 535-536 (2006) (no reasonable expectation of privacy in rear work area not visible from street in view of fact that other employees had free access even after hours); Sullivan v. District Court, 384 Mass. 736, 741–43 (1981) (no reasonable expectation of privacy in employee's jacket left in employee canteen of hospital).

[235] *See* O'Connor v. Ortega, 480 U.S. 709 (1987) (reasonable expectation of privacy in desk and files). Five members of the *Ortega* court concluded that the plaintiff also had a reasonable expectation of privacy in his office. Compare Nelson v. Salem State College, 446 Mass. 525,526 (2006) (no reasonable expectation of privacy in areas of premises accessible to other employees).

[236] *See, e.g.,* California v. Carney, 471 U.S. 386 (1986) (warrantless search of motor home parked in public lot upheld). *See also* Commonwealth v. Mamecos, 409 Mass. 635 (1991) (testing brakes on defendant's car for three-day period after fatal accident did not violate a reasonable expectation of privacy). *Cf.* Florida v. White, 526 U.S. 559 (1999) (warrantless seizure of automobile that officer had probable cause to believe was subject to forfeiture valid under Fourth Amendment). The sniffing of the exterior of an automobile by a trained dog does

automobile constitutes a search requiring adequate justification. [236.5] Thus the sticking of one's head into the open cargo door of a van was deemed a "search" requiring at least probable cause[237] and the opening of a car door after a plain view observation of marijuana was held to require separate justification.[238] The automobile exception to the warrant requirement is addressed *infra* at § 17.9E.

8. Containers

A legitimate expectation of privacy exists in any container that keeps from view or ready discernability the nature of its contents.[239] However, if the container is open or transparent so that the nature of its contents is disclosed,[240] or if the nature of the contents can be readily inferred from the nature of the container,[241] it may be seized

not interfere with a reasonable expectation of *privacy. See* Illinois v. Caballes, 543 U.S. 405,410 (2005) (fourth amendment); Commonwealth v. Mateo German, 453 Mass. 838, 845 (2009) (article 14). Commonwealth v. Feyenord, 445 Mass. 72, 83 (2005) (same). Electronic monitoring of automobiles has been upheld under the fourth amendment. United States v. Knotts, 460 U.S. 276,281-283 (1983) (installation of beeper device on item placed inside suspects' vehicle deemed not search).

[236.5] Installation of a G.P.S. device on the suspect's vehicle and monitoring its movements is a fourth amendment search. United States v. Jones, _U.S._, 132 S. Ct. 945,949 (2012) (implicating property interests rather than privacy and distinguishing *Knotts*). See Commonwealth v. Connolly, 454 Mass. 808, 820-824 (2009) (entry to install GPS constitutes seizure under art.14).

[237] Commonwealth v. Podgurski, 386 Mass. 385, 389 (1982). *But see* Commonwealth v. Santana, 420 Mass. 205, 210 n.4 (1995) (leaning into car to replace bag handed to officer by passenger not a search); Commonwealth v. Leonard, 422 Mass. 504 (1996) (officer unable to get attention of operator of car parked in breakdown lane is justified in opening door).

[238] Commonwealth v. Sergienko, 399 Mass. 291 (1987) (plain view observation of marijuana from outside vehicle did not justify opening of door to seize it).

[239] United States v. Ross, 456 U.S. 798 (1982) (reasonable expectation of privacy in paper bag found in automobile but warrantless search of bag justified under automobile exception). The court in *Ross* refused to draw a distinction based on the worthiness of the container stating, "For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a tooth brush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case." *Ross, supra,* 456 U.S. at 822. *See Commonwealth v. Muckle*, 61 Mass. App. Ct. 678. 683 (2004) ("bag of refuse" found in automobile was deemed closed container supporting reasonable expectation of privacy); Bond v. United States, 529 U.S. 334 (2000) (individual has reasonable expectation that canvas bag stored in overhead compartment on bus would not be subject to exploratory examination by touch). The seizure and retention of a container requires reasonable suspicion. United States v. Place, 462 U.S. 696 (1983). But the sniffing of a container by trained dogs does not implicate the Fourth Amendment. Commonwealth v. Pinto, 45 Mass. App. Ct. 790 (1998).

[240] *See* Commonwealth v. Garcia, 409 Mass. 675, 685 (1990) (paper bag with top open; trial court found "by the look and feel of the bag that it likely contained contraband"); Commonwealth v. Irwin, 391 Mass. 765, 768–69 (1984) (closed tupperware containers lawfully opened because marijuana inside was visible from outside). *Cf.* Commonwealth v. DiToro, 51 Mass. App. Ct. 191, 198 (2001) (no reasonable expectation of privacy in inside of bag which had previously been opened for undercover officer).

[241] *See* Arkansas v. Sanders, 442 U.S. 753, 764–65 n.13 (1979) (recognizing that some containers which reveal their contents do not "support" any reasonable expectation of privacy").

and searched. The validity of the search and seizure of containers depends on the context in which the officers came on the container, and in some situations article 14 may provide greater protection than the Fourth Amendment.[242]

9. Prisons and Other Custodial Settings

Faced with a complete lack of proof by a defendant that he had any reasonable expectation in a prison locker, the Massachusetts Appeals Court followed the U.S. Supreme Court case of *Hudson v. Palmer* [243] and held that neither the Fourth Amendment nor article 14 requires a warrant or other procedure before a prisoner, his cell, or his locker can be searched by prison authorities charged with maintaining internal order and discipline.[244] The U.S. Supreme Court has upheld routine strip searches of pretrial detainees held within the general prison population. [244.5] Other custodial or semicustodial situations, including searches of probationers, school children, and defendants on arrest or booking, are addressed *infra* at § 17.9.

10. Abandoned Property

When property is voluntarily abandoned or discarded, there is usually no reasonable expectation of privacy.[245] However, the act of discarding the property may

See also Texas v. Brown, 460 U.S. 730, 743 (1983) (plurality opinion) (opaque balloon tied at both ends immediately recognizable to experienced officer as containing heroin).

[242] *See* Commonwealth v. Garcia, 34 Mass. App. Ct. 386, 393 (1993) (reasonable expectation of privacy in locked mailbox even though not tenant of building); *Compare* In the matter of the Enforcement of a Subpoena, 436 Mass. 784, 793-794 (2002) (subpoena requiring individual to produce emails is not a search into person's private space like a mailbox). See also

Commonwealth v. Sullo, 26 Mass. App. Ct. 766 (1989) (personal business cards seized from arrestee at booking went beyond necessities of inventory search); Commonwealth v. Bishop, 402 Mass. 449 (1988) (search of gym bag seized from impounded pickup truck invalid under art. 14 because no specific guidelines for inventory of closed containers); Commonwealth v. Madera, 402 Mass. 102 (1988) (warrantless search of gym bag seized from arrested drug suspect valid as properly incident to arrest). *Cf.* Commonwealth v. Watson, 430 Mass. 725, 733 (2000) (unnecessary to decide whether art. 14 requires probable cause to seize suitcases during *Terry* stop).

[243] 468 U.S. 517, 525–28, 536 (1984).

[244] Commonwealth v. McCollins, 23Mass. App. Ct. 436 (1987). *But cf.* Commonwealth v. DiMarzo, 364 Mass. 669 (1974) (court order preceded by adversary hearing provided more protection than search warrant and thus satisfied any Fourth Amendment concerns of inmate whose footwear was seized to compare with crime scene footprints).

[244.5] Florence v. Bd. of Chosen Freeholders of County of Burlington, _U.S._, 131 S.Ct. 1510 (2012). But see Commonwealth v. Thomas, 429 Mass. 403, 409 (1999) (probable cause required under art.14).

[245] *See Commonwealth v. Perkins*, 450 Mass. 834,842 (2008) (no expectation of privacy in cigarette butts and soda can left behind by detainee after interrogation and DNA evidence not subject to suppression); *Commonwealth v. Bly*, 448 Mass. 473, 491-492 (2007) (no expectation of privacy in water bottle or cigarette butts left behind by inmate);Commonwealth v. Pratt, 407 Mass. 647, 660 (1990) (no reasonable expectation of privacy under art. 14 in trash bags left "three feet from street near driveway in front of Pratt's residence"); California v. Greenwood, 486 U.S. 35 (1988) (same for Fourth Amendment). *See also* Abel v United States, 362 U.S. 217, 241 (1960) (items put in waste basket of apartment defendant was preparing to leave); Commonwealth v. Pina, 406 Mass. 540 (1990) (no privacyinterest in wallet left behind

be the fruit of an unconstitutional police stop or other illegality (as often is the case with "drop-see" testimony).[246] It is also possible that article 14 would be held to provide some protection where care had been taken to prevent exposure of discarded property to the public at large.[247]

§ 17.7C. BURDEN OF PROOF ON SUPPRESSION MOTION

At the hearing on the motion to suppress a search pursuant to a warrant, the defendant has the burden of proving that the evidence was illegally obtained.[248] Thus the defendant must show that the warrant was invalid or that the search exceeded the scope of the warrant.[249] However, a warrantless search is presumed unreasonable,[250] and the government must show that it fell within one of the exceptions to a warrant requirement.[251] If the police have executed a valid warrant but have seized items not listed in the warrant, the prosecution bears the burden to justify the separate seizures.[252]

§ 17.8 SEARCH UNDER A WARRANT

when defendant was transferred to halfway house); Commonwealth v. Nutile, 31 Mass. App. Ct. 614, 619 (1991) (no expectation of privacy in items thrown from car during chase). *But see* Smith v. Ohio, 494 U.S. 541 (1990) (no abandonment of bag suspect threw on car hood on approach of officer); Commonwealth v. Straw, 422 Mass. 756, 761 (1996) (no voluntary abandonment under Fourth Amendment of briefcase thrown out window into fenced backyard on approach of police). *Cf.* Commonwealth v. Augello, 452 Mass.1021 affirming 71 Mass.App.Ct. 105,107 (2008) (statements disavowing ownership of suitcases not an abandonment); Commonwealth v. Nattoo, 452 Mass. 826, 832 (2009) (search of trash bags containing belongings left for friend to pick up on roadside not unreasonable under fourth amendment avoiding Appeals Court's reliance on "no expectation of privacy" ground).

[246] Commonwealth v. O'Laughlin, 25 Mass. App. Ct. 998 (1988) (jacket with contraband thrown from car by fleeing defendant suppressed because no valid basis for initial police confrontation).

[247] *See* Commonwealth v. Krisco Corp., 421 Mass. 37, 41 (1995) (reasonable expectation of privacy in dumpster located in fenced alley next to business premises). *Cf., e.g.*, Commonwealth v. Sullo, 26 Mass. App. Ct. 766, 769 n.4 (1989) (court notes that questions still abound concerning the opening of containers); Horsemen's Benevolent & Protective Ass'n v. State Racing Comm'n, 403 Mass. 692, 699–700 (1989) (recognition that personal information can be garnered from analysis of urine, a human waste product).

[248] Commonwealth v. Rodriguez, 378 Mass. 296, 303 (1979); Commonwealth v. Antobenedetto, 366 Mass. 51, 56 (1974). The motion to suppress must be accompanied by an affidavit setting out the facts supporting the motion. Mass. R. Crim. P. 13(a)(2). A memorandum of law must be filed with the motion unless the motion seeks to suppress evidence of a warrantless search. Mass. R. Crim. P. 13(a)(4). *See* Commonwealth v. Fudge, 20 Mass. App. Ct. 382, 386 (1985) (defendant's memorandum cannot be required in warrantless search case).

[249] Commonwealth v. Fancy, 349 Mass. 196, 202 (1965).

[250] Katz v. United States, 389 U.S. 347, 357 (1967).

[251] Commonwealth v. Eddington, 459 Mass. 102,108 (2009); Commonwealth v. Antobenedetto, 366 Mass. 51, 57 (1974).

[252] Commonwealth v. Fudge, 20 Mass. App. Ct. 382, 385 (1985); Commonwealth v. Rodriguez, 378 Mass. 296, 303 (1979).

§ 17.8A. ISSUANCE OF THE SEARCH WARRANT

The formal requirements of a search warrant are set forth in G.L. c. 276, §§ 1 through 2c, and must satisfy article 14 as well as the Fourth Amendment.[253] Any Massachusetts court of justice has authority to issue a search warrant for any location within the state.[254] The applicant[255] must present to the clerk or justice a sworn statement in writing[256] that sets forth sufficient facts to show "that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched."[257]

1. Probable-Cause Must Appear Within the "Four Corners" of the Affidavit

The warrant application must be supported by an affidavit, presented in person, which contains all information on which the Commonwealth relies to establish probable cause to search.[258] If the affiant has any special expertise in interpreting the significance of facts contained in the affidavit, that significance should be disclosed in the affidavit.[259] The applicant need not rely solely on her own affidavit but may attach sworn statements of other officers to the application.[260]

The judge hearing a motion to suppress evidence seized pursuant to a search warrant must consider *only* the warrant affidavit in deciding if there was probable cause

[253] Commonwealth v. Upton, 394 Mass. 363 (1985). *See* Commonwealth v. Franklin, 358 Mass. 416 (1970) (because these statutory sections set forth constitutional requirements they apply to all search warrants, including those authorized by other statutory provisions).

[254] G.L. c. 276, § 1. The plain meaning of the statute allows for issuance without regard to the location of the search or the commission of the alleged crime. Commonwealth v. Mendes, 457 Mass. 805,811 (2010).

[255] In most cases the applicant for a warrant is a police officer or attorney for the Commonwealth but the affiant may be a private person who has more direct knowledge of the facts than the officer. *See* Commonwealth v. Bond, 375 Mass. 201, 204–06 (1978) (search warrant valid on application by private representative of telephone company accompanied by assistant attorney general).

[256] The affiant must appear personally; an "oral warrant" based on a telephone call from an officer to the court is invalid. Commonwealth v. Curcio, 26 Mass. App. Ct. 738, 745 (1989). But exclusion of the evidence seized under a telephonic warrant is a separate issue. See Commonwealth v. Nelson, 460 Mass.564,573 (2011)(violation of warrant statute by obtaining warrant by phone did not prejudice defendant but a finding of reasonable efforts to locate judge in person deemed necessary to avoid exclusion).

[257] Commonwealth v. Cinelli, 389 Mass. 197, 213 (1983).

[258] Commonwealth v. Truax, 397 Mass. 174, 178–81 (1986); Commonwealth v. Sheppard, 394 Mass. 381, 388–89 (1985).

[259] Commonwealth v. Taglieri, 378 Mass. 196, 199 (1979). *But see* Commonwealth v. Byfield, 413 Mass. 426 (1992) (lack of information in affidavit showing how informant knew what he witnessed was drug transaction not fatal to warrant).

[260] *See* Commonwealth v. Saleh, 396 Mass. 406, 408–12 (1985) (sworn affidavit of DEA agent attached to application and incorporated by reference). *See also* Commonwealth v. Jordan (No. 2), 397 Mass. 494 (1986) (second warrant relied on unattached affidavit that had been part of application for first warrant issued same day).

to issue the warrant.[261] The magistrate may use common knowledge[262] and "draw reasonable inferences from the facts,"[263] but she may not use any specialized knowledge or experience in evaluating the affidavit.[264]

2. Technical Defects

Search warrant affidavits are to be read in a "commonsense, not a hyper technical manner."[265] Thus defects in the technical formalities in applying for a warrant that do not directly impinge on the probable-cause requirement will not lead to suppression of the evidence.[266] Although the failure to sign the affidavit will vitiate the warrant because an unsigned affidavit is a nullity,[267] the failure to sign each page attached to the affidavit is not fatal.[268] And an unsigned warrant was deemed a technical violation not warranting suppression in circumstances demonstrating that the judge's failure to sign was inadvertent.[269] Similarly, a reviewing court will overlook

[261] Commonwealth v. Kaupp, 453 Mass.102, 107 (2009);Commonwealth v. Germain, 396 Mass. 413, 415 n.4 (1985). *Cf.* Commonwealth v. Frodyma, 386 Mass. 434, 447–48 (1982) (suppression even though the "information could have been inserted in both the affidavit and the warrant with remarkable ease"). The magistrate is forbidden to give effect to sworn oral statements of the applicant. Commonwealth v. Sheppard, 394 Mass. 381, 388 (1985). The requirement of an affidavit guarantees that "nothing is left to the uncertainty of oral testimony as to what was otherwise stated to the magistrate, and the defendant is given a full opportunity to challenge the legality of the search." Commonwealth v. Monosson, 351 Mass. 327, 330 (1966).

[262] *See* Commonwealth v. Labelle, 15 Mass. App. Ct. 175, 179 (1983) (knowledge of size and nature of locality).

[263] Commonwealth v. Taglieri, 378 Mass. 196, 198 (1979). *See, e.g.*, Commonwealth v. Byfield, 413 Mass. 426, 430 (1992) (inference that a "forty" is forty-dollar packet of cocaine not one requiring special knowledge).

[264] Commonwealth v. Taglieri, 378 Mass. 196, 198 (1979).

[265] Commonwealth v. Truax, 397 Mass. 174, 180 (1986). *See also* Commonwealth v. Kaupp, 453 Mass. 102, 111 (2009).

[266] *See* Commonwealth v. Nelson, 460 Mass. 564,573 (2011) (violation of warrant statute by obtaining warrant by telephone did not prejudice defendant but finding of reasonable efforts to locate judge locally necessary to avoid exclusion); Commonwealth v. Sheppard, 394 Mass. 381, 388–89 (1985) (although *warrant* defective because of failure to describe with particularity items to be seized no exclusion of evidence under state law because defect was technical and was cured by officers' conduct and specificity of affidavit); Commonwealth v. Truax, 397 Mass. 174 (1986) (transposition on application form of premises to be searched with property to be seized).

[267] Commonwealth v. Dozier, 5 Mass. App. Ct. 865 (1977).

[268] *See* Commonwealth v. DeCologero, 19 Mass. App. Ct. 956 (1985) (affiant's oath appearing on initial printed form did not have to be repeated on attached pages). *See also* Commonwealth v. Truax, 397 Mass. 174, 179 (1986) (no requirement that attached pages be signed); Commonwealth v. Bass, 24 Mass. App. Ct. 972, 975 (1987) (same).

[269] *See* Commonwealth v. Pellegrini, 405 Mass. 86 (1986) (judge signed affidavits to attest to fact that officer had sworn to them).

inartful language on the affidavit form and will examine all documents presented with the affidavit in order to find the requisite oath and probable cause.[270]

§ 17.8B. PROBABLE CAUSE

1. The Standard of Probable Cause

Probable cause must be demonstrated in the affidavit, which cannot be supplemented with extrinsic facts.[271] The showing must comport with the requirements of the federal constitution[272] and state constitutional and statutory law.[273] Probable cause is "less than evidence which would justify . . . conviction" but "more than bare suspicion,"[274] and observations as consistent with innocence as criminal activity do not satisfy the standard.[275] However courts have made clear that "affidavits should be read as a whole, not parsed, severed, and subjected to hypercritical analysis."[276] The general preference for warrants has also led to the conclusion that in a very close case the court should "allow a certain leeway or leniency in the after the fact review of the sufficiency of applications for warrants."[277]

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[270] *See* Commonwealth v. Bass, 24 Mass. App. Ct. 972, 974–75 (1987) (signed typewritten attached page held to be incorporated by reference to printed affidavit form that contained oath but no information; warrant upheld); Commonwealth v. Chamberlain, 22 Mass. App. Ct. 946, 949 (1986) (clerk's omission to insert affiant's name appearing elsewhere; it was clear that affiant had been present and had sworn to statement); Commonwealth v. Dane Entertainment Servs., Inc., 23 Mass. App. Ct. 1017 (1987) (recitation on face of affidavit that fourteen-page report with earlier date was "attached" and "incorporated therein" sufficient where judge found that it had been presented to magistrate despite lack of physical attachment).

[271] *See supra* § 17.8A.

[272] U.S. Const., amend. 4.

[273] G.L. c. 276, § 1 (authority to issue warrants on showing of probable cause); Mass. Const. Declaration of Rights art. 14. The word *cause* in art. 14 has been held to mean "probable cause." Commonwealth v. Upton, 394 Mass. 363, 370 (1985) (citing Commonwealth v. Dana, 2 Mass. 329, 336 (1841)).

[274] *See* Brinegar v. United States, 338 U.S. 160, 175 (1949). A "strong reason to suspect" is not sufficient to establish probable cause. Commonwealth v. Upton, 394 Mass. 363, 370 (1985). Rather under either the fourth amendment or article 14 there must be a "substantial basis" for the conclusion that evidence of criminal activity will be found in the place to be searched. Commonwealth v. Kaupp, 453 Mass. 102, 110 (2009).

[275] Commonwealth v. Sampson, 20 Mass. App. Ct. 970, 971 (1985). *Cf.* Commonwealth v. Reddington, 395 Mass. 315, 317–18 (1985) (police ruse — calling to drug suspect with report that police were coming — coupled with suspect's rapid exit from house and placing something in trunk of car not sufficient to establish probable cause).

[276] United States v. Ventresca, 380 U.S. 102, 109 (1965). See Commonwealth v.Cavitt, 460 Mass. 617,626 (2011). *See also* Brinegar v. United States, 338 U.S. 160, 175 (1949) (standard must be applied with a view to the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act"); Commonwealth v. Montorusso, 33 Mass. App. Ct. 765, 768 (1992) (affidavit taken as a whole revealed sufficient probable cause — smell of marijuana outside suspect's door plus other facts).

[277] Commonwealth v. Corradino, 368 Mass. 411, 416 (1975).

The evidentiary standard of probable cause is the same for both search and arrest,[278] but there are important analytical distinctions between probable cause to arrest and to search.[279] In the search context, probable cause depends on two intersecting questions: (1) Is the item sought sufficiently connected to specific criminal activity? and (2) Is there sufficient information available to conclude that the item will likely be in the place to be searched at the time the search will occur?[280] On the other hand, probable cause to arrest relates solely to the likelihood that the person to be arrested has committed an offense.[281]

2. The *Aguilar-Spinelli* Test for Informant's Tips

Although the Supreme Court has abandoned this doctrine,[282] article 14 requires that if an affidavit is based on information from an unknown informant, probable cause must be tested under the principles of *Aguilar v. Texas* [283] and *Spinelli v. United States.*[284] Under the *Aguilar-Spinelli* standard the magistrate "must be informed of (1) some of the underlying circumstances from which the informant concluded that the contraband was where he claimed it was (the basis of knowledge test), and (2) some of the underlying circumstances from which the affiant concluded that the informant was 'credible' or his information 'reliable' (the veracity test)."[285] If the informant's tip fails either prong of the *Aguilar-Spinelli* test, other allegations in the affidavit that corroborate the information could support a finding of probable cause,[286] but "each

[278] Commonwealth v. Robinson, 403 Mass. 163, 164 (1988); Commonwealth v. Bottari, 395 Mass. 777, 783 (1985).

[279] *See* Commonwealth v. Beldotti, 409 Mass. 553 (1991) (adequate probable cause to support search of defendant's bedroom but insufficient probable cause for warrant to test defendant's body for evidence of victim's blood); Commonwealth v. Skea, 18 Mass. App. Ct. 685 (1984) (discussing both probable cause to arrest and to search).

[280] Commonwealth v. Cefalo, 381 Mass. 319, 328 (1980). Commonwealth v. Truax 397 Mass. 174, 178 (1986) (quoting Commonwealth v. Cinelli, 389 Mass. 197, 213 (1983). Compare Commonwealth v. Kenney, 449 Mass. 840, 845-846 (2007) (affidavit presented sufficient probable cause of presence of child pornography in suspect's apartment) and Commonwealth v. Kaupp. 453 Mass.102, 113-114 (2009) (affidavit insufficient to demonstrate probable cause that suspect's private computer contained child pornography). See also Commonwealth v. Walker, 438 Mass. 246 (2002) (sufficient probable cause to justify search for evidence of armed robbery and murder); Commonwealth v. Gentile, 437 Mass. 569, 575-577 (2003) (probable cause to seize and search suspect's truck).

[281] *See, e.g.*, Commonwealth v. Grzembski, 393 Mass. 516, 521 (1984). Probable cause to arrest does not diminish with time, while probable cause to search usually evaporates quickly in the absence of fresh additional information. *See* discussion of timeliness of information *infra* at § 17.8B(4).

[282] Illinois v. Gates, 462 U.S. 213 (1983) (substituting a "totality of the circumstances test" for the *Aguilar-Spinelli* test).

[283] 378 U.S. 108 (1964).

[284] 393 U.S. 410 (1969). See Commonwealth v. Alfonso A.,438Mass.372(2003)(art.14)

[285] Aguilar v. Texas, 378 U.S. 108, 114 (1964). *See* Commonwealth v. Upton, 394 Mass. 363, 374 (1985) *(Aguilar-Spinelli* standard applicable under art. 14). The same test is applied to arrests and warrantless searches. *See, e.g.*, Commonwealth v. Robinson, 403 Mass. 163, 164 (1988) (warrantless arrest).

[286] Spinelli v. United States, 393 U.S. 410, 415 (1969); Commonwealth v. Upton, 394 Mass. 363, 374–75 (1985).

element of the test must be separately considered and satisfied or supplemented in some way."[287]

a. Basis of Knowledge Test

The most probative hearsay information in a search warrant affidavit is a statement that the informant *personally saw* the incriminating item in the place for which the warrant is requested. If such an observation was timely the basis of knowledge prong will have been satisfied.[288] The detailed nature of the tip may justify an inference of personal observation.[289]

Hearsay from an informant, however suggestive of wrongdoing, often requires corroboration by police investigation before the basis of knowledge test can be met.[290]

[287] Commonwealth v. Upton, 394 Mass. 363, 376 (1985).

[288] *See, e.g.*, Commonwealth v. Alfonso A., 438 Mass. 372, 375 (2003) (inference of personal observation by informant); Commonwealth v. Monteiro, 75 Mass.App.Ct. 280,285 (2009) (report to teacher based on personal observation of student informant): Commonwealth v. Peterson, 61 Mass. App.Ct. 632, 636-637 (2004) (statements by suspect's family members raise inference of personal observation); Commonwealth v. Parapar, 404 Mass. 319, 322 (1989) (statement of informant that he obtained drugs three times from same person in specific apartment allows clear inference of personal observation); Commonwealth v. Ramos, 402 Mass. 209, 214 (1988) (averment that informant saw bags of heroin in specific apartment); Commonwealth v. Borges, 395 Mass. 788, 795 (1985) (basis of knowledge satisfied where it was clear that informant personally observed criminal activity). However, an allegation of "personal knowledge" needs additional support. *See* Commonwealth v. Atchue, 393 Mass. 343, 348 (1984) (allegation of "first hand knowledge" coupled with "specificity of the facts" satisfies basis of knowledge prong). *See also* Commonwealth v. Fleming, 37 Mass. App. Ct. 927, 928 (1994) (informant was prospective recipient of cocaine sufficient inference of personal knowledge); Commonwealth v. Luce, 34 Mass. App. Ct. 105 (1993) (informant's knowledge from personal observations stale but recent conversations with suspect buttressed basis-of-knowledge prong). *Cf.* Commonwealth v. Fontaine, 28 Mass. App. Ct. 575, 578–79 (1990) (specific description of marijuana plants by informant member of town conservation commission satisfies basis-of-knowledge prong without showing how informant knew it was marijuana).

[289] *See* Commonwealth v. O'Day, 440 Mass. 296, 302 (2003) (detail of mechanics of drug sales and persons involved lead to inference of personal observation); Commonwealth v. Rodriguez, 75 Mass. App.Ct. 290, 296 (2009) (detailed description of appearance, vehicle and method of operation); Commonwealth v. Atchue, 393 Mass. 343, 348 (1984) ("The informant's assertion of first hand knowledge coupled with the specificity of the facts he furnished lends credence to the belief that 'criminal activity was evidenced from personal observation' ") *(quoting* United States v. Unger, 469 F.2d 1283, 1286 (7th Cir. 1972)).

[290] *See* Commonwealth v. Cast, 407 Mass. 891 (1990) (police corroboration of details provided by informant strengthens inference of direct knowledge); *See also* Commonwealth v. Brown, 57 Mass. App.Ct. 326,328 (2003) (detailed tip corroborated by police observations); Commonwealth v. Peguero, 26 Mass. App. Ct. 912, 913–14 (1988). In *Peguero* the informant had visited the target apartment several times, been present when suspects talked to persons who came to buy cocaine, and had seen weighing scales and other paraphernalia. The court cautiously upheld the warrant only after finding sufficient reinforcement by police surveillance. *Compare* Commonwealth v. Gisleson, 6 Mass. App. Ct. 911 (1978) (informant said be had visited defendant's apartment and said defendant was "in good shape with grass"; insufficient to support inference of personal observation); Commonwealth v. Byfield, 32 Mass. App. Ct. 912 (1992) (informant described transaction occurring in premises but did not say what was in packet sold by suspect for 40 dollars).

So too, if the basis of the informant's knowledge is not revealed or cannot be inferred from the tip's detail, independent police corroboration may compensate for the deficiency.[291] Corroboration of facts "suggestive of criminal conduct" will be given more weight than corroboration of innocent details.[292]

Counsel must be particularly sensitive to situations in which the informant's personal knowledge of the suspect's criminal activity fails to connect a specific item of contraband or evidence to a specific location for which the warrant is sought.[293] A bare conclusion by an informant that contraband will be in a certain place is the chief evil that the "basis of knowledge" test is designed to eliminate in that it does not reveal the source of the informant's information.[294]

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[291] *See* Commonwealth v. Upton, 394 Mass. 363, 376 (1985) ("Independent police corroboration can make up for deficiencies in either or both prongs of the *Aguilar-Spinelli* test"). *See also* Commonwealth v. Robinson, 403 Mass. 163, 166 (1988) (specific description of drug suspect plus behavior predicted by informant corroborated by police observation); Commonwealth v. Rosario, 54 Mass. App. Ct. 914, 916 (2002) (detailed information about predicted behavior confirmed by police); Commonwealth v. Washington, 39 Mass. App. Ct. 195 (1995) (basis of knowledge established by timing and location of suspect's predicted appearance); Commonwealth v. Powers, 39 Mass. App. Ct. 911 (1995) (basis of knowledge missing but corroboration by police of presence of defendant's car in driveway of drug seller); Commonwealth v. Triantafillakos, 33 Mass. App. Ct. 949 (1992) (police corroboration of exact description and conduct of suspect predicted by informant); Commonwealth v. Mebane, 33 Mass. App. Ct. 941 (1992) (specific description of drug suspect and arrival time on train plus information that suspect's destination was site of recent drug raid); Commonwealth v. Ramon, 31 Mass. App. Ct. 963 (1992) (corroboration of time and location of drug transaction plus observation and exchange of money); Commonwealth v. Brown, 31 Mass. App. Ct. 574, 579 (1992) (informant accurately predicted arrival time and general description of drug suspect but corroboration was only of "innocuous innocent details"); Commonwealth v. Gates, 31 Mass. App. Ct. 328, 332 (1991) (informant's personal observation of cocaine stale but defendant's confederate offered to sell informant cocaine recently). *Cf.* Draper v. United States, 358 U.S. 307 (1959) (previously reliable informant described suspect specifically and correctly predicted his behavior; corroboration by police of predicted behavior sufficient to show probable cause).

[292] *See* Commonwealth v. Bottari, 395 Mass. 777, 784 (1985). In *Bottari* the police corroborated only the identification number and description of the suspect's car and its location rather than any facts associated with the alleged crime, and the court held that the tip failed to satisfy the basis of knowledge test. *See also* Commonwealth v. Frazier, 410 Mass. 235, 240 (1991) (corroboration of defendant's registration number and telephone number insufficient to satisfy basis of knowledge prong); Commonwealth v. Grinkley, 44 Mass. App. Ct. 62, 71 (1997) (corroboration of skin color and location of kids seen as minimal); Commonwealth v. O'Brien, 30 Mass. App. Ct. 807 (1991) (corroboration of automobile owned by truck theft suspect and observation on suspect's property of truck not exactly fitting informant's description of stolen vehicle insufficient to satisfy basis of knowledge prong); Commonwealth v. Avalo, 37 Mass. App. Ct. 904 (1994) (predicted behavior of suspect only as to innocent details — insufficient to establish basis of knowledge).

[293] *See, e.g.*, Commonwealth v. Saleh, 396 Mass. 406, 411 (1985) (informant "believed" that drugs were being stored in defendant's apartment; insufficient to show basis of knowledge; warrant upheld because adequate corroboration supplied nexus to target premises). *See also* Commonwealth v. Upton, 390 Mass. 562, 569 (1983) (informant described "stolen stuff" she said was located in mobile home; insufficient because informant failed to state where or when she had seen items); Commonwealth v. Padilla, 42 Mass. App. Ct. 67, 71 (1997) (informant told that drugs would be delivered from apartment plus return of car to apartment after sale — sufficient).

[294] Commonwealth v. Honneus, 390 Mass. 136, 141–42 (1983). *See* Commonwealth v. Bottari, 395 Mass. 777, 783–84 (1985) (general conclusion that suspect had gun not sufficient to

b. Veracity or Reliability Test

The veracity prong of the *Aguilar-Spinelli* test is satisfied by a showing of either the informant's general credibility or the reliability of the information provided in the particular case.[295] If more than one informant is used, the reliability of each must be scrutinized.[296] This second prong of the *Aguilar-Spinelli* test can be met (1) by showing that the informant provided reliable information to the police in the past, (2) by statements of the informant that go against his penal interest, (3) by highly specific details that are self-verifying, or (4) by independent police corroboration.

Prior police experience with informant: If the affiant states that the informant has provided accurate information in the past that led to a conviction, the allegation is sufficient to satisfy the "veracity" prong.[297] But the bare recitation that the informant

establish how information was obtained); Commonwealth v. Kaufman, 381 Mass. 301, 304 (1980) (information that suspect kept "large amounts of cash and drugs" at target address insufficient even with some corroborating observations because of lack of basis for informant's conclusion).

Similarly, a reliable informant's tip that he had "heard" that the suspect had contraband in his house did not provide an adequate basis of knowledge to support probable cause and did not rise above the quality of a "casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." Commonwealth v. Reddington, 395 Mass. 315, 317–24 (1985) (quoting Spinelli v. United States, 393 U.S. 410, 416 (1969). But see Commonwealth v. Brown, 57 Mass. App.Ct. 326,328 (2003) (informant overheard person speaking to suspect about details of drug transaction later corroborated).

[295] Commonwealth v. Alfonso A., 438 Mass. 372,375-376 (2003); Commonwealth v. Parapar, 404 Mass. 319, 322 (1989); Commonwealth v. Rojas, 403 Mass. 483, 486 (1988); Commonwealth v. Germain, 396 Mass. 413, 418 (1985).

[296] *See, e.g.,* Commonwealth v. Ramos, 402 Mass. 209, 213–14 (1988) (two informants; marginal reliability of one sufficiently bolstered by police corroboration); Commonwealth v. Saleh, 396 Mass. 406, 410 n.6 (1985) (court disregards portion of affidavit concerning second informant whose reliability not shown). Note that if the informant quotes another source the reliability of that source must also be shown in the affidavit if it is to be relied on in any measure. Commonwealth v. Grzembski, 393 Mass. 516, 521–22 (1984); Commonwealth v. Kuszewski, 385 Mass. 802, 805 (1982).

[297] *See, e.g.,* Commonwealth v. Amral, 407 Mass. 511, 515 (1990) ("informant had given'information in the past leading to the arrest *and conviction* of subjects for similar offenses' (emphasis added)"); Commonwealth v. Robinson, 403 Mass. 163 (1988) (veracity established byrecord of 25 arrests and 15 convictions resulting from past information provided by informant);Commonwealth v. Kaufman 381 Mass. 301, 302 (1980) (informant who supplied information leading to arrest and conviction of one person deemed credible); Commonwealth v. Hall, 366 Mass. 790 (1975). Cooperation leading to prior arrests and indictments has also been held sufficient, at least where there was some corroboration by police investigation. Commonwealth v. Saleh, 396 Mass. 406, 410 (1985). *See* Commonwealth v. Mantinez, 44 Mass. App. Ct. 513, 519 (1998) (information leading to prior arrest and seizure of drugs).

Controlled buys of contraband conducted by informants under police supervision can adequately demonstrate the veracity of the informant. Commonwealth v. Desper, 419 Mass. 163, 168 (1994) setting out the elements of controlled buy generally expected). See *Commonwealth v. O'Day*, 440 Mass. 296, 303 (2003) (controlled buys plus corroboration). *Commonwealth v. Brown*, 57 Mass.App.Ct. 326,328 (2003) (prior information leading to controlled buy of narcotics plus informant well known to police).

has provided information leading to an arrest is not enough to establish reliability;[298] there should be at least some detail regarding the prior arrest to allow the magistrate to draw a reasonable conclusion of reliability.[299] Evidence of a track record by the informant that fails to satisfy the veracity prong may contribute to finding of reliability where it is supplemented by police corroboration.[300]

Statements against penal interest: A statement by an informant that provides a ground for concluding that he himself has committed a crime is said to carry its own indicia of reliability.[301] If the informant remains anonymous to the police and the

[298] Commonwealth v. Santana, 411 Mass. 661 (1992) (prior information leading to arrest of two named individuals insufficient); *See* Commonwealth v. Melendez, 407 Mass. 53 (1990) (prior information provided by informant leading to arrest of two individuals insufficient to establish reliability). *See also* Commonwealth v. Rojas, 403 Mass. 483, 486–87 (1988) ("naked assertion that in the past the informant had provided information which led to a prior arrest is insufficient by itself to establish an informant's veracity"). *Compare* Commonwealth v. Valdez, 402 Mass. 65 (1988) (where informant's tip of whereabouts of suspect led to successful arrest on outstanding warrant, arrest was deemed to verify tip). Commonwealth v. Soto, 35 Mass. App. Ct. 340, 344 (1993) (averment that informant provided information leading to arrest of suspect awaiting trial on trafficking charge not sufficient to establish veracity). *Cf.* Commonwealth v. DiPietro, 35 Mass. App. Ct. 638, 642 (1993) (adequate track record is not tainted because the assistance of the informant was dated).

[299] *See* Commonwealth v. Rodriguez, 15 Mass. App. Ct. 290,296 (2009) (information leading to arrest and seizure of cocaine); Commonwealth v. Perez-Baez, 410 Mass. 43, 46 (1991) (prior information had led to arrest of two named persons still awaiting trial and seizure of cocaine — sufficient information to establish informant's veracity); Commonwealth v. Grady, 33 Mass. App. Ct. 917 (1992) (no necessity to name those arrested on informant's prior tips); Commonwealth v. Lapine, 410 Mass. 38, 41–42 (1991) (prior tip led to arrest and seizure of drugs and information contained in prior tip was shown to be accurate); Commonwealth v. Rojas, 403 Mass. 483, 486 (1988) (magistrate "must be furnished with more detail regarding the circumstances of the prior arrest in order to make a meaningful determination of the informant's veracity"). Cf. G.L. c. 276, § 2B (requiring that "affidavit shall contain the facts, information, and circumstances upon which such person relies"). *But cf.* Commonwealth v. Ramos, 402 Mass. 209, 213–14 (1988) (averment that the "informant has provided me with information in regards to narcotics that I have been able to substantiate" passed muster where bolstered by additional police corroboration). *But see* Commonwealth v. Monterosso, 33 Mass. App. Ct. 765 (1992) (informant involved in controlled buys which led to arrests and seizures of drugs but no information that they were result of information provided by him).

[300] *See* Commonwealth v. Ramos, 402 Mass. 209, 214 (1988) See also Commonwealth v. Brown, 57 Mass.App.Ct. 326,328 (2003). Whether the informant is identified or identifiable by police contributes to the determination of veracity. See Commonwealth v. Alfonso A., 438 Mass. 372, 375-376 (2003) (unnamed informant was known to police as were his "whereabouts"); Commonwealth v. Rodriguez, 75 Mass.App.Ct. 290,296, (2009) (knowledge of unnamed informant's identity and address deemed a factor).

[301] *See* Commonwealth v. Connolly, 454 Mass. 808, 816 (2009) (informants admitted they were 'runners' for defendant's drug operation); Commonwealth v. Parapar, 404 Mass. 319, 322–23 (1989) ("informant's declaration against his or her penal interest is a factor that a magistrate may properly consider in determining probable cause"); Commonwealth v. Olivares, 30 Mass. App. Ct. 596, 598 (1991) (informant's postarrest admission of purchasing drugs from suspect contributes to veracity prong); Commonwealth v. Norris, 6 Mass. App. Ct. 761, 765 (1978) ("not conclusive on the issue of reliability, may be sufficient to support a finding of probable cause"). *Compare* Commonwealth v. Nowells, 390 Mass. 621, 626 (1983) (informant's statement that he was in defendant's apartment "to get [turned on] with cocaine" did not satisfy requirement and did not contribute to reliability prong) *with* Commonwealth v. Vynorius, 369 Mass. 17, 21 (1975) (admission of violation of drug laws constitutes declaration against penal

affiant, a statement against penal interest is, of course, meaningless, and the courts recognize this.[302] But even if the informant is known to the police, it does not follow necessarily that a statement purporting to admit to participation in a crime is reliable without a showing of the context in which the statement was made.[303] The prime motivation for informants is usually self-interest — money, favors, assistance with ongoing cases, or a promise of confidentiality or immunity — and thus it is not necessarily logical to view the product of such a relationship as inherently reliable merely because the informant has acknowledged privately some criminality on his part. Counsel should continue to attack the statement against penal interest as a legal fiction insufficient to establish reliability.

Self-verifying detail: If the information provided by the informant is sufficiently detailed in its description of the criminal activity alleged, the reliability of the information is enhanced.[304] However, the detailed nature of the tip may not be enough by itself to satisfy the veracity prong.[305] If there are tips from two or more informants included in the affidavit which are otherwise insufficient, the information may be deemed reliable if the tips corroborate one another in "significant, detailed respects."[306]

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interest). Cf. Commonwealth v. Simpson, 442 Mass. 1009 (2004) (rescript) (woman who purchases drugs for undercover cop unknown to her is not "informant" but additional information provided after disclosure deemed reliable as declarations against penal interest).

[302] *See* Commonwealth v. Allen, 406 Mass. 575 (1990) (informant admitted to purchasing marijuana but affidavit did not state whether informant's identity was known to police); Commonwealth v. Alessio, 377 Mass. 76, 81–82 (1979); Commonwealth v. Nowells, 390 Mass. 621, 626 (1983).

[303] *See* Commonwealth v. Melendez, 407 Mass. 53 (1990) (admission by informant that he had purchased cocaine not sufficient as statement against penal interest where there was no corroboration and thus no reasonable fear of prosecution). *Compare* Commonwealth v. Alvarez, 422 Mass. 198, 204–205 (1996) (statement of identified informant admitting involvement under circumstances giving rise to reasonable fear of prosecution); Commonwealth v. Muse, 45 Mass. App. Ct. 813 (1998) (fear of prosecution could involve offense other than subject of warrant); Commonwealth v. Munera, 31 Mass. App. Ct. 380 (1991) (declaration against penal interest at time when informant had reasonable fear of prosecution). *But see* Commonwealth v. Watson, 36 Mass. App. Ct. 252, 255 (1994) (informant stating he had bought drugs not sufficient to show reasonable fear of prosecution).

[304] *See* Commonwealth v. Mendes, 78 Mass. App. Ct. 474,483 (2010) (information from two informants 'extremely detailed') Commonwealth v. Mullane, 445 Mass. 702, 706-707 (2006) (level of detail of sexual activity at massage school plus knowledge of informant's identity); Commonwealth v. Alfonso A., 438 Mass. 372, 377 (2003)(specificity plus corroboration of "critical detail"). *Cf.* Commonwealth v. Atchue, 393 Mass. 343, 348 (1984) (named informant's assertion of first hand knowledge "coupled with specificity of facts lends credence" to statements).

[305] See Commonwealth v. Alfonso A., 438 Mass. 372,376 (2003) (detail "ordinarily" not enough by itself for veracity) *But see* United States v. Caggiano, 899 F. 2d 99,103 (1st Cir. 1990) (specificity may satisfy fourth amendment "totality of circumstances" inquiry).

[306] *See e.g.* Commonwealth v. Rabb, 70 Mass.App.Ct. 194,204 (2007) (mutually corroborating tips); Commonwealth v. Russell, 46 Mass. App. Ct. 513 (1999) (mutual corroboration of tips which were "consistent" "contemporaneous" and "overlapping"); Commonwealth v. Luce, 34 Mass. App. Ct. 105 (1993) (mutual corroboration of three tips in significant respects). *See also* Commonwealth v. Nowells, 390 Mass. 621, 627 (1983) (insufficient mutual corroboration when tips were consistent only as to presence of handguns at target premises); Commonwealth v. Santana, 411 Mass. 661, 665 (1992) (two anonymous tips

Independent police corroboration: Although deficiencies in either prong of the *Aguilar-Spinelli* test may be overcome by independent police corroboration,[307] most of the cases discussing the adequacy of such corroboration deal with the veracity prong.[308] Independent police corroboration of facts contained in the informant's tip may contribute to a finding that the information was reliable, especially where the corroboration is of suspicious rather than innocent facts.[309] The affiant need not

failed to adequately corroborate one another); Commonwealth v. Desper, 419 Mass. 163, 167 (1994) (anonymous phone call insufficient because it failed to corroborate main informant's tip in significant respects); Commonwealth v. Watson, 36 Mass. App. Ct. 252, 256 (1994) (tips corroborated one another in several respects); Commonwealth v. Rojas, 403 Mass. 483, 488 (1988) (two insufficient tips may corroborate one another but "they will be held to a high standard before being considered reliable"). *Cf.* Commonwealth v. Kiley, 11 Mass. App. Ct. 939 (1981) (10 detailed tips corroborated each other and, with other corroboration, established probable cause).

In many cases, the police gain corroboration through a "controlled buy." *See, e.g.*, Commonwealth v. Desper, 419 Mass. 163, 171 (1994) (stating that search of informant prior to controlled buy should be done but finding affidavit adequate based on close supervision of informant's activities by police); Commonwealth v. Warren, 418 Mass. 86, 88–89 (1994) (discussing procedures in controlled buy); Commonwealth v. Villella, 39 Mass. App. Ct. 426, 428 (1995) (close supervision of controlled buy by intermediary of informant — sufficient to corroborate tip).

[307] Commonwealth v. O'Day, 440 Mass. 296,302 (2003); Commonwealth v. Upton, 390 Mass. 562, 568 (1983). *Cf.* Draper v. United States, 358 U.S. 307 (1959) (police corroboration of details of suspect's description and behavior, predicted by previously reliable informant, were sufficient for probable cause).

[308] The courts have relied on police corroboration in analyzing the informant's veracity in the following representative cases: *Commonwealth v. O'Day*, 440 Mass. 296, 302 (2003); *Commonwealth v. Alfonso* A., 438 Mass. 372 (2003);Commonwealth v. Carrasco, 405 Mass. 316, 321–22 (1989); Commonwealth v. Parapar, 404 Mass. 319 (1989); Commonwealth v. Valdez, 402 Mass. 65, 70–71 (1988); Commonwealth v. Truax, 397 Mass. 174 (1986); Commonwealth v. Germain, 396 Mass. 413 (1985); Commonwealth v. Scalise, 387 Mass. 413 (1982); Commonwealth v. Gates, 31 Mass. App. Ct. 328, 333 (1991) (described as "close case").

[309] *See* Commonwealth v. O'Day, 440 Mass. 296, 302 (2003) (police surveillance plus controlled buys sufficient);Commonwealth v. Bakoian, 412 Mass. 295, 301 (1992) (corroboration of specific details "not easily obtainable by uninformed bystander"); Commonwealth v. Va Meng Joe, 425 Mass. 99 (1997) (tip fairly detailed and police corroborated details); Commonwealth v. Alvarez, 422 Mass. 198 (1996) (sufficient corroboration of tip when key seized in one search fit lock at second location plus statement of arrestee at first location); Commonwealth v. Welch, 420 Mass. 646, 653 (1995) (police confirmed key fact not available to uninformed observer); Commonwealth v. Spano, 414 Mass. 178 (1993) (prior controlled buy, criminal history of defendant, and suspicious traffic at defendant's apartment deemed sufficient corroboration): Commonwealth v. Blake, 413 Mass. 823, 828 (1992) (monitored drug transaction corroborated details of tip); Commonwealth v. Cast, 407 Mass. 891, 900 (1990) (corroboration of suspicious details plus "certain indicia of reliability in the tip itself" sufficient for veracity prong under art. 14); Commonwealth v. Ramos, 402 Mass. 209, 213–14 (1988) (tip predicting drug transport adequately corroborated); Commonwealth v. Cruz, 53 Mass. App. Ct. 24, 35 (2001) (corroboration of beeper number plus additional incriminating information); Commonwealth v. Rosario, 37 Mass. App. Ct. 920 (1994) (specificity of information plus corroboration of most details); Commonwealth v. Watson, 36 Mass. App. Ct. 252, 255 (1994) (corroboration of suspicious activity and information not generally available); Commonwealth v. Soto, 35 Mass. App. Ct. 666, 670 (1993) (detailed tip plus corroboration of predicted behavior "within a narrow time frame"); Commonwealth v.

personally have made the observations because the knowledge of one officer engaged in an ongoing investigation is deemed to be the knowledge of all.[310]

Police knowledge of the suspect's prior criminal acts may support the reliability requirement if the acts were sufficiently similar in nature and close in time to the acts described in the tip.[311] Similarly, police knowledge of the criminal reputation of the associates of the suspect may be used to "substantiate other information in piecing out probable cause."[312] However, mere association is often as consistent with innocence as with criminal activity and such evidence should be viewed with suspicion.[313] Police

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Olivares, 30 Mass. App. Ct. 596, 598 (1991) (corroboration of informant's calls to defendant and informant's meeting with defendant at prearranged time for "drug buy" — sufficient); Commonwealth v. Fillippidakis, 29 Mass. App. Ct. 679, 685–86 (1991) (corroboration of information regarding arrest of three persons related "to the objectives of the warrant").

Compare Commonwealth v. Pina, 453 Mass. 438,442 (2009) (no corroboration of facts allowing inference of presence of drug supply in suspect's home); Commonwealth v. Reyes, 423 Mass. 568, 573 (1996) (corroboration of nonincriminating details available to uninformed bystander — insufficient for veracity prong); Commonwealth v. Alvarado, 423 Mass. 266, 272 (1996) (corroboration of innocent details insufficient); Commonwealth v. Rojas, 403 Mass. 483, 485 n.3 (1988) (fact that suspect was "in constant possession of a handgun" adds nothing without information that he was not licensed); Commonwealth v. Borges, 395 Mass. 788, 795 (1985) (same); Commonwealth v. Upton, 390 Mass. 562, 571 (1983) (presence of motor home at designated address and name of defendant's girlfriend added almost nothing to reliability of informant); Commonwealth v. Kaufman, 381 Mass. 301, 304–05 (1980) (observation of plastic garbage bags consistent with innocence as well as marijuana operation); Commonwealth v. Motta, 34 Mass. App. Ct. 921 (1993) (confirmation of name and address provided by informant not sufficient); Commonwealth v. Giselson, 6 Mass. App. Ct. 911, 912 (1978) (confirming prediction of presence of certain car outside suspect's apartment adds nothing without showing car's connection to criminal activity).

[310] *See, e.g.*, Commonwealth v. Perez, 80 Mass.App.Ct. 241, 274 (2011) Commonwealth v. Gullick, 386 Mass. 278, 283 (1982) (probable cause to arrest); Commonwealth v. McDermott, 347 Mass. 246, 249 (1964) (probable cause to search). *Cf.* Commonwealth v. Wright, 15 Mass. App. Ct. 245, 249 (1983) (affiant named several officers who provided information but failed to specifically attribute each statement; "obvious" that information was relayed by officers 'who were not paid informants").

[311] *See* Commonwealth v. Germain, 396 Mass. 413, 418 n.7 (1985). *See also* Commonwealth v. Preston, 27 Mass. App. Ct. 16, 21 (1989) (prior criminal record for related offense "is entitled to weight as evidence of criminal disposition"). *But see* Commonwealth v. Reyes, 423 Mass. 568 (1996) (insufficient details regarding prior arrest of defendant); Commonwealth v. Desper, 419 Mass. 163, 167 (1994) (criminal histories of "uncertain vintage" entitled to no weight); Commonwealth v. Oliveira, 35 Mass. App. Ct. 645 (1993) (defendant's record too remote in time to count as corroboration). Commonwealth v. Melendez, 407 Mass. 53 (1990) (defendant's recent guilty plea to cocaine possession insufficient to demonstrate proclivity to sell cocaine); Commonwealth v. Allen, 406 Mass. 575 (1990) (four-year-old conviction for possession of marijuana insufficient to corroborate information concerning sale of marijuana).

[312] Commonwealth v. Wallace, 22 Mass. App. Ct. 247, 250 & n.4 (1986) (affidavit detailing association with several individuals whose criminal records were presented to magistrate). *See also* Commonwealth v. Corradino, 368 Mass. 411, 414 n.4 (1975) (suspect visited cafe suspected by police of having regular unlawful card games).

[313] *See* Commonwealth v. Frazier, 410 Mass. 235, 240–41 (1991) (only information informant had about defendant was her association with known criminal); Commonwealth v. Griffin, 79 Mass. App.Ct. 124,128 (2011) (police search of passenger after arrest of driver and search of vehicle deemed invalid); Commonwealth v. Sampson, 20 Mass. App. Ct. 970, 971

experience as to criminal techniques and patterns of behavior may be given weight if sufficient circumstances are set forth in the affidavit to show the basis for the officer's expertise and the inferences are spelled out.[314]

Whenever police observations are material to a showing of probable cause, counsel should determine (1) whether the facts observed were gained by an unlawful arrest or search and (2) whether any of the facts asserted can be shown to be false.[315] If so, the court will excise that portion of the affidavit derived from the illegality and examine the remaining allegations to determine if probable cause still exists to support the warrant.[316]

Named informants: The *Aguilar-Spinelli* test was designed to ensure the reliability of information received from anonymous informants. Thus, the standard of reliability is relaxed when the informant is identified by name regardless of whether the informant is a citizen-witness, a victim, or merely someone possessed of information concerning the crime.[317] However, the basis of knowledge prong must still be satisfied.

(1985) (assuming police had probable cause that illegal gaming was occurring at bar, presence of defendant seated next to man acting furtively was not enough to justify search of defendant).

[314] See eg. Commonwealth v. Santiago, 66 Mass. App. Ct. 515,522 (2006) (expertise of affiant used to conclude drugs would be separated from records). See also Commonwealth v. Cast, 407 Mass. 891, 900 (1990) (use of rented vehicles by drug traffickers to avoid detection and protect suspect's own vehicles from seizure is fact of "special significance" to experienced officer); Commonwealth v. Taglieri, 378 Mass. 196, 199–201 (1979). *Cf.* Commonwealth v. Kaufman, 381 Mass. 301, 305 (1980).

[315] *See. e.g.,* Commonwealth v. Ramos, 402 Mass. 209 (1988) (illustrative though unsuccessful attempt to incorporate both approaches). Although there is no requirement that a search warrant affidavit set forth the lawful basis on which the police observations were made, "if, as a matter of fact, the observations resulted from a violation of the defendants' Fourth Amendment [or art. 14] rights, the observations cannot support the issuance of search warrants, and any evidence traceable to those observations must be suppressed." Commonwealth v. D'Onofrio, 396 Mass. 711, 713 (1986).

[316] *Cf.* Commonwealth v. Pietrass, 392 Mass. 892, 900–03 (1984) (fruits of illegal police conduct). A similar rule is applied when dealing with misrepresentations in the affidavit. Commonwealth v. Honneus, 390 Mass. 136, 142 (1983).

[317] *See* Commonwealth v. Alfonso A., 438 Mass. 372, 375 (2003) (police knowledge of identity and location of informant not enough by itself but with detail and corroboration deemed sufficient): Commonwealth v. Mullane, 445 Mass. 702, 707-708 (2006) (informant provided sworn statement including detailed description of alleged criminal conduct); Commonwealth v. Beliard 443 Mass. 79,86 (2004) (detailed tip by informant named in affidavit); Commonwealth v. Zorn, 66 Mass. App. 228, 236-237 (2006) (totem pole hearsay of victim, mother and DSS officials deemed sufficient); Commonwealth v. Rodriguez, 75 Mass. App.Ct. 290,296 (2009) (knowledge of unnamed informant's identity and address deemed a factor) *Commonwealth v. Monteiro*, 75 Mass. App.Ct. 280 (2009) (student report of presence of gun to teacher to officer deemed reliable). See also Commonwealth v. Atchue, 393 Mass. 343, 347–48 & n.4 (1984) (serious charge "volunteered by an identified party carries with it the indicia of reliability"; same when named informant is participant in crime because naming informant more easily permits defense to challenge truth of statements); Commonwealth v. Olivares, 30 Mass. App. Ct. 596 (1991); Commonwealth v. Cast, 401 Mass. 891, 900 (1990); Commonwealth v. Freiberg, 405 Mass. 282, 297–98 (1989) (identified person observed burial of murder victim); Commonwealth v. Baharioan, 25 Mass. App. Ct. 35, 37 (1987); Commonwealth v. Grzembski, 393 Mass. 516, 521 (1984) (ultimate source of tip was identified citizen "living at a known address"); Commonwealth v. Bowden, 379 Mass. 472, 477 (1980) (citizen-witness to murder); Commonwealth v. Butterfield, 44 Mass. App. Ct. 926, 927 (1998) (citizen known to officer

Describing the informant as a "concerned citizen" without revealing his identity does not satisfy the veracity prong.[318]

3. Nexus Between the Crime and the Place and Items Listed

a. Nexus to Items

The affidavit must demonstrate a nexus between each item described in the warrant and the criminal activity under investigation. [318.5] For example, this nexus (and thus probable cause) was lacking when an affidavit established that the suspect had a gun concealed in a particular place but failed to mention that the suspect had no legal authority to possess the weapon.[319] It is not enough to show that the items to be seized are material to a criminal investigation; there must be probable cause to believe they would be incriminating.[320]

However, the magistrate is entitled to draw inferences from the affidavit, and even if the items listed in the warrant are not mentioned in the affidavit, probable cause to connect the items to criminal activity may be found to flow from the facts in the

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reported suspect operating under influence); Commonwealth v. Zuluaga, 43 Mass. App. Ct. 629, 635–36 (1997) (named informant who wore wire put "credibility on the line").

[318] Commonwealth v. Rojas, 403 Mass. 483, 485 n.5 (1988). Although "concerned citizens" who report information to the police out of civil duty ordinarily are not subject to the same degree of skepticism as other informants, the magistrate should not assume veracity without at least being provided the name of the citizen. *Rojas, supra,* 403 Mass. at 488. Even if the informant provides her name and address she may not be deemed reliable unless the information can be verified. *See* Commonwealth v. Grinkley, 44 Mass. App. Ct. 62, 69 (1997) (name and address given but phone number not left and court deemed informant as "inaccessible" as anonymous informant). *But see* Commonwealth v. Alfonso A., 438 Mass. 372, 375 (2003) (unnamed informant whose identity was known to officers "not an untraceable, unknown source").

[318.5] See e.g**.** Commonwealth v. Cruz, 459 Mass. 459,476 (2011) (odor of burnt marijuana alone does not give rise to probable cause of criminal activity afer decriminalization of possession of small amount).

[319] *See, e.g.,* Commonwealth v. Rojas, 403 Mass. 483, 485 n.3 (1988) (information that defendant possessed handgun insufficient to establish probable cause of possession without license); Commonwealth v. Nowells, 390 Mass. 621, 627 (1983) (affidavit for search warrant invalid in that it failed to show that "blasting caps" were connected to criminal activity); Commonwealth v. Stevens, 361 Mass. 868 (1972) (rifles being loaded into trunk of car near site of riots in progress without more did not provide probable cause for issuance of search warrant).

[320] Commonwealth v. Jean-Charles, 398 Mass. 752 (1986). In *Jean-Charles* state officers investigating insurance fraud obtained a warrant to search the defendant doctor's office for the files of two patients suspected of filing fraudulent claims. Because there was no probable cause to believe that the doctor knew whether the patients had needed treatment, the court held the warrant invalid. The court also rejected the argument that the warrant was a valid third-party warrant because there was no probable cause to believe the documents "would aid in a particular apprehension or conviction." *Jean-Charles, supra,* 398 Mass. at 759 (quoting Commonwealth v. Murray, 359 Mass. 541, 547 (1971)). The court left open the question whether Massachusetts would follow the federal precedents for "third party" search warrants. *Jean-Charles, supra,* 398 Mass. at 760 n.11. *See also* Commonwealth v. Rodriguez, 378 Mass. 296 (1979) (not shown that officers aware of nexus between items seized and rape).

affidavit.[321] Where an affidavit supports a finding of probable cause for some items listed but not for others, then only those items that are not supported by probable cause will be suppressed because the valid part of the warrant may be deemed severable.[322] However, if none of the items listed is sufficiently supported by the affidavit and any natural inferences from it, the warrant should be considered a general warrant and all items will be suppressed.[323]

b. Nexus to Place

A search warrant is invalid if the underlying facts in the affidavit do not provide a nexus to the place targeted for search.[324] Because the Commonwealth is

[321] *See* Commonwealth v. Cefalo, 381 Mass. 319, 330 (1980). In *Cefalo* the facts set out in the search warrant affidavit indicated that the murder victim had been shot in the head while seated in a car. The court upheld the warrant authorizing the seizure of bloodstained clothing because the affidavit permitted the inference that the suspect's clothing might have been spattered with blood. *See also* Commonwealth v. McRae, 31 Mass. App. Ct. 559, 562 (1991) (proper inference from affidavit that leather jacket and ski hat listed in warrant had been included in victim's description of attacker and failure to expressly mention them in affidavit was result of inadvertence).

[322] Commonwealth v. Lett, 393 Mass. 141, 144–46 (1984). The validity of part of the search warrant may justify the initial intrusion and the prosecution may still attempt to justify the seizure of items outside the scope of the warrant under one of the exceptions to the warrant requirement such as the plain view doctrine, but the burden of proof will shift to the Commonwealth. Commonwealth v. Fudge, 20 Mass. App. Ct. 382, 385 (1985). Commonwealth v. Rodriguez, 378 Mass. 296 (1979).

[323] *See* Commonwealth v. Lett, 393 Mass. 141, 145–46 (1984).

[324] *See* Commonwealth v. Pina, 453 Mass. 438, 443 (2009)(no facts to connect drug . activity to suspect's residence). Compare Commonwealth v. O'Day, 440 Mass. 296, 303-304 (2003)(surveillance of suspect going from home directly to site of sale of drugs sufficient for nexus to residence); Commonwealth v. Donahue, 430 Mass. 710,716 (2000) (sufficient evidence to justify search of murder suspect's home and car); Commonwealth v. Wilson, 427 Mass. 336 (1998) (probable cause to search murder suspect's car, house, mother's house and work area inferable from facts contained in affidavit); Commonwealth v. Pratt, 407 Mass. 647, 662 (1990) (specific information in affidavit gives rise to probable cause to search land behind suspect's residence). *See also* Commonwealth v. Rodriguez, 75 Mass. App.Ct. 290,298-299 (2009) (information from informant that suspect had 'additional quantities' of cocaine packaged on his person enough for probable cause to search residence); Commonwealth v. Santiago, 66 Mass. App.Ct. 515 (2006) (discussing factors relevant to drug business provided in affidavit to support probable cause); Commonwealth v. Lima, 80 Mass. App.Ct. 114 (2011) (applying *Santiago* factors); Commonwealth v. Monteiro 80 Mass. App.Ct. 171 (2011) (adequate nexus);Commonwealth v. Dillon, 79 Mass. App.Ct. 290, 295 (2011) (no nexus to particular residence); Commonwealth v. Smith, 57 Mass. App. Ct. 907, 910 (2003) (suspect came directly from home to controlled buy and went home after another sale – not enough nexus to residence); Commonwealth v. Luthy, 69 Mass. App. Ct. 102 (2007) (suspect returns to home after controlled buys but inference of large quantities of drugs provides sufficient nexus to residence);Commonwealth v. Rise, 50 Mass. App. Ct. 836, 841 (2001) (though target of warrant lived on second floor, affiant's knowledge of additional family members on first floor justified warrant for entire premises). *Compare* Commonwealth v. Olivares, 30 Mass. App. Ct. 596, 600–01 (1991) (probable cause for search of suspect's business but no facts in affidavit to establish probable cause to search home); Commonwealth v. Wright, 15 Mass. App. Ct. 245, 250–51 (1983); Commonwealth v. Kaufman, 381 Mass. 301, 304–05 (1980). *Cf.* Commonwealth v. Anthony, 451 Mass. 59, 71 (2008) (sufficient nexus to suspect's computer by inferences drawn by facts); Commonwealth v. Wade, 64 Mass. App. Ct. 503 (2005) (no evidence that drugs

bound by the four corners of the document, an inadvertent failure to connect information in the affidavit to a specific residence or location will invalidate the warrant even if the affiant had additional sufficient information.[325] However, a court may draw inferences from the facts in the affidavit to make the proper connection to a particular place. For example, the search of a defendant's residence was upheld where there was probable cause to believe that he had committed an armed robbery, that the items sought were connected to the crime, and that the defendant resided at the targeted premises.[326] But information merely establishing that a person committed a crime will not necessarily support an inference of probable cause to search his home.[327]

A court will usually infer from the discovery of drugs in a vehicle or residence that additional drugs will be located there.[328] And because drugs are moveable contraband that can be secreted easily in many places, probable cause to search a residence will tend to support the search of the curtilage and any vehicles on the premises.[329] But whether there is a sufficient nexus between the place to be searched

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would be in car);Commonwealth v. Toole, 389 Mass. 159, 163 (1983) (in context of warrantless search of motor vehicle Commonwealth failed to show "connection between the vehicle and any criminal activity of the defendant").

[325] United States v. Hove, 848 F.2d 137 (9th Cir. 1989) (inadvertent omission from affidavit of information possessed by police linking suspect to place to be searched rendered warrant invalid); Commonwealth v. Perada, 359 Mass. 147 (1971).

[326] Commonwealth v. Cinelli, 389 Mass. 197, 212–13 (1983) (nexus "may be found in 'the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property,' " quoting United States v. Lucarz, 430 F.2d 1051, 1055 (9th Cir. 1970). Commonwealth v. Lima, 80 Mass.App.Ct. 114 (2011) (adequate nexus to suspect's residence relying on affiant's expertise in drug operations). Compare Commonwealth v. Pina, 453 Mass. 438, 443 (2009) (no facts to connect drug activity to suspect's residence). *See also* Commonwealth v. Dillon, 79 Mass. App.Ct. 290,295 (2011) (no nexus to suspect's residences); Commonwealth v. Young, 77 Mass. App. Ct. 381, 387 (2010) (suspect's routine walk from apartment to point of sale established nexus); Commonwealth v. Wilson, 427 Mass. 336, 344 (1998) (affidavit fact that suspect had not gone home after murders and was arrested at mother's house allows for inference he went to mother's house after murders — probable cause to search). *See also*; Commonwealth v. Jones, 424 Mass. 770 (1997) (no reason for suspects to rid themselves of weapons, such as knives, that can be cleaned); Commonwealth v. Allard, 37 Mass. App. Ct 676, 677 (1994) (personal observation of marijuana plants in backyard sufficient for probable cause to search house and shed); Commonwealth v. Burt, 393 Mass. 703, 715–16 (1985) (three of four suspects seen carrying packages into homes; fair inference from pattern to search fourth suspect's home); Commonwealth v. Farrell, 14 Mass. App. Ct. 1017, 1018 (1982) (reasonable inference that items may be in suspect's girlfriend's apartment).

[327] Commonwealth v. Pina, 453 Mass. 438, 443 (2009);Commonwealth v. Cinelli, 389 Mass. 197, 213 (1983). *See* Commonwealth v. Chongarlides, 52 Mass. App. Ct. 366, 371-372 (2001);United States v. Charest, 602 F.2d 1015 (1st Cir. 1979) (probable cause to believe suspect committed murder 18 days prior to application for warrant did not support inference for search at suspect's home for murder weapon).

To the extent that the probable cause that a person committed a crime is dependent on inference rather than direct observation, a court will be reluctant to draw the further inference that the incriminating items will be found in his home. Commonwealth v. Wright, 15 Mass. App. Ct. 245, 250–51 (1983).

[328] *See, e.g.,* Commonwealth v. Saleh, 396 Mass. 406, 412 (1985).

[329] Commonwealth v. Fernandez, 458 Mass. 137,146 (2010) *See* Commonwealth v. Signorine, 404 Mass. 400, 402–05 (1989) (search of car outside residence supported by warrant

and the items sought is nearly always a factual question that will be decided with reference to the court's sense of how most people behave.

4. Timeliness of the Information

A critical element for a valid search warrant is the timeliness of the information contained in the affidavit: is the information provided to the magistrate sufficiently fresh to ensure that probable cause still exists at the time the warrant is issued and executed.[330]

The nature of the items sought is important in determining whether the information is stale. For example, a tip that a body had been buried at a certain location would provide probable cause for a far greater time than would information about an easily removable object.[331]

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for house). *But see* Commonwealth v. Santiago, 410 Mass. 737, 741 (1991) (warrant to search residence does not authorize search of vehicle parked on public street in front of residence — distinguishing *Signorine*).

[330] The "proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." Sgro v. United States, 287 U.S. 206, 210 (1932). "Whether the proof meets this test must be determined by the circumstances of each case." Commonwealth v. Atchue, 393 Mass. 343, 349 (1984).

To the extent that it can be shown that probable cause has eroded during the period prior to execution of the warrant, art. 14 may require suppression without a showing of prejudice based on the *Upton-Sheppard* distinction between the failure of probable cause, in which case exclusion has been applied consistently, and technical violations such as unreasonable delay in executing a warrant *(see infra)*, to which the exclusionary rule may not be applied absent a showing of prejudice.

[331] Drugs are considered a readily disposable commodity whose likely presence in a particular place "dwindles rather quickly with the passage of time." United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972). See Commonwealth v. Dillon, 79 Mass. App.Ct. 290,296-297 (2011) (no timely nexus between drugs and particular location);Commonwealth v. Matias 440 Mass. 784,794 (2004) (information of presence of drugs not stale in light of facts 'freshening' tip). *See also* Commonwealth v. Malone, 24 Mass. App. Ct. 70, 72–74 (1987) (observation of marijuana one or two weeks prior to application not sufficient absent adequate information about quantity or type of use); Commonwealth v. Zayas, 6 Mass. App. Ct. 931 (1978) (affidavit reciting but a single sale of drugs by defendant a month and a half prior to application for warrant held not timely). *Compare* Commonwealth v. McRae, 31 Mass. App. Ct. 559, 563(1991) ("The passage of time from attack to search (twelve days) did not make too remote the inference that the attacker's clothing and knife would be found in his residence. . . "). Commonwealth v. DiStefano, 22 Mass. App. Ct. 535, 540–41 (1986) (neither time gap of two days between latest information and affidavit nor eight day period between information and execution made search stale). Lapse of time is less significant if the statements of the informant suggest "protracted or continuous conduct." Commonwealth v. Alvarez, 422 Mass. 198, 205 (1996) (one-and-a-half-week lapse since observation of drugs not stale because information consistent with large-scale narcotics operation). See *Commonwealth v. Matias*, 440 Mass. 787,794 (2004) (evidence of continuous operation and recent trash pull "freshened" tip); *Commonwealth v. Connolly*, 454 Mass. 808, 818 (2009) (information not stale in view of allegations of ongoing activity); Commonwealth v. Cruz, 430 Mass. 838, 843 (2000) (passage of two weeks from last information to execution of warrant in drug case not excessive in light of "proper inference of ongoing criminal activity"). Commonwealth v. Rodriguez, 49 Mass. App. Ct. 664, 670 (2000) (three days since informant saw heroin but other information about ongoing operation).

The omission from the affidavit of facts concerning the time when the relevant observations were made is a serious defect.[332] However, such omissions can be overcome if the magistrate can properly infer the present existence of probable cause from the facts contained in the affidavit. For example, undated information that weapons were stored in a bus terminal locker was deemed timely because of a proper inference that such lockers are commonly rented only for short periods of time.[333]

Gaps in the timing of observations can also be overcome by reliable information that the items sought are part of an ongoing enterprise, such as the business of selling drugs from a certain location.[334] However, the bare recitation that the facts contained in an affidavit are part of a pattern of ongoing criminal conduct must be carefully examined for reliability to insure that the allegations are not the "mere recitation of rumor."[335]

A valid warrant may be based on the likelihood that a certain object sought by investigators will be in a particular place in the near future.[336] Such "anticipatory search warrants" usually are issued to intercept drugs in transit. If a reliable tip predicts that the contraband is en route to a specific place or person, a warrant may issue based on the likelihood that probable cause will exist at the time the warrant is executed.[337]

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[332] Commonwealth v. Morton, 26 Mass. App. Ct. 949, 950–52 (1988).

[333] Commonwealth v. Atchue, 393 Mass. 343 (1984). *See* Commonwealth v. Jordan, 397 Mass. 494 (1986) (affidavit referred to observations occurring during execution of search warrant issued two hours earlier by same magistrate; failure to specify time of observations not fatal because magistrate permitted to use his own knowledge of ongoing process); Commonwealth v. Javier, 32 Mass. App. Ct. 988 (1992) (affidavit failed to state dates of informant's observations but sufficient ground to infer they were contemporaneous to dated discussions between affiant and informant).

[334] See Commonwealth v. Connolly, 454 Mass. 808,817 (2009) (proper inference of ongoing activity) Commonwealth v. Beliard, 443 Mass. 79, 87 (2004) (six weeks from last report of guns in house but circumstances showed continuous presence of guns there over time – not stale); Commonwealth v. Matias, 440 Mass. 787, 794 (2004) (evidence of continuous drug operation and some information from trash pull "freshened" tip). Compare Commonwealth v. Dillan, 79 Mass. App. Ct. 290, 296-297 (2011) (no evidence to show timely nexus to location).

[335] *See* Commonwealth v. Reddington, 395 Mass. 315, 322–25 (1985) (series of tips alleging pattern of drug sales failed reliability standard). *Compare* Commonwealth v. Wallace, 22 Mass. App. Ct. 247 (1986) (seven-year surveillance bolstered inadequate tips and established probability of ongoing narcotics operation to overcome staleness contention); Commonwealth v. Burt, 393 Mass. 703, 716 (1985) (five-month ongoing criminal operation involving systematic theft of coins from parking meters).

[336] Commonwealth v. Connolly 454 Mass. 808 (2009) Commonwealth v. Staines , 441 Mass. 521,529-530 (2004)

[337] Commonwealth v. Staines, 441 Mass. 521, 529-530 (2004); Commonwealth v. Connolly, 454 Mass. 808,815 (2009) (predicting drugs would be in van); Commonwealth v. Soares, 384 Mass. 149, 153–54 (1981). In Massachusetts, the anticipatory warrant must be executed within seven days of issuance. Commonwealth v. Weeks, 13 Mass. App. Ct. 194, 199 n.7 (1982). The triggering event that allows for the execution of an anticipatory search warrant must be "clear, explicit and narrowly drawn . . . in the affidavit." Commonwealth v. Gauthier, 425 Mass. 37, 44 (1997) (quoting United States v. Moetamedi, 46 F.3d 225, 229 (2d Cir. 1995)). The triggering event must have actually occurred prior to execution of the warrant but need not appear on the face of the warrant. *Gauthier, supra*, 425 Mass. at 44–45 (triggering event did not occur — search invalid). If the warrant to search for contraband is to issue prior to the arrival of the contraband, it "must be on a sure and irreversible course to its destination, and a future search of the destination must be made expressly contingent upon the contraband's

§ 17.8C. PARTICULARITY REQUIREMENT

Both the Fourth Amendment and article 14 require that a search warrant describe with particularity the place to be searched and items to be seized.[338]

1. Items to Be Seized

A warrant will be considered too general if the documents in possession of the executing officers fail to limit sufficiently the discretion of the officers or to give adequate notice to the target of the search of what the police may look for.[339] However, violations of the particularity requirement will not always result in exclusion of the evidence. If the police conduct a search under an insufficiently detailed warrant "as if the warrant had complied with constitutional and statutory requirements," the evidence seized may be admissible.[340] And specific descriptions of items in the warrant are not

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arrival there." United States v. Ricciardelli, 998 F.2d 8, 12 (1st Cir. 1993). But see Commonwealth v. Staines, 441 Mass. 521, 530 n. 7 (2004) ("Sure course" required but maybe just in controlled buy situations). The fourth amendment does not require that the triggering condition be contained in the warrant itself. United States v. Grubbs, 547 U.S. 90, 98 (2006).

[338] The particularity requirement is designed to protect against general warrants by providing the Commonwealth an opportunity to show that the officer's discretion was limited, provide a defendant the opportunity to show that the officer's authority was too broad and to notify the property owner the extent of the officer's authority. Commonwealth v. Gauthier, 425 Mass. 37, 42 (1997). Thus, the officers must have a copy of the warrant in their possession and necessary supporting documents. Groh v. Ramirez, 540 U.S. 366 (2003). But the suspect need not be shown the supporting documents as long as they are present and available at the time of the search. Commonwealth v. Valerio, 449 Mass. 562, 575 (2007). Art. 14 may provide more protection than fourth amendment. Commonwealth v. Guaba, 417 Mass. 746, 753-754 (1994).

[339] See Groh v. Ramirez, 540 U.S. 366 (2003) (warrant failed to provide adequate description and supporting documents not present); Compare Commonwealth v. Valerio, 449 Mass. 562, 575 (2007) (affidavit containing sufficient description not attached to warrant but available at time of search). See also Commonwealth v. McDermott, 448 Mass. 750, 771-772 (2007) (warrant authorizing certain categories of "records" deemed sufficiently specific to allow for search of suspect's computer and disks); Commonwealth v. Rutkowski, 406 Mass. 673 (1990) (warrant to search for stolen guns, jewelry and coins more specifically described in affidavit insufficient in absence of affidavit).

[340] Commonwealth v. Sheppard, 394 Mass. 381, 391 (1985) (no prejudice to defendant from technical violation) Cf. Commonwealth v. Nelson, 460 Mass. 564 (2011) (failure of affiant to personally appear before magistrate). The particularity requirement may be applied less strictly in the context of a search for business records during investigations into ongoing fraudulent practices, because all of the records are likely to be relevant to show the existence of a fraudulent scheme. *See* United States v. Brien, 617 F.2d 299, 307–09 (1st Cir. 1980) (warrant authorizing seizure of most of business records of commodities firm suspected of broad fraudulent scheme justified). *Compare* In re Lafayette Academy, 610 F.2d 1 (1st Cir. 1979) (warrant overboard in authorizing seizure of almost every writing on premises). *Cf.* Commonwealth v. Kenneally, 383 Mass. 269, 271 (1981) (warrant for seizure of all "records and papers" of insurance company upheld because company was operating without license making "everything it did unlawful"); Commonwealth v. Baldwin, 11 Mass. App. Ct. 386, 392–93 (1981) ("stolen motor vehicles" sufficiently specific where vehicle identification numbers could be checked quickly by computer). There, will be greater scrutiny of warrants for items that executing officers must read through or scrutinize to determine the nexus to criminal

essential if the officers could not have ascertained their exact description prior to the application for the warrant.[341] Finally, incriminating items encountered inadvertently during a legal search under a warrant may be seized under the plain-view doctrine.[342]

2. Place to Be Searched

The constitutional and statutory requirements of particularity apply to the place to be searched as well as to the things to be seized.[343] The description of the place must adequately limit the discretion of the executing officers so that they will not invade privacy in an area unintended by the magistrate. The standard is "not whether the description given is technically accurate in every detail but whether it is sufficient to enable an officer to identify the place intended with reasonable effort, and whether there is a likelihood that another place might be mistakenly searched."[344] A vague description in the warrant might be cured by a reference in the warrant to an attached affidavit containing a more detailed description of the premises.[345] And the knowledge of executing officers of the correct location may overcome an ambiguity in the warrant description of the place to be searched.[346]

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activity because of first amendment implications. *See, e.g.,* Stanford v. Texas, 379 U.S. 476 (1965); Commonwealth v. Dane Entertainment Servs., 389 Mass. 902, 906–08 (1983). *Cf.* Commonwealth v. D'Amour, 428 Mass. 725 (1999) (right of access to read letter from suspect to friend under warrant allowing search for "writings relating to gun ownership"). Cf. Commonwealth v. Depina, 75 Mass. App. Ct. 842, 850 (2009) (seizure of cell phone within the scope of warrant in drug case and search of phone justified as incident to arrest).

[341] *See* Commonwealth v. Freiberg, 405 Mass. 282, 298–99 (1989). In *Freiberg* the police had discovered a body with severe head wounds and had probable cause to believe the victim had been brought from an adjoining house. The officers obtained a warrant to search the house for "blood . . . clothing . . . or any other instrument used in crime." The court held that the warrant satisfied the particularity requirement because "the police could not be expected to describe with detailed precision the items to be seized when the exact characteristics of those items were not known to them." *Freiberg, supra,* 405 Mass. at 299. See also Commonwealth v. DePina, 25 Mass. App. Ct. 842,847 (2009) (seizure of cell phone valid as "implement… related to… distribution of cocaine").

[342] *See infra* § 17.9B. But if the search exceeds the scope of the warrant the plain view doctrine will not cure a particularity problem. Commonwealth v. Cruz, 53 Mass. App. Ct. 24, 33-34 (2001).

[343] Commonwealth v. Valerio, 449 Mass. 562 (2007) (warrant description of address misstated but cured by correct description in available affidavit). *See* Commonwealth v. Jung, 420 Mass. 675, 685 (1996) (warrant authorizing search of entire burned dwelling too broad in view of knowledge that fire started in basement); Commonwealth v. Carrasco, 405 Mass. 316, 322–25 (1989); Commonwealth v. Upton, 394 Mass. 363, 370 (1985).

[344] Commonwealth v. Cohen, 6 Mass. App. Ct. 653, 655 (1978). *See* Commonwealth v. Walsh, 409 Mass. 642, 645 (1991) (warrant described house by number, occupant, and description but no address — description sufficient using same standard under art. 14 as that used under Fourth Amendment). See also Commonwealth v. Rodriguez, 49 Mass. App. Ct. 664, 670 (2000) (warrant describing "90 Elm" deemed sufficient to allow entry into "92 Elm"; part of same building).

[345] Commonwealth v. Pope, 354 Mass. 625, 628–29 (1968).

[346] *See* Commonwealth v. Toledo, 66 Mass. App. Ct. 688, 699 (2006) (warrant had wrong address, affidavit right address, officers search right place, warrant not defective);Commonwealth v. Rugaber, 369 Mass. 765 (1976) (warrant description better fitting wrong house did not lead to exclusion where officers executing warrant went to correct house

If the warrant is for an entire apartment building reasonably known to the police as such and probable cause cannot be found for each unit, the warrant is void unless the affidavit shows that all of the apartments were involved in the criminal activity or that the targeted suspect had "the run of the whole structure" as owner or landlord with power to exercise control over the entire premises.[347] Probable cause to search a specific apartment for contraband will support a warrant expressly authorizing the search of common areas to which the defendant had access.[348]

If the police are reasonably unaware that a particular building has multiple units, an otherwise valid search warrant will be upheld even if they search the "wrong" apartment.[349] Police are not required to jeopardize a surveillance by entering the building or by interviewing occupants in order to determine the number or exact location of each apartment in a multiple-unit dwelling.[350] However, a warrant for a single apartment containing a description that partly fits each of two neighboring apartments and leaves discretion to the officers to choose between them will fail the particularity requirement.[351]

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after seeing suspects leave). In *Rugaber* the court stated that "the knowledge of the officers on the scene eliminated any danger that there might be a mistaken search of the premises next door." *Rugaber*, *supra*, 369 Mass. at 769. *See also* Commonwealth v. Clarke, 44 Mass. App. Ct. 502, 508 (1998) (knowledge of surveilling officers cured incorrect date in warrant); Commonwealth v. Gonzalez, 39 Mass. App. Ct. 472, 477 (1995) (address of corner building misidentified in warrant, but officers had sufficient information from warrant to identify and search correct location); Commonwealth v. Singer, 29 Mass. App. Ct. 708, 715 (1991) ("The designation in a search warrant of the name of the occupant of the apartment to be searched is generally sufficient to identify the unit"); Commonwealth v. Cohen, 6 Mass. App. Ct. 653, 654–56 (1978) (ambiguity in description overcome by "common sense" of police in searching only intended apartment); Commonwealth v. Petrone, 17 Mass. App. Ct. 914 (1983) (police observations and new information on scene permitted them to search intended apartment despite inaccuracy in warrant).

Even where the officers went to the wrong door by mistake but acted reasonably in correcting their error, the Appeals Court upheld the search of the correct apartment consistent with the description in the warrant. Commonwealth v. Demogenes, 14 Mass. App. Ct. 577 (1982). This warrant was bolstered by the requirement that the affiant be the one to serve the warrant and confirm the identification of the premises. *But* see Commonwealth v. Douglas, 399 Mass. 141, 143–44 (1987) (search warrant void that described place to be searched solely relying on designated officer to identify premises prior to execution).

[347] See Commonwealth v. Erickson, 14 Mass. App. Ct. 501, 504-507 (1982) (warrant void); Compare Commonwealth v. Dew, 443 Mass. 620, 626 (2005) (suspect had access to all units of multi-unit dwelling)

[348] Commonwealth v. Pierre, 71 Mass. App. Ct. 58, 64 (2008) (warrant to search apartment included authority to search storage locker in basement with corresponding number). See Commonwealth v. Perez, 76 Mass. App. Ct. 439,441 (2010) (area next to foundation beneath first floor window not beyond scope of warrant for residence).

[349] Maryland v. Garrison, 480 U.S. 79 (1987); Commonwealth v. Luna, 410 Mass. 131, 137 (1991) (upholding warrant to search entire house containing two apartments where evidence did not show officers knew it contained two apartments but stating that defendant had right to hearing on issue of officers' knowledge). Commonwealth v. Dominguez, 57 Mass. App. Ct. 606, 611-612 (2003) (officers believed it was single-family and did not have notice it was multi-family dwelling).

[350] Commonwealth v. Carrasco, 405 Mass. 316, 322–25 (1988).

[351] Commonwealth v. Treadwell, 402 Mass. 355 (1988). *Compare* Commonwealth v. Toledo, 66 Mass. App. Ct. 688, 699 (2006) (insufficient addresses between warrant and

Often a warrant will purport to authorize the search of "any person present" at the premises at the time the search is conducted. The validity of such a term hinges on the nature of the probable cause set out in the affidavit. The description is "sufficiently particularized if all persons present were almost surely participants in the illegal activity."[352] The more public the place to be searched, the less likely it is that such a search of persons present will be valid.[353]

The particularity of place requirement has been deemed satisfied where the warrant authorizes the search of a unique container even though the location of the container was unknown at the time the warrant was sought.[354] Such an anticipatory warrant does not violate the particularity requirement as long as the execution of the warrant is limited to such times as when the container is in the possession of the named suspects and in a place in which they have no reasonable expectation of privacy.[355]

§ 17.8D. EXECUTION OF THE SEARCH WARRANT

There are three issues that may affect the validity of the execution of an otherwise valid warrant: (1) the timing of the execution in relation to the issuance of the warrant; (2) whether the executing officers have followed the "knock and announce" requirements; and (3) whether the scope of the search exceeds the limits of the warrant.[356]

1. Time Restrictions

affidavit but officers' knowledge left no reasonable possibility for error);Commonwealth v. Gonzalez, 39 Mass. App. Ct. 472, 477 (1995) (warrant misidentified address but correctly described premises so officers were able to search correct location).

[352] Commonwealth v. Smith, 370 Mass. 335, *cert. denied*, 429 U.S. 944 (1976) (requiring court to assess such provision with "rigid scrutiny" and adopting guidelines to insure that "any person present" is likely to be involved in the illegal activity). Compare Commonwealth v. Perez, 68 Mass. App. Ct. 282, 286 (2007) (language valid for small premises, private home, location of controlled buys following *Smith*) and Commonwealth v. Brown, 68 Mass. App. Ct. 261, 268 (2007) (no evidence that all persons at suspect's mother's house shared in criminal activity).

[353] *See* Commonwealth v. Baharoian, 25 Mass. App. Ct. 35, 38–40 (1988) (unnamed patrons of variety store fronting as gambling spot should not have been subject to search under "any patrons present" phrase). *See also* Ybarra v. Illinois, 444 U.S. 85, 90-96 (1979) (patrons of bar to be searched under warrant 'could not be pat-frisked under authority of warrant).

[354] Commonwealth v. Weeks, 13 Mass. App. Ct. 194 (1982).

[355] Commonwealth v. Weeks, 13 Mass. App. Ct. 194, 198–99 (1982).

[356] Other issues may arise concerning the manner of the execution of the warrant. Thus,where police officers failed to adequately supervise a civilian investigator in the execution of three warrants, the searches were deemed invalid even though the investigator had been authorized to assist the officers. Commonwealth v. Sbordone, 424 Mass. 802, 809 (1997). The manner of the execution of the warrant must be reasonable. Commonwealth v. Garner, 423 Mass. 735, 744–45 (1996) (upholding use of stun grenade tossed into rear bedroom because of "strong grounds to believe the occupants were armed and vicious"). Officers have a right to detain persons on the premises during the execution of the warrant. See Section 17.3 supra. See e.g. *Michigan v. Summers*, 452 U.S. 692, 705 (1981). But see *Commonwealth v. Charros*, 443 Mass. 752, 765 (2005) (no authority to stop and detain persons after they have left premises under fourth amendment or art. 14).

Officers executing a search warrant must do so "within a reasonable time" of the issuance of the warrant.[357] By statute the warrant must be returned within seven days, after which it is void.[358] Even if the warrant is executed within seven days, suppression may be warranted if the officers have unreasonably delayed the execution and the defendant can show "legal prejudice" caused by the delay.[359] If the information contained in the affidavit provides probable cause for only a short period of time, and the execution is delayed beyond that period, suppression should follow under article 14.[360]

Unless the warrant specifically authorizes a nighttime search, the search must be conducted during the day.[361] However, the application need not set out the reasons for the officer's request for a nighttime warrant, nor is the magistrate required to state the cause for issuing such a warrant.[362] With respect to the issuance of nighttime warrants, Massachusetts has adopted the rule for nighttime expressed under Fed. R. Crim. P. 41(h): nighttime begins at 10 P.M. and ends at 6 A.M.[363] If an unauthorized nighttime search has been conducted, the defendant may have to show prejudice before the items seized will be suppressed.[364]

2. Knock and Announce Requirement

Except in limited circumstances, the police "cannot make an unannounced entry into a dwelling house."[365] A "no-knock" warrant may be issued if the officers

[357] Commonwealth v. Cromer, 365 Mass. 519 (1974).

[358] G.L. c. 276, § 3A. Commonwealth v. Cromer, 365 Mass. 519 (1974). Cf. See Commonwealth v. Nelson 460 Mass. 564,572 (2011) ('ministerial' error in warrant return procedure does not void valid warrant).

[359] Commonwealth v. Cromer, 365 Mass. 519, 526 (1974).

[360] *See supra* § 17.8B(4). *But cf.* Commonwealth v. DiStefano, 22 Mass. App. Ct. 535, 540–41 (1986) (neither gap of two days between latest information and affidavit nor eight days between information and execution of warrant rendered warrant stale).

[361] G.L. c. 276, § 2.

[362] *Compare* Commonwealth v. Garcia, 23 Mass. App. Ct. 259, 260-61 (1986) (good cause for nighttime search presumed from fact that magistrate issued such warrant) *with* Commonwealth v. DiStefano, 22 Mass. App. Ct. 535, 541–43 (1986) (good practice for nighttime warrant to be issued only on a request backed up by reasons).

[363] Commonwealth v. Grimshaw, 413 Mass. 73, 81 (1992).

[364] Commonwealth v. Grimshaw, 413 Mass. 73, 77–80 (1992). Commonwealth v. Garcia, 23 Mass. App. Ct. 259, 264 (1986). The *Garcia* court suggested that this would be in the nature of a showing that the police discovered something they would not have found if the search had been conducted in the daytime.

[365] Commonwealth v. Santiago, 452 Mass. 573,574-575 (2008); Commonwealth v. Cundriff, 382 Mass. 137, 139–40 (1980). The "knock and announce" rule is incorporated into the Fourth Amendment requirement of reasonableness. Wilson v. Arkansas, 514 U.S. 927 (1995) (requiring police to justify failure to knock and announce). A violation of the knock and announce rule will not result in exclusion under the fourth amendment. Hudson v. Michigan, 547 U.S. 586 (2006). If the knock and announce would be a "useless gesture," it need not be done. Commonwealth v. Antwine, 417 Mass. 637, 641 (1994) (no requirement to knock and announce if officers are "virtually certain that a person already knows why the police are present"). *Cf.* Commonwealth v. Rivera, 429 Mass. 620, 624 (1999) (knock and announce required before forcible entry — aggressive knocking until suspect answers door does not implicate rule).

"inform the issuing magistrate of the circumstances which give the police probable cause to believe that the evidence. . . will be destroyed."[366] Even if they have a no-knock warrant, the police must make a "threshold reappraisal of the actual threat of the destruction of the evidence" at the scene of the search; if the facts originally justifying the no-knock warrant no longer exist, the officers must knock and announce their purpose prior to entry.[367] This requirement is not satisfied by knocking and simultaneously opening the door and announcing one's identity on stepping inside.[368]

Without prior judicial authorization on the warrant, an unannounced entry may be justified if exigent circumstances have developed after the issuance of the warrant giving rise to probable cause either that the officers' safety would be jeopardized or that evidence would be destroyed if the normal rules are followed. The burden is on the prosecution to demonstrate the exigency and the standard is "strict."[369] Any reasons foran unannounced entry that are known to the police prior to the issuance of the warrant must be presented to the magistrate and cannot be relied on to demonstrate the exigency.[370] The common justifications for a no-knock warrant are (1) police safety, (2)

[366] Commonwealth v. Scalise, 387 Mass. 413, 421 (1982). See Commonwealth v. Silva, 440 Mass. 772, 784 (2004) (probable cause that evidence would be destroyed); Commonwealth v. Jimenez, 438 Mass. 213 (2002) (same); Commonwealth v. Santiago, 452 Mass. 573, 578-579 (2008) (probable cause of threat to officer safety but presence of dog without more not considered sufficient); Commonwealth v. Ortega, 441 Mass. 170 (2004) (sufficient probable cause of fear for safety and probable destruction of evidence); Commonwealth v. Macias, 429 Mass. 698, 701 (1999) (decided under art. 14); Richards v. Wisconsin, 520 U.S. 385 (1997) (reasonable suspicion required under Fourth Amendment); Commonwealth v. Gondola, 28 Mass. App. Ct. 286 (1990) (warrant authorized no-knock entry but no basis shown in affidavit). *Compare* Commonwealth v. Benlein, 27 Mass. App. Ct. 834 (1989) (warrant affidavit described premises as giving open view to arrival of police and likely to allow escape or destruction of narcotics if no-knock warrant not provided).

The decision whether to suppress the evidence seized in a search violating the knock and announce requirement depends on: "(1) The degree to which the violation undermined the governing rule of law . . . and (2) The extent to which exclusion will tend to deter such violations from being repeated in the future. . . ." Commonwealth v. Gomes, 408 Mass. 43, 46 (1990) (evidence suppressed). *Compare* Commonwealth v. Rodriguez, 415 Mass. 447, 451 (1993) (experience of officers in large-scale sophisticated drug operation justified no-knock warrant); Commonwealth v. Lopez, 31 Mass. App. Ct. 547, 550 (1991) (assuming that no-knock provision was improper no suppression pursuant to *Gomes* where officers entered open door and immediately announced identity and purpose). See Commonwealth v. Siano, 52 Mass. App. Ct. 912, 915 (2001) (failure to knock on breezeway door before entering but knock and announce accomplished at kitchen door – no suppression).

[367] Commonwealth v. Santiago, 452 Mass. 573, 574-575 (2008); Commonwealth v. Scalise, 387 Mass. 413, 421 (1982). See Commonwealth v. Jimenez, 438 Mass. 213, 223 (2002) (no basis for no-knock exigency existed at time of execution of no-knock warrant).

[368] Commonwealth v. Manni, 398 Mass. 741, 742 (1986). *See* Commonwealth v. Eller, 66 Mass.App.Ct. 564,573 (2006) (announcing purpose to defendant through screen door, no knock but no suppression) Commonwealth v. Goggin, 412 Mass. 200 (1992) (officer used ruse to get defendant to open door; when defendant tried to close door officer put arm across threshold; no entry until subsequent announcement of purpose); Commonwealth v. Gondola, 28 Mass. App. Ct. 286, 289 (1990) (officer knocked but did not announce until he was inside premises violates rule—suppression required). *Compare* Commonwealth v. Lopez, 31 Mass. App. Ct. 547, 550 (1991) (officer crossed threshold then announced purpose — assuming violation of rule suppression not required).

[369] *See* Commonwealth v. Scalise, 387 Mass. 413, 422 n.8 (1982).

[370] Commonwealth v. Manni, 398 Mass. 741, 742–43 (1986).

the likely destruction of evidence, and (3) the probability that the target of the search will flee.[371] Although drugs are readily disposable, the fact that they are listed in a warrant does not justify by itself the issuance of no-knock warrant.[372] Once the officers have knocked and announced their purpose, they need not wait long for a response before using force to enter. [372.5]

3. Limitations on the Scope of the Search

In executing a search warrant the police are limited by the particular description of the place to be searched and the objects to be seized, addressed *supra.* The executing officers are encouraged to use common sense and observations on the scene to make sure that the correct location is searched and no others.[373] The lawful search of fixed premises "generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search."[374] For example, if the warrant is for a particular residence, the scope of the search includes any automobile owned or controlled by the owner of the residence and located within the curtilage of the residence at the time of the search.[375]

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[371] Commonwealth v. Santiago, 452 Mass. 573 (2008) (adequate evidence of threat to safety); Commonwealth v. Silva, 440 Mass. 772, 784 (2004) (probable cause to believe evidence would be destroyed);Commonwealth v. Scalise, 387 Mass. 413, 422–23 (1982). Commonwealth v. Cundriff, 382 Mass. 137, 140–48 (1980). *Cf.* Commonwealth v. Hoffman, 385 Mass. 122 (1982) (no showing defendant was armed or poised to flee or drugs were about to be destroyed and warrantless entry to arrest held invalid).

[372] Commonwealth v. Santiago, 452 Mass.573 (2008); Commonwealth v. Macias, 429 Mass. 698, 702 (1999) (rejecting proffered exception and finding no adequate facts to dispense with requirement); Commonwealth v. Scalise, 387 Mass. 413, 417 (1982). Commonwealth v. Chausse, 30 Mass. App. Ct. 956, 957 (1991) (sufficient affidavit containing information about "easily disposable" quantities plus evidence defendant was "probably aware that he [was] under surveillance"). *See also* Richard v. Wisconsin, 520 U.S. 385 (1997) (rejecting blanket exception to knock and announce requirement in felony drug cases); Commonwealth v. Jimenez, 438 Mass. 213, 219-221 (2002) (rejecting *per* se exception to knock and announce requirement in felony drug cases, but finding sufficient facts of likely destruction of evidence for no-knock warrant). *Cf.* Commonwealth v. DiStefano, 22 Mass. App. Ct. 535, 541–42 (1986) (no-knock entry justified where defendant was known to have previously possessed firearm, had dobermans on premises, had history of being fugitive, and was dealing drugs "susceptible of disposal down a toilet or drain").

[372.5] See United States v. Banks, 540 U.S. 31 (2003) (after knock and announce officers waited 15-20 seconds to enter by force – deemed reasonable); Commonwealth v. Bush, 71 Mass. App. Ct. 130, 136 (2008) (reasonable ground to use force after 5 seconds).

[373] Commonwealth v. Petrone, 17 Mass. App. Ct. 914 (1983); Commonwealth v. Demogenes, 14 Mass. App. Ct. 577 (1982); Commonwealth v. Cohen, 6 Mass. App. Ct. 653, 654–56 (1978); Commonwealth v. Rugaber, 369 Mass. 765 (1976]; Commonwealth v. Pope, 354 Mass. 625, 628–29 (1968).

[374] Commonwealth v. Signorine, 404 Mass. 400, 403 (1989). See Commonwealth v. Perez, 76 Mass. App. Ct. 439,441 (2010) (search properly extended to freshly dug area next to location of subject residence); Commonwealth v. Singer, 29 Mass. App. Ct. 708, 715 (1991) (fact that defendant had key to locked room in cellar justified extending search there).

[375] The extent of the curtilage of the residence is determined by a consideration of four factors: "(1) the proximity of the area to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the

Within the area targeted for the search the police may look anywhere that the item plausibly may be concealed.[376] Thus the nature of the object sought determines the appropriate scope of the search.[377] Once the items described in the warrant have been found, the authority to search under the warrant is terminated.[378] Items not listed on the search warrant may be seized under the plain-view doctrine or some other exception to the warrant requirement,[379] with the burden on the Commonwealth to demonstrate the legality of the search.[380]

4. Return of the Warrant

G.L. c. 276, § 3A, requires that a search warrant be returned within seven days to the court that issued the warrant by the officer who received it. The return shall include an inventory of the items seized pursuant to the warrant.[381] The failure to return the warrant within seven days has been held to be ministerial error, which will not vitiate an otherwise valid search.[382] So too, when the return was signed by an officer

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steps taken by the resident to protect the area from observations by people passing by." Commonwealth v. McCarthy, 428 Mass. 871, 875 (1999) (citing United States v. Dunn, 480 U.S. 294, 301 (1987). See Commonwealth v. Signorine, 404 Mass. 400, 406 (1989) (automobile in suspect's driveway deemed within curtilage); Commonwealth v. Perez, 76 Mass. App. Ct. 439 (2010) (ground area next to foundation and beneath first-floor window deemed within curtilage of house); Commonwealth v. Wallace, 67 Mass. App. Ct. 901, 903 (2006) (warrant for second floor apartment included authority to search attic area only accessible to tenants of that apartment); Commonwealth v. Pacheco, 21 Mass. App. Ct. 565, 567-568 (1986) (warrant for apartment and cellar area deemed to include common areas in cellar not within privacy or control of other tenants; Commonwealth v. Fernandez, 458 Mass. 137, 146-147 (2010) (car parked in driveway next to suspect's apartment deemed within curtilage). Compare Commonwealth v. McCarthy, supra, at 875-877 (1999) (visitor's space some distance from apartment building not within curtilage of defendant's apartment); Commonwealth v. Hall, 366 Mass. 790, 794-795 (1975) (warrant to search one apartment in building owned by suspect did not authorize search of separate empty apartment)..

[376] Commonwealth v. Gabbidon, 17 Mass. App. Ct. 525, 532–33 (1984) (examination of photo album justified during search for small cutting blade); Commonwealth v. LaBelle, 15 Mass. App. Ct. 175, 183 (1983).

[377] Commonwealth v. DePina, 75 Mass. App. Ct. 842,847 (2009); Commonwealth v. Wills, 398 Mass. 768, 774–75 (1986); Commonwealth v. Hawkins, 361 Mass. 384, 387 (1972) (police justified in looking in envelope during search for drugs).

[378] *See* Commonwealth v. Balicki, 436 Mass. 1, 12-13 (2002) (videotaping and photographing of inside of suspect's home converted search under warrant into general search); *See also* Commonwealth v. Wood, 389 Mass. 552, 558 (1983).

[379] *See, e.g.* Commonwealth v. Tyree, 455 Mass. 676,694 (2010); Commonwealth v. Lett, 393 Mass. 141, 146–48 (1984). *Compare* Commonwealth v. Wojcik, 358 Mass. 623 (1971) (seizure invalid where officers' only basis for suspecting items were stolen was name of major airline printed on each item); Commonwealth v. Hawkins, 362 Mass. 384 (1972) (seizure of bonds invalid where they had names different from defendant's in that further investigation was necessary to establish them as stolen). See also Commonwealth v. Sleich-Brodeur, 457 Mass. 300,306-308 (2010) (officiers justified in seizing documents after cursory reading).

[380] Commonwealth v. Rodriguez, 378 Mass. 296 (1979).

[381] *See* Commonwealth v. Ierardi, 17 Mass. App. Ct. 297, 302 (1983) (evidence seized from car trunk but omitted from return of warrant excluded).

[382] Commonwealth v. Cromer, 365 Mass. 519 (1974). Failure to return warrant because it is lost may result in suppression unless sufficient secondary sources available.

who was not present at the search, the evidence has been deemed admissible in the absence of a showing that the search had been conducted improperly or that the inventory was inaccurate.[383]

§ 17.8E. MISREPRESENTATIONS IN THE SEARCH WARRANT AFFIDAVIT

1. Generally

False statements contained in a warrant affidavit that were necessary to a showing of probable cause will vitiate the warrant if the defendant can show that they were made knowingly or with reckless disregard for the truth.[384] If the defendant makes a substantial preliminary showing, the Fourth Amendment requires a hearing at which the defendant must show by a preponderance of the evidence that the false statement was made knowingly or recklessly. If so, the court will excise the statement and determine whether the rest of the affidavit will support the showing of probable cause.[385] Police misrepresentations may warrant dismissal of the charges if the defendant can show that such misconduct prejudiced the defendant by causing irremediable harm to her opportunity for a fair trial.[386] Even without a showing of prejudice, egregious deliberate and intentional misconduct could result in dismissal of the indictment.[387]

The Massachusetts courts have followed the Fourth Amendment requirements and have declined to extend the rationale under article 14 to misrepresentations in the

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Commonwealth v. Ocasio, 434 Mass. 1, 7-8 (2001) (warrant lost but supporting documents available).

[383] Commonwealth v. Aldrich, 23 Mass. App. Ct. 157, 162, 161–63 (1986). *See* Commonwealth v. Chandler, 29 Mass. App. Ct. 571, 579 (1990) (officer who signed return as having executed search had not done so — error harmless).

[384] Franks v. Delaware, 438 U.S. 154, 155–56 (1978). *See* generally Commonwealth v. Long, 454 Mass.542,552 (2009) (outlining procedure). Material omissions must also be considered. Id.

[385] *See, e.g.,* Commonwealth v. Ramos, 72 Mass. App.Ct. 773,780 (2008) (upholding motion to suppress after false statements and excised omissions inserted). *Compare* Commonwealth v. Bennett, 414 Mass. 269 (1993) (probable cause without tainted information). Omissions as well as statements may violate Franks. *See* Ramos, *supra* at 778. (finding as false both statements of affiant and omissions about drug-detecting dogs). *See also* Commonwealth v. Long, 454 Mass. 542,553 (2009) (omitted information must be added as well as false information deleted).

[386] *See* Commonwealth v. Lewin, 405 Mass. 566 (1989) (recognizing that prosecutonal misconduct including acts of police officers could cause prejudice but finding no prejudice resulting from knowingly false application for search warrant). *Cf.* Commonwealth v. Hernandez, 421 Mass. 272, 276 (1995) (refusal of prosecution at trial to disclose location from which observations of drug sale were made may warrant dismissal if prejudice can be shown). The failure to return the warrant at all, because it is lost, is not ministerial, and may require suppression, unless a secondary source can establish "all the terms of the warrant." Commonwealth v. Ocasio, 434 Mass. 1, 7-8 (2001) (original warrant lost without serious fault of Commonwealth and original applications and affidavit were available to prove contents of warrant).

[387] *See* Commonwealth v. Lewin, 405 Mass. 566, 583, 587 (1989) (finding perjury of police officers outrageous but concluding that "repetition of such conduct by others will be sufficiently discouraged without dismissal of the charges").

affidavit that were negligently made.[388] However, article 14 might require suppression of all evidence obtained pursuant to an affidavit in which an officer made deliberate misrepresentations under oath whether or not probable cause exists in the remaining statements of the affidavit.[389]

2. Obtaining a Hearing

a. Substantial Preliminary Showing Obtains Hearing by Right

In nearly every case the most difficult hurdle in attacking the affidavit is to obtain a hearing in which the affiant and other witnesses can be examined under oath. The motion for the hearing should include affidavits or other evidence that challenge the facts contained in the affidavit together with a memorandum demonstrating that, without the challenged facts, probable cause is lacking.[390] Under *Franks v. Delaware*, it

[388] Commonwealth v. Nine Hundred & Ninety Two Dollars, 383 Mass. 764, 771 (1981).

[389] *See* Commonwealth v. Bennett, 414 Mass. 269, 272 (1993) (suggesting same but noting no deliberate misrepresentations); Commonwealth v. Ramos, 402 Mass. 209, 215 n.4 (1988); Commonwealth v. Nine Hundred & Ninety Two Dollars, *supra*, at 768.

[390] *See, e.g.*, Commonwealth v. Long, 454 Mass. 542,552 (2009) (defendant's burden "not a light one"); Commonwealth v. Colon, 449 Mass. 207, 224 (2007) (no "substantial preliminary showing" in record);Commonwealth v. Blake, 413 Mass. 823, 826 n.5 (1992) (use of certain words not accurate but "not misleading"; no *Franks* hearing required); Commonwealth v. Pignato, 31 Mass. App. Ct. 907, 908 (1991) (affidavit from person claiming to have been the confidential informant contradicting material representations in warrant affidavit constituted "substantial preliminary showing"); Commonwealth v. Honneus, 390 Mass. 136, 142–43 (1983) (defendant "by affidavit, made a 'substantial preliminary showing,' as required by *Franks"*). *Honneus*, however, illustrates the imperfections of the *Franks* procedure. The affidavit stated that the informant, who obtained the drugs from a named person, quoted his seller as saying he got the drugs from the defendant. At the hearing the affiant testified only that the informant concluded his seller had gotten the drugs from the defendant, not that the seller actually told him so. The S.J.C. upheld the suppression of the evidence by inferring that the trial court concluded that the misrepresentation was intentional under *Franks v. Delaware*. However, this is a case where suppression was called for but where the misrepresentation appears to have been at most negligent.

Case law in this area reads like a catalogue of failed offers of proof. *See, e.g.*, Commonwealth v. Nine Hundred & Ninety Two Dollars, 383 Mass. 764 (1981) (statements by informants not so transparently wrong as to establish preliminary showing of affiant's recklessness); Commonwealth v. Ramos, 402 Mass. 209 (1988) (defendant's affidavit challenging affiant's account does not satisfy threshold showing requirement); Commonwealth v. Valdez, 402 Mass. 65, 68 (1988] (erroneous dates in affidavit deemed typographical not rising above negligence); Commonwealth v. Carpenter, 22 Mass. App. Ct. 911 (1986) (fact that affiant had been indicted for felonious theft of cocaine was insufficient); Commonwealth v. Douzanis, 384 Mass, 434 (1981) (bare assertion that affiant fabricated informant or informant's report insufficient); Commonwealth v. Padilla, 42 Mass. App. Ct. 67, 73 (1997) (alleged misrepresentations in crediting one informant with prior help to police for successful searches that relied in fact on another informant — mistake seen as negligent); Commonwealth v. Singer, 29 Mass. App. Ct. 708, 714 (1991) (number and variety of affidavits based on information from one informant insufficient to call for *Franks* hearing on whether informant existed). *Compare* Commonwealth v. Ramirez, 416 Mass. 41, 53 (1993) (where officer relied on same information in 71 warrant affidavits and only 60 percent of warrants led to seizure of contraband, sufficient preliminary showing of false statement to justify *Franks* hearing). Commonwealth v. Ramirez, 49 Mass. App. Ct. 257 (2000) (after remand for *Franks* hearing no misrepresentation in affidavit

is the affiant's state of mind, not that of the informant, that bears on the validity of the affidavit.[391] However, to the extent that the false information was provided to the affiant by other police sources, the court will examine such misrepresentations.[392] The bare assertion that the affiant fabricated an informant's report or the very existence of any informant is not sufficient to require a hearing.[393]

The Supreme Judicial Court has held that a pre-*Franks* in camera proceeding is required "where the defendant by affidavit asserts facts which cast a reasonable doubt on the veracity of material representations made by the affiant concerning a confidential informant."[394] The purpose of the in camera proceeding is to allow the judge to explore the allegations by examining the affiant and perhaps the informant without disclosing the informant's identity to decide if a substantive preliminary showing has been made.[395]

b. Discretionary Franks-type Hearing

Although the Supreme Judicial Court has been reluctant to hold that a *Franks* hearing should have been granted as a matter of constitutional right in the cases that

found). But see Commonwealth v. Long, 454 Mass. 542, 558 (2009) (affirming suppression after voiding of warrant); Commonwealth v. Ramos, 72 Mass. App. Ct. 773,780 (2008) (same).

[391] Franks v. Delaware, 438 U.S. 154, 171 (1978).

[392] See Commonwealth v. Nine Hundred & Ninety Two Dollars, 383 Mass. 764, 772 n.8 (1981) (leaving open question of whether reckless or intentional misstatements by paid informants will be subject to judicial scrutiny). *Cf.* Commonwealth v. Luce, 34 Mass. App. Ct. 105, 111 (1993) (pre-*Franks* in camera questioning of federal agent who provided information to affiant).

[393] Commonwealth v. Douzanis, 384 Mass. 434, 439 (1981).

[394] Commonwealth v. Amral, 407 Mass. 511, 522 (1990). *Compare* Commonwealth v. Padilla, 42 Mass. App. Ct. 67, 73 (1997) (alleged misrepresentations in crediting one informant with assistance to police for searches that relied on another — no substantial miscarriage of justice in failing to provide *Amral* hearing); Commonwealth v. Mebane, 33 Mass. App. Ct. 941 (1992) (no *Amral* hearing for alleged misstatement of expected arrival time of train in which defendant was traveling).

[395] Commonwealth v. Amral, 407 Mass. 511, 522–23 (1990). *See* Commonwealth v. DeMatos, 77 Mass. App. Ct. 727, 740 (2010) (discrepancies adequately explained without necessity of *Amral* hearing);Commonwealth v. Singer, 29 Mass. App. Ct. 708, 714 (1991) (number and variety of affidavits based on information from one informant does not warrant even *Amral* in camera hearing). The *Amral* hearing enables the judge "to make an informed decision regarding the defendant's challenge to the affidavit while upholding the government's interest against unwarranted disclosure of its informant's identity." *Amral, supra,* 407 Mass. at 521. To ensure protection of the informant's identity, the judge may exclude defense counsel from the in camera proceeding. *Amral, supra,* 407 Mass. at 525. *But cf.* Commonwealth v. Crawford, 410 Mass. 75, 79–80 n.2 (1991) (defense counsel has right to be present at in camera hearing to determine sufficiency of informant's tip resulting in warrantless arrest *not* for purpose of deciding whether there was substantial preliminary showing of false statements in affidavit); Commonwealth v. Crawford, 417 Mass. 40 (1994) (reversing suppression order on remand based on credibility of officer's open court testimony). See also Commonwealth v. Alcantara, 53 Mass. App. Ct. 591, 597 (2002) (hearing conducted with cross examination of affiant but no *in camera* hearing for disclosure to court of informant's identity); Commonwealth v. DeMatos, 77 Mass. App. Ct. 727, 739 (2010) (no *Amral* hearing required).

have come before it, it has consistently endorsed the idea that the trial court may permit such a hearing as a matter of discretion.[396]

Investigation and discovery are the chief methods of obtaining the facts necessary to make a threshold showing. One area of discovery would be affidavits filed in other criminal cases by the same affiant, which could reveal a pattern casting doubt on the affiant's veracity. A motion to discover the promises or inducements made to anonymous informants may lead to evidence establishing the informant as a state agent.[397] Material omissions of facts known to the affiant should also be offered as evidence both of the misrepresentation and of the mens rea of the affiant.[398]

3. The *Franks* Hearing

If the defendant is granted a *Franks* hearing, whether as a matter of right or discretion, she must prove by a preponderance of the evidence[399] three elements: (1) misrepresentation of facts or material omissions of fact in the warrant affidavit by the affiant; (2) made with knowledge of their falsity or reckless disregard for the truth; and (3) material to the showing of probable cause in the affidavit.[400] Materiality depends on whether, after excising the misrepresentations, the court can still glean sufficient probable cause from the affidavit.[401] If not, the result will be suppression.

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[396] Commonwealth v. Douzanis, 384 Mass. 434, 439–43 (1981). Commonwealth v. Long, 454 Mass. 542,552 n.12 (2009).

[397] *See* Commonwealth v. Brzezinski, 405 Mass. 401, 405–06 & n.3 (1989) (informant held not to be state agent due to minimal police involvement in his actions but underlying question left unresolved). *See also* Rosenthal & Zorza, Veracity Challenges to Search Warrant Affidavits, Committee for Public Counsel Training Handout, No. 79B (1989).

[398] See Commonwealth v. Long, 454 Mass. 542,552 (2009) (omissions creating misimpression of facts) *Cf.* United States v. Paradis, 802 F.2d 553, 558 (1st Cir. 1986) (omission of informant's record and other inaccuracies may have justified *Franks* hearing but for existence of independent probable cause); Commonwealth v. Corriveau, 396 Mass. 319 (1985) (cited omissions not deemed significant); United States v. Stanert, 762 F.2d 775 (9th Cir. 1985). An affidavit may be insufficient when it omits facts adverse to the warrant application. People v. Kurland, 28 Cal. 3d 376, 384 (1980). However there is no necessity for including investigation efforts that were not successful. *See* Commonwealth v. Luce, 34 Mass. App. Ct. 105, 111 (1993) (unsuccessful attempts to get defendant to sell drugs not included in warrant affidavit).

[399] Franks v. Delaware, 438 U.S. 154, 155–56 (1978).

[400] *See, e.g.,* Commonwealth v. Ramos, 72 Mass. App. Ct. 773, 779 (2008) (misstatements and material omissions of fact deprived affidavit of probable cause); Commonwealth v. Long, 454 Mass. 542,552 (2009) (same); Commonwealth v. Brzezinski, 405 Mass. 401, 406–08 (1989) (defendant proves two of three but neglects to prove affiant's state of mind or to seek finding on that issue). *See also* Commonwealth v. Pratt, 407 Mass. 647 (1990) (allegation in affidavit that affiant had not previously submitted same application was not false nor in bad faith when affiant added new allegations to old affidavit); Commonwealth v. Valdez, 402 Mass. 65, 69–71 (1988) (discretionary *Franks* hearing proper but proof of negligent misrepresentations only and probable-cause independent of challenged statements).

[401] Commonwealth v. Long, 454 Mass. 542, 552 (2009); Commonwealth v. Honneus, 390 Mass. 136, 142 (1983); Commonwealth v. Dion, 31 Mass. App. Ct. 168, 173 (1991). It is still an open question whether article 14 would require suppression despite a finding of independent probable cause if a deliberate misrepresentation was established. Commonwealth v. Ramos, 402 Mass. 209, 215 n.4 (1988).

§ 17.9 WARRANTLESS SEARCHES

The Fourth Amendment and article 14 guarantee the right to be free from unreasonable searches and seizures. A search is presumed to be unreasonable unless it is conducted under the authority of a valid warrant supported by a showing of probable cause.[402] However there are several exceptions to the warrant requirement that have been characterized as "specifically established and well delineated."[403] In each case involving a warrantless search, the burden is on the prosecution to show that the search falls within one of the exceptions.[404]

§ 17.9A. CONSENT

The police may conduct a search without a warrant or probable cause if they have the consent of a person who has lawful authority over the area to be searched.[405] Among the more frequent issues litigated in consent cases are whether the consent was unequivocal and voluntary, the scope of the consent given, and whether a third party had sufficient authority to consent to a search of an area in which the suspect had a privacy interest.

1. Consent Must Be Unequivocal

The mere fact that a person does not object to a search is not sufficient to establish consent.[406] Even actions that appear to indicate consent will not necessarily justify a search if they do not unequivocally show a willingness to allow the search.[407]

2. Scope of a Consensual Search

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[402] *See* Katz v. United States, 389 U.S. 347, 357 (1967).

[403] Katz v. United States, 389 U.S. 347 (1967). *But see* Commonwealth v. Skea, 18 Mass. App. Ct. 685, 692–93 (1984) *(Katz* principle does not mean that "there exists a frozen list of exceptions into which any warrantless search must fit as a condition of validity"; thus search of suspect's person with probable cause and exigent circumstances justified).

[404] Commonwealth v. Antobenedetto, 366 Mass. 51, 57 (1974). See e.g., Commonwealth v. Lopez, 458 Mass. 383, 393 (2010) (burden on government to show consent by one with authority to do so).

[405] See e.g. United States v. Matlock, 415 U.S. 164, 171 (1974); Commonwealth v. Tyree, 455 Mass. 676, 696-697 (2010) (owner of condominium consents to search)

[406] *See* Bumper v. North Carolina, 391 U.S. 543, 549 (1968) (mere "acquiescence to a claim of lawful authority" not sufficient to establish voluntary consent).

[407] Gestures that are ambiguous do not allow for inference of consent. *See, e.g.* Commonwealth v. Carr 458 Mass.295,303 (2010) (coercive environment and ambiguous response); Commonwealth v. Rogers, 444 Mass. 234, 240-241 (2005) (stepping back and pointing into kitchen in response to police question not sufficient to show consent to enter); Commonwealth v. McGrath, 365 Mass. 631, 631–32 (1974) (drug suspect who spread out his hands in front of a police officer and said "I'm clean this time" was held not to have consented to the search of his person). *Compare* Commonwealth v. Cantalupo, 380 Mass. 173, 177–78 (1980) (suspect who opened jacket and said "search me" held to have consented to search of person); *Cf.* Commonwealth v. Marmolejos, 35 Mass. App. Ct. 1, 4 (1993) (undercover officer had consent to first entry, and ambiguous testimony on consent to second entry deemed sufficient).

Similarly, the proper scope of a consensual search is no greater than the consent given.[408] Thus the consent to search a house does not authorize tearing down the walls,[409] and the consent to search for drugs does not confer authority to examine documents.[410] If the scope of the consent is not explicit, the court must determine "whether, in light of all the circumstances, a man of reasonable caution would be warranted in the belief that some limitation was intended by the consent given."[411]

3. Voluntariness of Consent

The consent to a search must be voluntary to be constitutional.[412] That is, it must be freely given and not the product of coercion or deception or the "mere acquiescence to a claim of lawful authority."[413] Because a consensual search is an exception to the Fourth Amendment warrant requirement, the prosecution bears the burden of proving that the consent was voluntary.[414] However, a claim that the consent

[408] *See, e.g.* Florida v. Jimenez, 500 U.S. 248 (1991) (consent to search automobile includes search of closed but unlocked container in trunk). The standard for assessing the scope of the consent is one of objective reasonableness. Id at 251. See also Commonwealth v. Gaynor, 443 Mass. 245, 255 (2005) (consent for blood sample reasonably extended to DNA); Commonwealth v. Farnsworth, 76 Mass. App. Ct. 87, 94 (2010) (consent to search home included top-floor bedroom where drugs and grow equipment found). Compare Commonwealth v. Thomas, 67 Mass. App Ct. 738, 743 (2006) (request by arrested suspect that police lock door did not justify extensive search for key into all areas of apartment).

[409] *See* State v. Koucoules, 343 A.2d 860, 867 (Me. 1974) (dicta).

[410] *See* United States v. Dichiarinte, 445 F.2d 126, 130 (7th Cir. 1971) (characterizing examination of documents as "greater intrusion into defendant's privacy than he had authorized").

[411] Commonwealth v. Cantalupo, 380 Mass. 173, 178 (1982). In Cantalupo, the suspect confronted the officers by opening his jacket and saying "search me." The court upheld the search of the suspect's shoe, emphasizing that the suspect made no objection during the course of the search. *See* Commonwealth v. Sanna, 424 Mass. 92, 98 (1997) (father's words and actions did not limit scope of consent to enter to speak with suspect, following *Cantalupo*); Commonwealth v. Podgurski, 44 Mass. App. Ct. 929, 931 (1998) (wife's consent extended to bedroom search for husband's guns). See *Commonwealth v. Caputo*, 439 Mass. 153 (2003) (consent to officers' entry by saying "Come on in" expressed no limit on how long they could remain); Commonwealth v. Hinds, 437 Mass. 54, 60 (2002) (defendant's consent to search of home computer network for 'electronic mail' allowed for scrolling of his directory because consent not limited to narrower method). See also Commonwealth v. Farnsworth, 76 Mass. App.Ct. 87, 98 (2010) (no limitation on scope of search for drugs).

[412] *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent to search car trunk was voluntary regardless of whether consenter was aware of right to refuse). See also Commonwealth v. Rogers, 444 Mass. 234,237-238 (2005) (consent to enter home).

[413] Bumper v. North Carolina, 391 U.S. 543, 548 (1968). *See also* Commonwealth v. Carr, 458 Mass.295,303 (2010) (equivocal response to intimidating request to search);*Commonwealth v. Rogers*, 444 Mass. 234, 243 (2005) (stepping back at arrival of officer and pointing toward kitchen in response to question not deemed voluntary). Compare *Commonwealth v. Hill*, 57 Mass. App. Ct. 240 (2003) (suspect "stepped aside" and allowed officers to enter deemed voluntary under circumstances). But see Commonwealth v. Rogers, 444 Mass. 234,241 (2005) (stepping back and pointing toward kitchen in response to inquiry of location of suspect).

[414] Commonwealth v. Lopez, 458 Mass. 383, 392 (2010); Tyree v. Keane, 401 Mass. 1, 8 (1987); Commonwealth v. Mendes, 361 Mass. 507, 512–13 (1972).

was not voluntary will be "carefully scrutinized to avoid giving [the defendant] an advantage."[415]

Although by consenting an individual gives up her constitutional right to privacy, there is no constitutional requirement that she be advised or aware of her right to refuse consent.[416] The Supreme Court has held that voluntariness is to be determined from the totality of the circumstances.[417] Unawareness of the right to refuse is merely a factor to be weighed in assessing the totality of the circumstances.[418]

All of the facts surrounding a claim of consent are relevant and no one factor is determinative. Perhaps most important in assessing voluntariness is the presence or absence of *coercion,* express or implied.[419] The fact that the consenting party has been arrested is not of itself sufficient evidence of coercion,[420] but the circumstances of the arrest may be so coercive as to invalidate the consent as involuntary.[421]

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[415] Commonwealth v. Harmond, 376 Mass. 557, 562 (1978).

[416] Commonwealth v. Walker, 370 Mass. 548, 555, *cert. denied,* 429 U.S. 943 (1976); Schneckloth v. Bustamonte, 412 U.S. 218 (1973). *See also* Ohio v. Robinette, 519 U.S. 33 (1996) (consent to search car after driver stopped for speeding; no other violations; no necessity to advise motorist of right not to consent).

[417] Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973); United States v. Drayton, 536 U.S. 194 (2002) (three officers board bus during scheduled stop and seek consent of passengers to search – consent deemed voluntary). *See also* Commonwealth v. Aguiar, 370 Mass. 490, 496 (1976). See Commonwealth v. Carr, 458 Mass. 295, 302 (2010) (setting out factors).

[418] *See, e.g*. United States v. Drayton, 536 U.S. 194, 207 (2002) (consent to search passengers of bus at scheduled stop after local police boarded it – deemed voluntary); Commonwealth v. Cantalupo, 380 Mass. 173 (1980); Commonwealth v. Harmond, 376 Mass. 557, 562 (1978); Commonwealth v. Walker, 370 Mass. 548, 554–55, *cert. denied,* 429 U.S. 943 (1976). See also Commonwealth v. Carr, 16 Mass.App.Ct. 41,52 (2009); Commonwealth v. Wallace, 70 Mass.App.Ct. 757, 762-764 (2007)

[419] See Commonwealth v. Carr, 458 Mass. 295,302 (2010) (factors in considering voluntariness). *See also* Commonwealth v. Rogers, 444 Mass. 234, 247 (2005) (recognizing subtle coercion which can arise in police-citizen encounters) Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973) ("no matter how subtly the coercion was applied the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed"). *Compare* Commonwealth v. Harmond, 376 Mass. 557, 559 (1978) (several police officers present in murder suspect's apartment with guns drawn at the time handcuffed suspect agreed to search of footlocker for murder weapon; court upheld trial court's finding that consent not voluntary) *with* Commonwealth v. Walker, 370 Mass. 548, 554–56 (1976) (several officers surrounded apartment where suspects were located, demanded entry, and attempted to enter with passkey when tenant let them in; court upheld trial court's finding of voluntary consent emphasizing tenant's fear caused by suspects and not police). Commonwealth v. Greenberg, 34 Mass. App. Ct. 197 (1993) (16-year-old boy not in custody questioned in presence of father by four officers at police station without coercion; providing clothing to police consensual).

[420] *See* United States v. Watson, 423 U.S. 411, 424 (1976). *See also* Commonwealth v. Franco, 419 Mass. 635, 642 (1995) (consent following arrest deemed voluntary); Commonwealth v. Aguiar, 370 Mass. 490, 497 (1976) ("The fact that a defendant was under arrest suggests that any consent was not voluntary, but that fact is not decisive and may be overridden by other circumstances"); Commonwealth v. LaBriola, 370 Mass. 366, 367 (1976) (valid consent to open briefcase after defendant was in custody at police station). A question still unresolved in Massachusetts is whether a consent given by a person in custody is testimonial and therefore subject to the requirements of Miranda v. Arizona, 384 U.S. 436

Police deception may also contribute to a finding of involuntariness.[422] If a police officer falsely claims to have a search warrant or lies to the suspect about the purpose of a requested search, the deception may be sufficiently coercive to vitiate the consent.[423] Some courts have focused on the difference between the threat to "seek" a warrant and the threat to "obtain" one,[424] but the Massachusetts courts do not appear to be receptive to the distinction.[425]

Deception as to the identity of an undercover police officer or agent has been condoned at least to the extent that such deception makes possible an entry into otherwise private areas.[426]

(1966). *See* Commonwealth v. Barnes, 20 Mass. App. 748 (1985) (raising but not resolving issue).

[421] *See, e.g.,* Commonwealth v. Carr, 458 Mass. 295,303 (2010) (presence of armed officers and commanding tone of encounter); Commonwealth v. Heath, 12 Mass. App. Ct. 677 (1982) (suspect alone, late at night, arrested and handcuffed, possibly intoxicated, after persistent requests for trunk key by officer; trial court's finding of consent to search trunk reversed); Commonwealth v. Beasley, 12 Mass. App. Ct. 62 (1982) (suspect arrested prior to alleged consent to search car trunk guarded by two officers, not advised of right to refuse; trial court's finding of no voluntary consent upheld); Commonwealth v. Harmond, 376 Mass. 557 (1978) (murder suspect was arrested with several officers present, some displaying weapons; court upholds lower court finding of involuntariness).

[422] See Commonwealth v. Gaynor, 443 Mass. 245 (2005) (recognizing that consent can be negated by reliance on police misrepresentations but not present here).

[423] *Cf.* Bumper v. North Carolina, 391 U.S. 543 (1968) (officers claimed to have a warrant to search woman's home but did not rely on warrant at trial). *But see* Commonwealth v. Buchanan, 384 Mass. 103 (1981), in which the trial court found three entries to the defendant's apartment to have been consensual, even though on the first visit an officer told the defendant he had a warrant and on the second visit the police threatened to get a warrant and to charge the defendant if the person they were looking for was found in the apartment. The court emphasized that the defendant was not the object of the investigation at the time of the first two visits, and that she was aware of her right to refuse consent. Furthermore, although the officers did not have a warrant to search the apartment or to arrest the defendant, they did have some kind of warrant. *Buchanan, supra,* 384 Mass. at 106.

[424] *See also* United States v. Sebetich, 776 F.2d 412, 425 (3d Cir. 1985) (discussing distinction between threat to obtain warrant suggesting no real choice for suspect and explaining truthfully that warrant would be sought if consent not given); United States v. Faruolo, 506 F.2d 490, 495 (2d Cir. 1974) (fact that officer said he would apply for and likely obtain warrant to search suspect's home did not in totality of circumstances vitiate consent).

[425] *See* Commonwealth v. Buchanan, 384 Mass. 103 (1981) (announcement by officer that he would obtain a warrant did not vitiate consent of defendant who was not then under investigation); Commonwealth v. Mendes, 361 Mass. 507, 512–13 (1972) (threat to seek a search warrant inconclusive on issue of voluntariness of consent). See also Commonwealth v. Yehudi Y., 56 Mass.App.Ct. 812, 818 n.11 (2002) (noting police announced intention to seek warrant). Commonwealth v. Farnsworth, 76 Mass. App. Ct. 87, 93 (2010) (mention of possibility of seeking warrant does not vitiate consent).

[426] *See* Hoffa v. United States, 385 U.S. 293 (1966) (fact that informer did not disclose role to suspect did not vitiate consent to informer to enter premises); Lewis v. United States, 385 U.S. 206 (1966) (consensual entry into home by undercover narcotics agent). *Compare* Gouled v. United States, 255 U.S. 298 (1921) (consent to entry of informer does not justify informer's search of premises and seizure of private papers) *with* Commonwealth v. D'Onofrio, 396 Mass. 711, 718 (1986) (officer's entry and observations of gay club generally open to public not violative of Fourth Amendment). *D'Onofrio* dismissed the argument that the officer gained entry by falsely denying his position stating, "The Government is entitled to use decoys and to

A *cooperative course of conduct* on the part of the consenting party will tend to override other factors suggesting involuntariness.[427] However, complete cooperation in a search that is guaranteed to uncover contraband coupled with a denial of wrongdoing has led some courts to conclude that the consent must have been involuntary.[428] Other courts have rejected this reasoning,[429] and the Supreme Judicial Court has stated that such circumstances do not automatically preclude a finding of voluntary consent.[430]

Another factor of critical importance in assessing voluntariness is the *state of mind of the consenting party.* If the individual is emotionally distraught or arguably under the influence of drugs or alcohol, the consent may be found to have been involuntary.[431] Conversely, when there is evidence that the consenting party was fully aware of the implications of the decision, the likelihood increases that the consent will be deemed voluntary.[432]

4. Third-Party Consent

In many cases the police obtain consent to search from someone other than the defendant. Such third-party consent is valid if it is voluntarily given and if the third party has "common authority over or other sufficient relationship to the premises or

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conceal the identity of its agents." *D'Onofrio, supra* (quoting Lewis v. United States, 385 U.S. 206, 209 (1966)). *See also* Commonwealth v. Goggin, 412 Mass. 200, 201–03 (1992) (officers announced themselves as representatives of Pop Warner football); Commonwealth v. Villar, 40 Mass. App. Ct. 742, 746 (1996) (officers placed arrested customer in front of drug suspect's peephole to gain entry).

[427] *See, e.g.,* Commonwealth v. LeBeau, 451 Mass. 244, 260-261 (2008) (cooperative attitude and knowledge of right to refuse consent lead to conclusion of voluntariness); Commonwealth v. Robinson, 399 Mass. 209 (1987). In *Robinson* the mother of a deceased infant agreed to give the baby's nurser to hospital authorities in connection with their investigation of the baby's death. Despite the contention that the mother did not know of the involvement of an assistant district attorney in the investigation, the court upheld the finding of voluntary consent emphasizing her consistent cooperation with the authorities. Commonwealth v. Greenberg, 34 Mass. App. Ct. 197 (1993) (consistent voluntary cooperation of murder suspect a factor in finding seizure of clothing consensual); Commonwealth v. Egan, 12 Mass. App. Ct. 658, 663 (1982) (cooperative conduct of suspect police officer "obviated the need for a search warrant"); Commonwealth v. Aguiar, 370 Mass. 490 (1976) (fact that the suspect spontaneously offered to allow search of package was determinative on the issue of consent).

[428] *See* Higgins v. United States, 209 F.2d 819, 820 (D.C. Cir. 1954).

[429] *See, e.g.,* United States v. Piet, 498 F.2d 178, 182 (7th Cir. 1974); Gorman v. United States, 380 F.2d 158, 165 (1st Cir. 1967).

[430] Commonwealth v. Harmond, 376 Mass. 557, 562 (1978).

[431] *See* Commonwealth v. Angivoni, 383 Mass. 30 (1981). In *Angivoni* the suspect had been hospitalized after a two-car accident when a Registry inspector requested that he consent to the taking and testing of a blood sample. The S.J.C. upheld the finding that there was insufficient proof of voluntary consent emphasizing the possibility that the defendant's reasoning capacity may have been reduced by alcohol, trauma, or the drugs administered to him at the hospital. See also Commonwealth v. Carson, 72 Mass.App.Ct. 368,370 (2008) (suspect in OUI sobbing uncontrollably and dry heaving – no voluntary consent to blood test).

[432] *See* Commonwealth v. Harris, 387 Mass. 758, 767 n.5 (1982) (consent in writing while attorney was present); Commonwealth v. Egan, 12 Mass. App. Ct. 658, 663 (1981) (consenting party was experienced law enforcement officer).

effects sought to be inspected."[433] Although the search is an intrusion upon the privacy of the absent suspect, it is justified by the fact that the suspect has ceded some of his or her privacy by sharing access to the premises. However, if the individual maintains a personal and exclusive privacy interest over a part of the premises, the third party may not consent to a search of that area.[434] A co-tenant who is present and objects to the search can override the consent given by the other tenant. [434.5]

a. Relationship to the Defendant

The extent of the third party's authority to consent may depend on the nature of his relationship with the defendant. While a cotenant has the right to consent to a search only of areas shared in common with other cotenants,[435] a parent has authority to allow the search of a minor's room and effects because of the authority a parent has over the child.[436] A spouse's consent may extend into some areas closed to a cotenant because the intimacy of the marital relationship connotes a greater sharing of privacy.[437]

Property concepts may be relevant to the inquiry into the authority of the third party to consent, although the Supreme Court has eschewed reliance on the "metaphysical subtleties" of property law.[438] The owner of a home generally maintains

[433] United States v. Matlock, 415 U.S. 164, 172 (1974). *See* Commonwealth v. Ploude, 44 Mass. App. Ct. 137, 141 (1998) (owner/lessor of business premises had "free rein of building" and suspect was aware of owner's regular use of office that was searched upon owner's consent). Under art. 14 consent may be given by a co-inhabitant with full access to the premises or by a person with written authority to allow police to enter and search. Commonwealth v. Porter P., 456 Mass. 254, 265-266 (2010) (director of transitional shelter had no written authority).

[434] *See, e.g.*, United States v. Block, 590 F.2d 535 (4th Cir. 1978) (parent's authority to consent to search of adult son's room not sufficient as to locked footlocker). *See also* Commonwealth v. Noonan, 48 Mass. App. Ct. 356, 362 (2000) (consent by suspect's girlfriend who shared apartment).

[434.5] Georgia v. Randolph, 547 U.S. 103, 121 (2006). See Commonwealth v. Ware, 75 Mass. App. Ct. (2009) (closing of door and failure to respond to police inquiries not deemed "unequivocal protest or objection").

[435] *See* Commonwealth v. Rodriquez, 364 Mass. 87, 93 (1973) (common bathroom); Commonwealth v. Connolly, 356 Mass. 617, 624, *cert. denied*, 400 U.S. 843 (1970) (common basement). Even if a cotenant has actual authority to consent to the search, the refusal of another cotenant who is present overrides the prior consent. Georgia v. Randolph, 547 U.S. 103, 121 (2006).

[436] *See, e.g.*, Vandenburg v. Superior Court, 8 Cal. App. 3d 1048 (1970). *See also* Commonwealth v. Farnsworth, 76 Mass. App.Ct. 87, 97 (2010) (mother's consent to search adult son's bureau and strong box); Commonwealth v. Ortiz, 422 Mass. 64, 70 (1996) (father's consent to search adult son's room deemed valid).

[437] The wife's authority to consent to a search of premises shared with her husband does not depend on any showing of authority from the husband. Commonwealth v. Deeran, 364 Mass. 193, 195 (1973) (consent by wife to search husband's dresser drawer valid).

[438] *See* Frazier v. Cupp, 394 U.S. 731, 740 (1969) (although defendant claimed that consenting party had access to only part of duffel bag, court upheld search of entire bag); Commonwealth v. Ploude, 44 Mass. App. Ct. 137, 140 (1998) (third-party consent depends not on proprietary interest of consenting party but on "joint access" to area searched).

the authority to consent to a search of the rooms occupied by a guest.[439] But a tenant has the right to possession of the leased premises to the exclusion of the landlord at least until the tenant's rights have been terminated.[440] So too a hotel owner may not consent to the search of a guest's room even though the owner has access to the room for cleaning and maintenance purposes.[441] However, if the guest or tenant abandons the premises, the owner's authority is restored.[442] The driver of an automobile may consent to a search of the car to the extent of his authority over the vehicle.[443]

The authority to consent to a general search of the premises does not extend to a closed container over which the suspect maintains an independent privacy interest.[444] However, if a container does not reasonably appear to police to be a separate private area, they may have sufficient authority to search it without inquiring into the authority of the consenting party.[445]

b. Apparent Authority

[439] *See* Commonwealth v. Tyree, 455 Mass. 676 (2010) (owner of condominium). Commonwealth v. Mendes, 361 Mass. 507, 513 (1972) (suspect's sister retrieved clothing from closet over which suspect did not have exclusive control). *See also* Commonwealth v. Eagles, 419 Mass. 825, 832 (1995) (entry into third party's home with consent of homeowner to find murder suspect valid); Commonwealth v. Voisine, 414 Mass. 772, 783–84 (1993) (homeowner validly consents to entry to arrest guest). *Cf.* Minnesota v. Olson, 495 U.S. 91 (1990) (overnight guest has sufficient privacy interest to challenge warrantless entry to arrest).

[440] *See* Commonwealth v. Porter P., 456 Mass. 254, 265 (2010) (mother and son shared room in shelter – shelter director lacked authority to consent to search); Chapman v. United States, 365 U.S. 610, 616 (1961) (landlord without authority to consent to search of tenant's apartment). *But see* Commonwealth v. Sandler, 368 Mass. 729 (1975) (consent by landlord to search rented barn valid where tenant disclaimed any interest in property).

[441] Stoner v. California, 376 U.S. 483, 490 (1964).

[442] *See* Abel v. United States, 362 U.S. 217 (1960) (defendant arrested in hotel room and then checked out; subsequent search consented to by hotel management valid). *See also* Commonwealth v. Netto, 438 Mass. 686, 698 (2003) (abandonment of motel room by arrest of occupants); Commonwealth v. Jackson, 384 Mass. 572, 583–84 (1981) (tenant had been arrested and advised friends to remove belongings from apartment; subsequent search valid based on consent of landlord and cotenant). Cf. Commonwealth v. Linton, 456 Mass. 534 (2010) (no abandonment of backpack handed over to police by brother from his house where suspect had been staying).

[443] *See, e.g.,* United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962) (driver who borrowed car had right to consent to cursory check of trunk). *See also* United States v. Morales, 861 F.2d 396, 399 (3d Cir. 1988) (driver may consent to search of entire vehicle including hidden compartment behind back seat).

[444] *See, e.g.,* Commonwealth v. Linton, 456 Mass. 534 (2010) (no actual or apparent authority to consent to search of guest's backpack); United States v. Block, 590 F.2d 535, 541 (4th Cir. 1978) (mother of adult son had no authority to consent to search of locked footlocker in son's room). But see Commonwealth v. Farnsworth, 76 Mass. App. Ct. 87, 97 (2010) (mother's consent to search adult son's bureau and strong box). *See also* United States v. Karo, 468 U.S. 705, 723–24 (1984)(O'Connor, J., concurring) ("A homeowner who entirely lacks access to or control over a guest's closed container would presumably lack the power to consent to its search under the standards articulated by this court in United States v. Matlock").

[445] *See* United States v. Sealey, 830 F.2d 1028, 1031 (9th Cir. 1987) (wife's consent to search sealed containers in garage valid as against husband).

A third-party consent is valid if the consenting party has actual authority over the area or container that is searched. However, actual authority may not be necessary if it reasonably appears to the officers that the consenter has sufficient authority over the area.[446] An entry and search can be justified if the officers made a reasonable mistake of fact concerning the authority to consent. But under art. 14 the officers must make a "diligent inquiry as to the consenting party's common authority over the home."[446.5]

§ 17.9B. PLAIN-VIEW DOCTRINE

Under the plain-view doctrine, if police are lawfully in a position to see property that they have probable cause to believe is associated with criminal activity, they may seize it as long as they can do so without an additional unjustified intrusion on protected privacy interests.[447] No warrant is necessary because, once the incriminating item is observed in plain view, a seizure merely implicates the owner's possessory rather than privacy interests and requiring a warrant would be a "needless inconvenience" to law enforcement officers.[448] There are two prerequisites to the application of the plain-view doctrine.[449] *First*, the officer must have a prior

[446] Illinois v. Rodriguez, 497 U.S. 177, 186 (1990). Commonwealth v. Wahlstrom, 375 Mass. 115 (1978). In *Wahlstrom* the court upheld the consent to search areas behind a store counter given to police by an employee of the defendant store owner, because the defendant had clothed the employee with a sufficient appearance of authority. Compare *Commonwealth v. Porter P.*, 456 Mass. 254 (2010) (no apparent authority in shelter director to consent to search of room shared by mother and son); *Commonwealth v. Linton*, 456 Mass. 534 (2010) (no apparent authority in brother to consent to seizure of backpack left at brother's home by suspect who was staying there).

[446.5] Commonwealth v. Porter P., 456 Mass. 254 (2010). A mistake of law will not satisfy the requirement. Id. (officer's review of shelter manual procedures on search of rooms not basis for authority to consent). See Commonwealth v. Lopez, 458 Mass. 383, 396 (2010) (no "objectively reasonable" basis to conclude woman who came to door of motel room had authority to consent to entry). Compare Commonwealth v. Dejarnette, 75 Mass. App. Ct. 88 (2009) (mother of suspect's child had apparent authority to consent to search of suspect's backpack which appeared to be that of a child)

[447] *Compare* Warden v. Hayden, 387 U.S. 294, 310 (1967) (valid warrantless seizure of evidence of armed robbery discovered in plain view during course of lawful exigent search for suspect and weapons) *with* Coolidge v. New Hampshire, 403 U.S. 443, 464–73 (1971) (plurality opinion) (warrantless seizure of murder suspect's automobile from suspect's property illegal in view of fact that police had probable cause and prior intention to seize vehicle and no exigent circumstances) *and* Commonwealth v. Sergienko, 399 Mass. 291, 295–97 (1987) (plain view of marijuana cigarette from outside of locked vehicle does not justify nonexigent warrantless entry into vehicle).

[448] *See* Coolidge v. New Hampshire, 403 U.S. 443, 467–68 (1971). However, the seizure itself is a Fourth Amendment intrusion in that the Fourth Amendment protects property as well as privacy. Soldal v. Cook County, Ill., 506 U.S. 56, 69 (1992) (a seizure of property must be justified even in absence of intrusion on privacy). Cf. United States v. Jones, _U.S._, 132 S.Ct. 935 (2012) (use of G.P.S. device invades suspect's property rights).

[449] *See* Horton v. California, 496 U.S. 128 (1990) (noninadvertent discovery of items not listed in search warrant; seizure valid under plain view doctrine). *See also* Coolidge v. New Hampshire, 403 U.S. 443, 464–73 (1971). In *Coolidge* the officers seized and searched a murder

justification for being in the place from which the observation was made.[450] *Second*, there must be a nexus between the item seized and criminal activity that was immediately apparent to the officer prior to the seizure.[451] Prior federal law also required that unless the item seized was contraband, stolen property, or a dangerous instrumentality, the officer must have come on it "inadvertently."[452] Under art. 14 inadvertence is still required. [452.5]

1. Right to Be in Position to Observe

Some courts invoke the plain-view doctrine only when there has been a prior valid intrusion on the suspect's privacy,[453] pursuant to a warrant or an exception to the warrant requirement[454] and they characterize seizures from public places as "open view." Other courts include both situations within the plain-view doctrine.[455] In either

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suspect's car that was parked in his driveway. Although they had a warrant authorizing the seizure and search, the court held that the warrant was invalid. Because the police had no valid authorization to intrude on the suspect's privacy and because they intended to seize the car, the seizure did not come within the plain view exception. *Coolidge*, *supra*, 403 U.S. at 471–72.

[450] Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971). *See* Commonwealth v. Silva, 61 Mass. App. Ct. 28 (2004) (plain view seizure of cocaine in car not valid where inventory procedures did not provide authority for officer to be in such position).

[451] Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). *See* Commonwealth v. Cruz, 53 Mass. App. Ct. 24, 34-36 (2001) (seizure of telephone cloning equipment not valid under plain view d*octrine because incriminating nature became apparent only after testing). Compare Commonwealth v. Pierre, 71 Mas*s. App. Ct. 58, 66 (2008) (incriminating nature of hundreds of pirated CDs apparent to officer familiar with the business).

[452] Coolidge v. New Hampshire, 403 U.S. 443, 469 (1971). *But see* Horton v. California, 496 U.S. 128 (1990) (inadvertence not required for plain view seizure of evidence).

[452.5] Commonwealth v. Balicki, 436 Mass. 1, 10 (2002). See Commonwealth v. Tyree, 455 Mass. 676-694 (2010) (items seized listed in invalid portion of partially valid warrant not subject to general requirement of inadvertence).

[453] See *generally* Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle,* 26 MERCER L. REV. 1047 (1975) (emphasizing that "plain view" doctrine is an extension of a prior valid intrusion on a protected area as distinguished from "open view" in which officer sees item from a vantage point that involves no intrusion on reasonable expectations of privacy). *Cf.* Arizona v. Hicks, 480 U.S. 321, 323 (1986) (charactering plain-view seizure as occurring "during lawful search of private area").

[454] *See, e.g.,* Warden v. Hayden, 387 U.S. 294 (1967) (officers justified in seizing evidence of armed robbery during course of lawful exigent search for suspect and weapons). If the initial intrusion is invalid, there is no right to seize items discovered in plain view. See Payton v. New York, 445 U.S. 573 (1980) (warrantless nonexigent entry into suspect's home to make arrest invalid and items observed in plain view illegally seized).

[455] *See, e.g.,* Commonwealth v. Hason, 387 Mass. 169, 177 (1982) (upholding under plain-view doctrine the seizure from public street of automobile that officers had probable cause to believe was stolen). *See also* Commonwealth v. Dowdy, 36 Mass. App. Ct. 495, 495, 497 (1994) (officers have right to seize contraband they observe in plain view in public place).

Observations on private property may not require a warrant or justifying exception if they do not violate a reasonable expectation of privacy. *See* Sullivan v. District Court, 384 Mass. 736, 742–43 (1981) (plain-view seizure of marijuana from open pocket of jacket observed in hospital canteen where suspect had "no reasonable expectation of privacy." In

case the principle is the same: the officer must have a right to be in a position to see in plain view the items subject to seizure.[456] That fact alone, however, does not justify a subsequent intrusion on the suspect's privacy in order to seize the property.[457]

2. Immediately Identified as Incriminating ("Nexus")

If an officer has a right to be in a particular place, he may seize evidence, fruits, instrumentalities, or contraband only if it is immediately apparent to him that there is a nexus between the item and criminal activity.[458] The nexus requirement is satisfied if the officer has probable cause to believe that the item is associated with criminal activity.[459] The connection to criminal activity must be immediately apparent without a closer investigation that may be characterized as a search.[460]

Sullivan the court recognized that it was "not necessary to invoke the so called plain view doctrine . . . to resolve the case." *Sullivan, supra,* 384 Mass. at 743 n.8. *See also* Commonwealth v. Sergienko, 399 Mass. 291, 293–94 (1987) (distinguishing between "plain view observation" and "plain view doctrine").

[456] *See, e.g.*, Commonwealth v. Silva, 61 Mass. App. Ct. 28 (2004) (plain view seizure of cocaine in car not valid where inventory procedures did not provide authority for officer to be in such position). See also Commonwealth v. Neilson, 423 Mass. 75, 80 (1996) (unlawful entry by police of college dormitory room vitiates seizure of marijuana plants in plain view). *Cf.* Commonwealth v. Swartz, 454 Mass. 330,335 (2009) (lawful position to observe contraband); Commonwealth v. Streeter, 71 Mass.App.Ct. 430,439 (2008) (officers in lawful position to see drugs).

[457] *See* Commonwealth v. Sergienko, 399 Mass. 291, 295–96 (1987) (entry into suspect's car after plain-view observation of marijuana cigarette inside not justified by exigent circumstances). *See also* Commonwealth v. Huffman, 385 Mass. 122, 126 (1982) (observation of marijuana inside suspect's apartment from adjoining building does not justify entry in absence of exigent circumstances).

[458] Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). See, e.g. Commonwealth v. Tyree, 455 Mass. 676,694 (2010): Commonwealth v. Wilson, 441 Mass. 390, 398 (2004) (immediately apparent that bag contained contraband drugs).

[459] Arizona v. Hicks, 480 U.S. 321, 326 (1986). If the item is evidence of a crime, it must be "plausibly related as proof to criminal activity of which [the officer] was already aware." Commonwealth v. Bond, 375 Mass. 201,206 (1978) See also Commonwealth v. Pierre, 71 Mass. App. Ct. 58, 66 (2008) (incriminating nature of hundreds of pirated CDs immediately apparent to officer familiar with the business). As to fruits or instrumentalities of crime or contraband, the item may be seized "when it bespeaks the likelihood of some criminal conduct of which the officers may have had no prior awareness." *Bond, supra,* 375 Mass. at 207. In *Bond* the court upheld the seizure of a handgun, burglarious tools, electronic devices for interception of communications, and marijuana. The gun and electronic devices were considered instrumentalities of crime because of their association with the burglarious tools and with a blue box seized under a search warrant. A gun may also be contraband if the officers have evidence that it is illegally possessed. *Bond, supra,* 375 Mass. at 208 n.8. *See* Commonwealth v. Robles, 423 Mass. 62, 67 (1996) (bloodstains on murder suspect's coat visible to naked eye plus suspect's statement that he was wearing same shoes on night of murder — adequate nexus as evidence of crime); Commonwealth v. Alvarez, 422 Mass. 198, 206 (1996)(seizure of key ring justified because keys relevant to control of apartment); Commonwealth v. Feijoo, 419 Mass. 486 (1995) (seizure of suggestive magazines and phallic-shaped molds justified by nexus to crime of sexual abuse); Commonwealth v. Calderan, 43 Mass. App. Ct. 228, 231 (1997) (probable cause to believe jewelry found on suspect was stolen); Commonwealth v. Halsey, 41 Mass. App. Ct. 200, 203 (1996) (warrant search resulted in seizure of pornographic material not mentioned in warrant-sufficient nexus to sexual abuse relying on officer's opinion of role of

It is important to distinguish between probable cause that an item *is* incriminating property and probable cause that it *contains* such property.[461] The plain-view doctrine only justifies a warrantless seizure of incriminating items that the officer can see without an additional intrusion on fourth amendment rights. Thus a container that keeps from view or ready discernability the nature of its contents may not be seized or opened in the absence of independent justification.[462] However, if the container is open or transparent so that the officers can identify its contents without searching it, they may seize the contents.[463] And some containers may be seized because, by their very nature[464] or by their odor or feel,[465] they disclose what is inside.

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pornographic materials in such crimes). *Compare* Commonwealth v. McCambridge, 44 Mass. App. Ct. 285, 290 (1998) (seizure of murder suspect's clothing after arrest for traffic offense — no probable cause for murder at times of seizure).

[460] *See* Commonwealth v. Ferguson, 410 Mass. 611, 615 (1991); Arizona v. Hicks, 480 U.S. 321, 325 (1986). In *Hicks* several officers entered an apartment under exigent circumstances to search for a suspect who had fired a weapon through the floor of his apartment injuring a person in the apartment below. One of the officers saw what he suspected was stolen stereo equipment and moved some of the items in order to see and record the serial numbers. The court held that the moving of the equipment was a "search" made without probable cause to believe the items were stolen and declared invalid the subsequent seizure of the equipment. See also Commonwealth v. Seng, 436 Mass. 537, 551-552 (2002) (inventory of personal belongings of murder suspect proper but closer examination of numbers on bank card seen as additional intrusion). *Compare* Commonwealth v. Sleich-Brodeur, 457 Mass. 300, 309 (2010) (cursory reading of documents not significant additional intrusion); Commonwealth v. D'Amour, 428 Mass. 725, 732 (1999) (same); Commonwealth v. Young, 382 Mass. 448, 458–59 (1981) (when officer approached open box containing papers more closely to examine them and noticed some details that provided a nexus to the crime under investigation, the closer look was not a "material additional intrusion" on the suspect's privacy); Commonwealth v. Beldotti, 409 Mass. 553, 556–57 (1991) (seizure of camera and photographs of victim from closet of murder suspect's home outside scope of warrant but reasonable to believe they "might bear on the proof of suspect's guilt").

[461] Commonwealth v. Kaupp, 453 Mass. 102,107 n.7 (2009) (seizure of computer did not justify search of its files); Commonwealth v. Varney, 391 Mass. 34, 39 n.4 (1984) ("We are cognizant that 'an officer's' authority to possess a package is distinct from his authority to examine its contents," quoting Walter v. United States, 447 U.S. 649, 654 (1980) (opinion of Stevens, J.)). *But cf.* Commonwealth v. Hinds, 437 Mass. 54, 62-63 (2002) (while examining defendant's computer directory, officer encounters file he reasonably believed to be child pornography – opening of file justified because defendant has no reasonable expectation of privacy in contraband).

[462] Commonwealth v. Ferguson, 410 Mass. 611, 615 (1991) (reaching into jacket pocket for bag not justified; contraband not in plain view). *See* United States v. Place, 462 U.S. 696, 701 (1983) ("Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit the seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present"). *Cf.* Arkansas v. Sanders, 442 U.S. 753, 763–66 (1979) (closed suitcase located in automobile may not be searched without warrant because owner has reasonable expectation of privacy therein).

[463] See Commonwealth v. Irwin, 391 Mass. 765 (1984) (closed tupperware container lawfully seized and opened because marijuana inside was visible from outside).

[464] *See* Arkansas v. Sanders, 442 U.S. 753, 764–65 n.13 (1979) (recognizing that some containers which reveal their contents do not "support a reasonable expectation of privacy").

Once the police are justified in seizing items in plain view, they may conduct a test to determine whether it is in fact evidence or contraband.[466] Such a test does not violate the nexus requirement because the test is simply a means of confirming what the officers had probable cause to believe at the time of the seizure. Nor does the test constitute a separate search because it does not intrude on a reasonable expectation of privacy.[467]

3. Inadvertent Discovery

The United States Supreme Court has held that the Fourth Amendment does not require the discovery of evidence in plain view to be inadvertent.[468] The Supreme Judicial Court has refused to abandon the inadvertence requirement under article 14.[469]

The plurality in *Coolidge v. New Hampshire* explained that the warrant requirement is undermined by allowing the seizure of items "which the police know in advance they will find in plain view and intend to seize."[470] However the standard of inadvertence was not whether the officers had no belief that they would encounter certain evidence but whether they had less than probable cause to believe they would do so.[471] The requirement of inadvertent discovery did not apply to the plain-view seizure of contraband, stolen property or objects dangerous in themselves.[472]

See also Texas v. Brown, 460 U.S. 730, 743 (1983) (plurality opinion) (opaque balloon tied at both ends immediately recognizable as containing heroin).

[465]See Minnesota v. Dickerson, 508 U.S. 366, 369 (1993) (recognizing "plain feel" doctrine under fourth amendment) and *Commonwealth v. Wilson*, 441 Mass. 390, 398 (2004); Commonwealth v. Hernandez, 77 Mass.App.Ct. 259,269 n.13 (2010) (adopting "plain feel" doctrine under art. 14). See also Commonwealth v. Garden, 453 Mass. 43, 47-49 (2009) (odor of marijuana detected by qualified person provides probable cause).

[466] *See* Commonwealth v. Varney, 391 Mass. 34, 41–42 (1984) (field test by police of white powder validly seized; not a Fourth Amendment intrusion).

[467] Commonwealth v. Varney, 391 Mass. 34, 39 (1984). *Cf.* Commonwealth v. Hinds, 437 Mass. 54, 62-63 (2002) (opening of computer file with title suggestive of child pornography upheld – no reasonable expectation of privacy in contraband).

[468] Horton v. California, 496 U.S. 128 (1990). In *Horton* the officers had probable cause to search for weapons as well as stolen property but the warrant failed to mention the weapons. If the officers use a warrant for certain items as a pretext to search for others, the plain view doctrine may not apply. *Horton, supra*, 496 U.S. at 142, 147 (Brennan, J., dissenting).

[469] Commonwealth v. Balicki. 436 Mass. 1, 10 (2002). See Commonwealth v. Tyree, 455 Mass. 676, 696 (2010) (inadvertence requirement)

[470] Coolidge v. New Hampshire, 403 U.S. 443, 471 (1971).

[471] Commonwealth v. Balicki, 436 Mass. 1, 15 (2002) (items not included in warrant but seized during search not subject to suppression because officers lacked probable cause as to them). See Commonwealth v. Wilson, 424 Mass. 336, 344 (1998) (spent .25 caliber casing validly seized); Commonwealth v. LaPlante, 416 Mass. 433, 440 (1993) (observation of defendant's clothes inadvertent because items not identified until warrant search). Compare Commonwealth v. Accaputo, 380 Mass. 435, 450-451 (1980) (seizure of prescription drugs under invalid warrant not valid because not inadvertent). But see Commonwealth v. Tyree, 455 Mass. 676, 695-696 (2010) (seizure of items listed in invalid portion of partially valid warrant not subject to inadvertence requirement following Commonwealth v. Lett, 393 Mass. 141, 147 (1984)).

[472] *See* Coolidge v. New Hampshire, 403 U.S. 443, 471 (1991). ("But to extend the scope of such an intrusion to the seizure of objects — not contraband nor stolen nor dangerous

§ 17.9C. EXIGENT CIRCUMSTANCES

Exigent circumstances justifying a warrantless search or seizure will be found to exist only where there is an overriding need to conduct the search and no time to obtain a warrant.[473] The burden of demonstrating the exigency is on the prosecution and the standard has been characterized as "strict."[474] Because the scope of the search is "strictly circumscribed by the exigency which justifies it,"[475] the purpose for which the search is conducted is a critical factor in assessing its validity.[476] The distinction between a search and a seizure is an important one because often the officers can seize the place where the search is to take place and obtain a warrant for the search. [476.5]

1. Entry and Search of the Home to Arrest

in themselves — which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure"). See *also* Commonwealth v. Accaputo, 380 Mass. 435, 448 (1980) ("discovery of evidence in plain view must be inadvertent, unless it is 'contraband or stolen goods or objects dangerous in themselves' "); Commonwealth v. Hason, 387 Mass. 169, 177 (1982] (relying on lesser or "negligible" privacy interest in property possessed unlawfully to justify plain-view seizure).

[473] See Brigham City, Utah v. Stuart, 547 U.S. 398, 407 (2006) (officers had reasonable grounds to enter home to protect injured adult and prevent more violence); Illinois v. McArthur, 531 U.S. 326, 334 (2001) (warrantless seizure of suspect's trailer awaiting warrant); Michigan v. Tyler, 436 U.S. 499, 509 (1978) (entry to investigate scene of fire immediately without a warrant justified but subsequent warrantless entries deemed unconstitutional). See also Commonwealth v. Kaupp, 453 Mass. 102, 107 (2009) (warrantless seizure of suspect's computer but no search of files until warrant arrives); Commonwealth v. Rodriguez, 450 Mass. 302, 310 (2007) (warrantless wiretap of suspect's conversation in home of another deemed reasonable in "situation developing unexpectedly").

[474] *See* Commonwealth v. Forde, 367 Mass. 798, 800 (1975) (finding no exigent circumstances to enter defendant's home to arrest when officers had ample time to obtain warrant). However, the court will examine the circumstances "in relation to the scene as it could appear to the officers at the time, not as it may appear to a scholar with the benefit of leisured retrospective analysis." Commonwealth v. Young, 382 Mass. 448, 456 (1981). See also Commonwealth v. Tyree, 455 Mass. 676, 692 (2010) (characterizing emergency search as "narrow exception" to warrant requirement); Commonwealth v. DeJesus, 439 Mass. 616, 620 n. 3 (2003) (quoting *Commonwealth v. Young*, supra).

[475] *See* Terry v. Ohio, 392 U.S. 1, 25–26 (1968) (reasonable suspicion that suspect is "armed and presently dangerous" justifies only limited warrantless frisk for weapons).

[476] *See* Arizona v. Hicks, 480 U.S. 321, 325 (1986) ("But taking action, unrelated to the objectives of the authorized intrusion . . . did produce a new invasion of respondent's privacy unjustified by the exigent circumstances that validated the entry").

[476.5] See Illinois v. McArthur, 531 U.S. 326 (2001) (seizure of suspect's trailer home from outside for two hours deemed reasonable and less intrusive than immediate search). See also Commonwealth v. DeJesus, 439 Mass. 616, 621 (2003) (recognizing right to control premises from outside but no circumstances justifying immediate entry – decided under art. 14); But see Segura v. United States, 468 U.S. 796, 806 (1984) (seizure of premises from inside after an illegal entry while awaiting search warrant no different from control of premises from outside – evidence seized pursuant not subject to exclusion); Cf. Commonwealth v. Kaupp, 453 Mass. 102, 107 (2009) (sufficient exigency for seizure of suspect's computer to prevent destruction of evidence while seeking warrant).

The police may make a warrantless entry into a home and search for a suspect whom they have probable cause to arrest if the delay required to obtain a warrant would threaten the officers' safety or jeopardize the arrest.[477] The validity of the search will depend on several factors including the nature and gravity of the offense, the possibility of violence or the escape of the suspect, the manner in which the entry is made, and the amount of time available to get a warrant.[478] If the officers had a reasonable opportunity to obtain a warrant before the exigent circumstances arose, the exigency may be deemed foreseeable and the warrantless search invalid.[479] But under the fourth amendment, the exception will apply unless the "officers gain entry to premises by means of an actual or threatened violation of the Fourth Amendment." [479.5]

If the police are in *"hot pursuit"* of a fleeing felon who retreats into a dwelling, they may enter and search the premises for the suspect and any weapons that might be used against the officers or others.[480] Hot pursuit is a narrow category of exigent circumstances connoting "some sort of chase";[481] if there is "no immediate and

[477] Payton v. New York, 445 U.S. 573 (1980). An arrest warrant is sufficient for entry into the suspect's home if the officers have reason to believe he is there. Commonwealth v. Silva, 440 Mass. 772, 779 (2004) (art. 14 and fourth amendment). Compare Commonwealth v. Webster, 75 Mass. App. Ct. 247, 253-254 (2009) (no reason to believe suspect present). If the officers make a valid entry but do not locate the suspect, their authority is ended and they must secure the premises from the outside. Id. See generally §17.5B, supra.

[478] *See* Commonwealth v. Forde, 367 Mass. 798, 807 (1975) (plurality opinion) (adoptingfactors set out in Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970)). *See also* Commonwealth v. Tyree, 455 Mass. 676, 685-692 (2010) (applying *Forde* factors and concluding no adequate exigency); Commonwealth v. Molina, 439 Mass. 206, 210 (2003) (no exigency). Compare Commonwealth v. Colon, 449 Mass. 207, 218 (2007) (sufficient exigency to enter suspect's girlfriend's apartment to arrest him); Commonwealth v. Dejarnette, 75 Mass. App. Ct. 88, 94 (2009) (entry to arrest armed suspect of violent crime); Commonwealth v. Garner, 59 Mass. App. Ct. 350, 366-367 (2003) (hot pursuit of shooting suspect). Commonwealth v. Pietrass, 392 Mass. 892 (1984) (amount of time necessary to obtain a warrant important factor in assessing exigency); Commonwealth v. Saunders, 50 Mass. App. Ct. 865 (2001), aff'd 435 Mass. 691, 696 (2002) (applying factors to arrest of unarmed robbery suspect even though building adequately surrounded – ' close case').

[479] *See, e.g.*, Commonwealth v. Forde, 367 Mass. 788 (1975) (officers had probable cause several hours before exigency arose). See also Commonwealth v. Molina, 439 Mass. 206, 210 (2003) (officers created exigency because entry to arrest was foreseeable); Commonwealth v. Gentle, 80 Mass. App.Ct. 243,251 (2011) (declining to decide whether art.14 forbids creation of exigency); Commonwealth v. MacAfee, 63 Mass App. Ct. 467, 477-478 (2005) (officers created exigency by going to suspect's door). Compare Commonwealth v. DiToro, 51 Mass. App. Ct. 191, 197 (2001) (undercover drug deal set up for particular site but officers uncertain until moment drugs arrived – circumstances deemed exigent).

[479.5] Kentucky v. King, _U.S._, 131 S.Ct. 1849,1862 (2011).

[480] *See* United States v. Santana, 427 U.S. 38, 42–43 (1976) (hot pursuit into home); Warden v. Hayden, 387 U.S. 294, 298–99 (1967) (officers justified in entering house five minutes after robbery suspect retreated there to search for suspect and weapons); Commonwealth v. Colon, 449 Mass. 207, 217 (2007); Commonwealth v. Paniaqua, 413 Mass. 796,798 (1992); Commonwealth v. Franklin, 376 Mass. 885, 899–901 (1978) (officers arriving at scene of violent racial confrontation justified in entering two apartments in pursuit of suspects); Commonwealth v. Montes, 49 Mass. App. Ct. 789, 792 n. 3 (2002) (entry into home to arrest fleeing vandalism suspect deemed justified).

[481] United States v. Santana, 427 U.S. 38, 43 (1976). See, e.g., Commonwealth v Garner, 59 Mass. App. Ct. 350, 366-367 (2003) (hot pursuit of suspect in shooting).

continuous pursuit of the suspect from the scene of the crime," the exception should not apply.[482] If the suspect retreats into an apartment building or rooming house, the police may not search a separate unit within the building without reason to believe the suspect is there.[483]

2. Protective Sweep of the Premises Following Arrest

In some cases the courts have upheld the warrantless search of the premises following arrest for accomplices of the arrestee or other persons who could present a danger to the officers.[484] Under the Fourth Amendment, if the officers have a reasonable belief based on articulable circumstances that there are third parties on the premises who may present a danger to the officers, they may conduct a "protective sweep" of the premises.[485] The protective sweep rationale has also been applied to justify a search for persons who might destroy evidence.[486] However it is justified, the protective sweep is limited to a brief and cursory check of the premises for *persons* and not for evidence or contraband.[487]

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[482] *See* Welsh v. Wisconsin, 466 U.S. 740, 753 (1984). *See also* Commonwealth v. Kirschner, 67 Mass. App. Ct. 836,843 (2006) (entry into back yard not justified by probable cause of fireworks complaint); Commonwealth v. DeGeronimo, 38 Mass. App. Ct. 714, 728–29 (1995) (no entry to arrest in home of driver involved in accident — following *Welsh v. Wisconsin*).

[483] *See* United States v. Winsor, 846 F.2d 1569 (9th Cir. 1988) (en banc) (hot pursuit into rooming house does not justify entry to every room; probable cause to believe suspect is inside necessary); Commonwealth v. Franklin, 376 Mass. 885, 899 (1978) (on entering apartment building police saw partially opened door which "sufficiently distinguished" apartment so as to warrant initial investigation).

[484] See, e.g., Commonwealth v. Bowden, 379 Mass. 472, 478 (1980) (arrest of murder suspect justifies check of premises for safety of officers). See also Commonwealth v. DeJesus, 439 Mass. 616, 625 n. 8 (2003) (reaffirming principle). But an arrest outside of the premises does not by itself justify an entry to conduct the sweep. Id. at 622. See Commonwealth v. Streeter, 71 Mass. App. Ct. 430, 438-439 (2008) (officers arrested suspect in hallway and had "objectively reasonable belief" persons were inside and evidence would be destroyed without entry).

[485] Maryland v. Buie, 494 U.S. 325 (1990). See Commonwealth v. Matos, 78 Mass. App. Ct. 156, 160 (2010) (dangerous suspect arrested and removed – protective search within minutes deemed valid as protective sweep); Commonwealth v. Ware, 75 Mass. App. Ct. 220, 233 (2009) (stating principle); Compare Commonwealth v. Nova, 50 Mass. App. Ct. 633, 636 (2000) (no facts to suggest others present after suspect was removed and officers returned for sweep). The nature of the crime itself can provide justification for the sweep to protect the safety of the officers. See Commonwealth v. DeJesus, 70 Mass. App. Ct. 114, 120-121 (2007) (violent nature of carjacking sufficient to justify post-arrest sweep).

[486] See, e.g., Commonwealth v. Streeter, 71 Mass. App. Ct. 430, 439-440 (2008).

[487] *See, e.g.,* Commonwealth v. Lewin (No. 1), 407 Mass. 617, 627 (1990) (protective sweep allows "only a cursory inspection of those spaces where a person may be found"); See Commonwealth v. Streeter, 71 Mass. App. Ct. 430, 439-440 (2008) (manipulation of canvas bag containing weapon deemed beyond scope of protective sweep). Compare Commonwealth v. Mejia, 64 Mass. App. Ct. 238, 248 (2005) (protective sweep for persons allowed removal of mattress from bed revealing handgun). See also Commonwealth v. Cruz, 53 Mass. App. Ct. 24, 37 (2001) (suggesting that protective sweep and plain view doctrine can be "cleverly used" to avoid requirement of warrant). But see Commonwealth v. Bui, 419 Mass. 392, 396 (1995) (protective sweep for weapons for officers with arrest warrant and warrant to search for suspect deemed valid).

3. To Prevent the Imminent Destruction or Removal of Evidence

a. Search of the Person

The police may search the person of a suspect if they have probable cause to search and the delay in obtaining a warrant would likely result in the destruction or removal of the evidence of crime.[488] For example, the Supreme Court has upheld the warrantless taking of a blood sample from a suspect to detect the alcohol content because the evidence diminishes rapidly over time.[489] The court also relied on the "highly evanescent" nature of the evidence in upholding the warrantless scraping of the fingernails of a murder suspect who had not been arrested.[490] Thus if no arrest has occurred to justify a search incident to arrest, the police may search the suspect's person if she is aware of the officers' suspicions and thus likely to remove or destroy the evidence before a warrant can be obtained.[491]

b. Search of the Home

The protection of the Fourth Amendment is greatest when the area to be searched is the home.[492] The Supreme Court has held that the police may enter and search a dwelling without a warrant to prevent the imminent destruction or removal of evidence.[493] Most jurisdictions, including Massachusetts, have recognized such an exigent circumstance.[494] However, the threat must be "quite specific" and the officers

[488] *See, e.g.,* Commonwealth v. Skea, 18 Mass. App. Ct. 685, 700 (1984) (limited warrantless search of person justified by probable cause to search and likely destruction or removal of evidence based on suspect's awareness of officers' suspicions). Cf. Commonwealth v. Williams, 76 Mass. App. Ct. 489, 492 (2010) (declaring invalid warrantless seizure of assault defendant's clothes to process blood evidence without showing of adequate exigency).

[489] Schmerber v. California, 384 U.S. 757, 770–71 (1966). Cf. Commonwealth v. Williams, 76 Mass. App. Ct. 489, 492 (2010) (recognizing that blood evidence on clothing best preserved by storing in paper bags but finding no showing of exigency).

[490] Cupp v. Murphy, 412 U.S. 291, 296 (1966).

[491] *See* Commonwealth v. Skea, 18 Mass. App. Ct. 685, 696 (1984) (relying in part on the conclusion that "a limited search of a man's person is a lesser invasion of his privacy than a search of his home or papers").

[492] *See* United States v. United States District Court, 407 U.S. 297, 313 (1972). *See also* Commonwealth v. Peters, 453 Mass. 818, 819 (2009) (characterizing entry into home by police as "serious governmental intrusion into one's privacy" and principal concern of fourth amendment and art. 14); Board of Selectman v. Municipal Court, 373 Mass. 783, 785 (1977) (warrantless search of a dwelling is "particularly subject to constitutional scrutiny").

[493] Kentucky v. King, _U.S._,131 S.Ct. 1849 (2011).

[494] See Commonwealth v. DeJesus, 439 Mass. 616, 621 (2003). Both the entry and the search for evidence must be justified. And, in the absence of a warrant, there must be probable cause to search and exigent circumstances. Id. Thus, under art. 14, the officers must have "specific information supporting a reasonable belief that evidence will indeed be removed or destroyed unless preventative measures are taken." Id. In *DeJesus* the court found no exigent circumstances. Id at 620. Compare Commonwealth v. Ortiz, 435 Mass. 369, 374-375 (2002) (warrantless search of suspect's store justified in light of threat by relatives of missing woman to break down door and conduct search). Police may secure the premises from the outside

must have a reasonable basis for concluding that the destruction or removal is imminent.[495] The court will examine several factors in assessing the exigency such as the degree of urgency, the amount of time available to obtain a warrant, the nature of the evidence, and the feasibility of securing the premises.[496] The time necessary to get a warrant is relevant only to the extent that it increases the likelihood of removal or destruction of the evidence. If the officers can safely secure the premises, even for several hours, while a warrant is sought, they must do so.[497]

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without a warrant or exigent circumstances. See Illinois v. McArthur, 531 U.S. 326 (2001) (seizure of suspect's trailer home from outside for two hours awaiting warrant deemed reasonable); Commonwealth v. Yesilciman, 406 Mass. 736, 743 (1990). If the object of the probable cause is a minor crime a warrantless entry into the home is not justified. See, e.g. Commonwealth v. Kirschner, 67 Mass. App. Ct. 836, 842-843 (2006) (fireworks complaint).

[495] *See* Commonwealth v. Hall, 366 Mass. 700, 802 (1975) ("In the cases held 'exigent' a quite specific threat has been found: 'based on the surrounding circumstances or the information at hand' it is reasonably concluded that 'the evidence will be destroyed or removed before . . . (the police) can secure a search warrant' ") (quoting United States v. Rubin, 474 F.2d 262, 268 (3d Cir. 1973).

The officers must have probable cause to believe the evidence is on the premises and a reasonable belief based on articulable facts that there are persons on the premises who are likely to destroy or remove the evidence before a warrant can be obtained. Commonwealth v. Tyree, 455 Mass. 676 (2010) (recognizing narrow exception to search warrant requirement but finding no risk of destruction or removal of evidence). See e.g. Commonwealth v. Marmalejos, 35 Mass. App. Ct. 1, 5 (1993) (concurring opinion) (danger of removal or destruction of evidence when undercover cop failed to return immediately to complete sale).

[496] *See* United States v. Rubin, 474 F.2d 262, 268–69 (3d Cir. 1973). In *Rubin* the court set out the following factors to be considered in determining whether there were exigent circumstances to prevent the destruction of contraband: "(1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) reasonable belief that the contraband is about to be removed; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and the knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic" (quoting United States v. Manning, 448 F.2d 992, 998–99 (2d Cir. 1971). *See also Commonwealth v. Tyree*, 455 Mass. 676 (2010) (no evidence of risk to officers, removal or destruction of evidence, or impracticability of getting a warrant); Commonwealth v. Huffman, 385 Mass. 122, 125 n.6 (1982) (no evidence that suspect observed with marijuana through apartment window was aware of officers' suspicions and several police officers available to secure premises from outside); Commonwealth v. Hall, 366 Mass. 740, 801–02 (1975) (possibility that someone might have returned to the premises and entered apartment not sufficient threat to establish exigency). *Compare* Commonwealth v. Martinez, 47 Mass. App. Ct. 839 (1999) (one of suspects encountered police waiting outside motel room during controlled buy); Commonwealth v. Amaral, 16 Mass. App. Ct. 230, 234 (1983) ("reasonable cause to believe that narcotics would be destroyed or removed" after violent arrest of drug suspect at busy intersection close to premises and officers heard phone ring inside apartment); Commonwealth v. Lee, 32 Mass. App. Ct. 85, 88 (1992) (clear probable cause and delay likely to result in removal of evidence; peaceable daylight entry to search without warrant justified). *See* Commonwealth v. Garcia, 34 Mass. App. Ct. 386 (1993) (several officers present to secure scene so warrantless search of mailbox at apartment building not necessary).

[497] The officers may impound the premises from the outside without a warrant or exigent circumstances. See Illinois v. McArthur, 531 U.S. 326 (2001) (probable cause that drugs were in suspect's house trailer – officers justified in denying access to suspect while awaiting warrant). An entry may be made to secure the premises if the officers have an

The exigency must be real and not the foreseeable result of an unreasonable delay on the part of the officers during which they could have obtained a warrant.[498] Although the police need not seek a warrant the moment they have probable cause,[499] a significant delay between the development of probable cause and the occurrence of the exigency may lead the court to conclude that the exigency was foreseeable and the warrantless search invalid.[500]

4. Emergency Searches for Other Purposes

objectively reasonable belief that the evidence will be removed or destroyed. Commonwealth v. DeJesus, 439 Mass. 616, 622 (2003) (decided under art. 14). But the officers may not remain inside the premises after a sweep while awaiting the warrant. Commonwealth v. Webster, 75 Mass. App. Ct. 247, 254 (2009). But see Segura v. United States, 468 U.S. 796, 810 (1984) (seeming to acknowledge illegal entry but deemed securing premises from within reasonable and refused to exclude evidence as fruit of illegal entry). Compare Commonwealth v. DeJesus, supra (distinguishing Segura). The search for evidence or contraband may not begin until the officers have possession of the warrant at the premises. Commonwealth v. Guaba, 417 Mass. 746, 752-756 (1994).

[498] The Supreme Court has rejected the creation of the exigency as violating the fourth amendment. Kentucky v. King, _U.S._, 131 S. Ct. 1849 ,1862 (2011) (as long as officers gain entry without a violation or threatened violation of the fourth amendment). See Commonwealth v. Gentle, 80 Mass. App. Ct. 243,251 (2011) (declining to decide issue under art.14). See e.g. Commonwealth v. Molina, 439 Mass. 206, 211 (2003) (officiers created exigency by appearing at suspect's home); Commonwealth v. Cataldo, 69 Mass. App. Ct. 465, 475 (2007) (officers without exigent circumstances for search of apartment created exigency by banging on door and alerting suspect); Commonwealth v. MacAfee, 63 Mass. App. Ct. 467, 476-478 (2005) (officers had probable cause for some time before going to door and creating exigency). *See* Commonwealth v. Forde, 367 Mass. 798 (1975). In *Forde* a suspect was arrested for possession of marijuana after leaving the defendant's apartment. Several hours later, the police overheard the suspect telling a companion to warn the defendant. Despite the fact that the exigency was real, the warning was foreseeable and the police had had adequate time to obtain a warrant. *Compare* Commonwealth v. Amaral, 16 Mass. App. Ct. 230 (1983). In *Amaral* the subject left the apartment to deliver cocaine nearby and was arrested in a violent confrontation with police. Because probable cause to search the apartment arose just prior to the arrest and the police had reason to believe there were others on the premises who may have been alerted to the arrest, the court upheld the warrantless entry of the apartment. *See also* Commonwealth v. Krisco Corp., 421 Mass. 37, 47 (1995) (exigency foreseeable); Commonwealth v. DeGeronimo, 38 Mass. App. Ct. 714, 727 (1995) (hour-long delay before going to drunk-driving suspect's home makes exigency foreseeable). *Cf.* Commonwealth v. Sergienko, 399 Mass. 291 (1987) (police had probable cause to search defendant's car for several hours before defendant returned; exigency foreseeable).

[499] Commonwealth v. Forde, 367 Mass. 798, 802 (1975).

[500] *See* Commonwealth v. Forde, 367 Mass. 798, 807 (1975) (three-hour delay vitiates exigency). *See also* Commonwealth v. MacAfee, 63 Mass. App. Ct. 467, 477-478 (2005) probable cause had existed for "some time" before officers went to door creating exigency). *Compare* Commonwealth v. Collazo, 34 Mass. App. Ct. 79 (1993) (no probable cause as to particular apartment until just prior to warrantless search) *with* Commonwealth v. Wigfall, 32 Mass. App. Ct. 582 (1992) (probable cause arose three hours before search in view of fact that suspect's apartment was only logical locus for drugs).

If the police must act immediately in response to an emergency to protect life or property, they may do so without a warrant.[501] Thus the police may make a warrantless entry into a home if they have reason to believe that a person inside is in need of immediate aid.[502] Similarly, the Supreme Court has stated that the police may conduct an immediate search of the scene of a murder for other victims or for the suspect although it has refused to recognize a broad murder-scene exception to the

[501] See e.g. Commonwealth v. Peters, 453 Mass. 818, 825 (2009) (sweep for victim inside home after report of argument and gunshot); Commonwealth v. Paniaqua, 413 Mass. 796 (1992) (police radio report of gunshots inside apartment building localized to one apartment); Commonwealth v. Ortiz, 435 Mass. 369, 374-375 (2001) (warrantless search of suspect's store justified in light of threat by relatives of missing woman to break down door and conduct search). Compare Commonwealth v. Knowles, 451 Mass. 91, 97 (2008) (report of man swinging baseball bat and tosses something into car trunk – seizure of man and search of trunk not justified by emergency exception); Commonwealth v. Allen, 54 Mass. App. Ct. 719, 722 (2002) (no threat to life or property to justify entry); Commonwealth v. Hurd, 56 Mass. App. Ct. 12, 18 (2001) (no exigency sufficient for entry onto property by officer investigating animal abuse); Cf. Pasqualone v. Gately 422 Mass. 398, 402 (1996) (presence of guns at residence for parolees not sufficient exigency).

The courts have recognized as well a closely related exception to the warrant requirement called the "community caretaking function" allowing officers to pursue an inquiry if they have a reasonable basis to believe that a person may be in jeopardy. See *Knowles*, supra at 95. See also Commonwealth v. Townsend, 453 Mass. 413 (2009) (concern expressed by close friend and history of domestic abuse and cocaine binges justified entry into defendant's apartment); Commonwealth v. McCarthy, 71 Mass. App. Ct. 591, 595 (2008) (search of handbag after owner suffered seizure to detect what drugs may have been ingested); Commonwealth v. Erickson, 74 Mass. App. Ct. 172, 176 (2009) (terrible smell from premises justified search for potential victim).

Either exception requires that the search or seizure be non-investigatory and supported on an objective basis. *Knowles*, supra at 96-97. A seizure of the individual may be justified under the community caretaking function. See Sec. 17.4A, supra.

[502] *See* Michigan v. Fisher, __ U.S. __, 130 S. Ct. 546 (2009) (entry upon seeing individual with bloody hand throwing things inside home deemed reasonable); Brigham City, Utah v. Stuart, 547 U.S. 398, 407 (2006) (reasonable grounds to enter home to aid injured adult and prevent more violence); Commonwealth v. Peters, 453 Mass. 818, 825 (2009) (sweep for victim inside home after report of argument and gunshot); Commonwealth v. Lindsey, 72 Mass. App. Ct. 485, 490 (2008) (report to police of woman outside building shaking and seeking help justified entry into building to look for her upon arrival); Commonwealth v. Mejia, 64 Mass. App. Ct. 238, 247 n.8 (2005) (belief that kidnap victim was inside building and shots fired). Commonwealth v. Morrison, 429 Mass. 511, 515–516 (1999) (entry into apartment of victim of domestic violence to arrest suspect deemed exigent); Commonwealth v. Snell, 428 Mass. 766, 775–776 (1999) (warrantless entry into marital home on reasonable belief that prior victim of domestic violence was injured or dead); Commonwealth v. Kingsbury, 7 Mass. App. Ct. 51 (1979), *aff'd in part*, 378 Mass. 751 (1979) (police searching for kidnapping victim justified in entering apartment after hearing moaning sounds from within). *Compare* Commonwealth v. Bates, 28 Mass. App. Ct. 217 (1990) (warrantless entry into apartment to look for missing person more than three hours after police received report not justified by exigent circumstances). *Cf.* Commonwealth v. Ortiz, 435 Mass. 369, 374 (2002) (entry into suspect's store to search for missing woman justified); Commonwealth v. Rexach, 20 Mass. App. Ct. 919 (1985) (responding to report of family abuse officer entered apartment and later followed defendant to bedroom; actions of officer "reasonable" in light of duty to protect wife from abuse).

warrant requirement.[503] The court has upheld as well the warrantless entry of a burning building by fire officials and the immediate search of the scene to investigate the cause of the fire.[504]

5. The Scope of the Exigent Search

Although the police may act without a warrant when confronted by exigent circumstances, the scope of their actions "must be strictly circumscribed by the exigency."[505] The officers may not expand the warrantless search by taking actions unrelated to the purposes of the authorized intrusion.[506] The intensity and duration of the search must be reasonable in the light of the exigent circumstances.[507] Some courts require that the police use the least intrusive alternative when conducting an exigent search.[508] For example, if the purpose of the search is to prevent the imminent destruction or removal of evidence, the officers arguably are limited to a protective sweep of the premises for persons rather than a search for evidence.[509]

§ 17.9D. SEARCH INCIDENT TO ARREST

[503] *See* Mincey v. Arizona, 437 U.S. 385 (1978) (warrantless search of premises over period of four days invalid); Thomas v. Louisiana, 469 U.S. 17 (1984) (extensive warrantless search of murder scene invalid). *See also* Commonwealth v. Lewin (No. 1), 407 Mass. 617, 624 (1990) (probing and lengthy search of murder scene exceeds exigency). Cf. Commonwealth v. Ghee, 414 Mass. 313, 317 (1993) (probable cause of presence of body in car trunk allows for opening of trunk without warrant).

[504] *See* Michigan v. Tyler, 436 U.S. 499 (1978). *See also* Commonwealth v. Jung, 420 Mass. 675, 683 (1996) (warrantless entry to investigate cause of fire the next morning in conjunction with normal overhaul operations justified). In *Jung*, the court assumed that subsequent entries would require a warrant. *Jung, supra*, 420 Mass. at 684.

[505] Terry v. Ohio, 392 U.S. 1 (1968). See Commonwealth v. Peters, 453 Mass. 818, 825-826 (2009) (first sweep of premises justified by emergency but second sweep exceeded scope of exigency).

[506] *See* Arizona v. Hicks, 480 U.S. 321 (1987). In *Hicks* the officers entered an apartment from which shots had been fired to search for the suspect, victims, and weapons but a subsequent warrantless search of stereo equipment for serial numbers was struck down as exceeding the scope of the exigency. *See also* Commonwealth v. Bass, 24 Mass. App. Ct. 972. 974 (1987) (officers justified in warrantless search of apartment for suspect in armed robbery but search of shelf behind dry bar exceeded scope of exigency); Board of Selectmen v. Municipal Court, 373 Mass. 783 (1977) (fact that police officer was found shot outside home did not justify intensive search of house).

[507] See Commonwealth v. Loadholt, 456 Mass. 411, 423 (2010) (search of bedroom and closet for weapon did not exceed exigency); Commonwealth v. Moore, 54 Mass. App. Ct. 334, 340 (2002) (search for weapon after report of shots fired deemed reasonable in scope). Compare Commonwealth v. Kaupp, 453 Mass. 102, 107 n.7 (2009) (exigent circumstances justified seizure of suspect's computer but not search of files).

[508] *See, e.g.,* United States v. Palumbo, 742 F.2d 656, 659 (1st Cir. 1984) (exigent circumstances existed to justify entry to apartment to preserve evidence from destruction).

[509] See e.g. Commonwealth v. Streeter, 71 Mass. App. Ct. 430, 439-440 (2008)(protective sweep for persons does not justify manipulation of canvas bag containing weapon). Compare Commonwealth v. Mejia, 64 Mass. App. Ct. 238, 248 (2005) (protective sweep for persons allowed removal of mattress from bed revealing handgun). *See also* Commonwealth v. Jeffers, 27 Mass. App. Ct. 1162, 1163-1164 (1989) (although officers could have secured apartment and sought warrant immediate search for weapon deemed reasonable).

A search incident to arrest must be based on a valid custodial arrest.[510] Assuming such an arrest, the police may conduct a limited warrantless search of the arrestee and the area within his immediate control.[511] In Massachusetts the limits on the search incident to arrest are governed by statute as well as the Fourth Amendment and article 14.[512] The parameters of the search incident to arrest are summarized below.

1. The Search Incident to Arrest Must Be for the Purpose of Seizing Weapons or Evidence of the Arrest Crime

In Massachusetts a statute affords greater protection than federal cases[513] by prohibiting a search for any purpose other than to seize evidence of the crime for which the suspect was arrested or weapons that the suspect might use against the officers.[514]

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[510] *See supra* § 17.5 for prerequisites to a valid arrest. The search incident to arrest depends on an actual arrest. If the officers do not arrest the suspect even though they have probable cause to do so, the search of the suspect may not be justified as a search incident to arrest. *See* Commonwealth v. Skea, 18 Mass. App. Ct. 685 (1984) (search not justified as incident to arrest but upheld on ground of exigent circumstances).

The arrest may not be made solely as a pretext to justify a search incident to arrest. However "the validity of an arrest is to be gauged by an objective standard rather than by inquiry into the officer's presumed motives." Commonwealth v. Petrillo, 399 Mass. 487, 491 (1987) (even though they suspected that defendant was in possession of drugs officers had probable cause to arrest for trespassing). See Virginia v. Moore, __ U.S. __, 128 S. Ct. 1598 (2008) (no-arrest policy for particular misdemeanor deemed no bar to arrest under fourth amendment).

[511] Chimel v. California, 395 U.S. 752 (1969). A manual strip search of the arrestee requires probable cause to search. Commonwealth v. Thomas, 429 Mass. 403, 408-409 (1999); Rodriguez v. Furtado, 410 Mass. 878, 888 (1991). Cf. Prophete, 443 Mass. 548, 556-558 (2005) (policy requiring removal of clothing to "last layer" not a strip search). The Supreme Court has upheld the visual strip search of pre-trial detainees without suspicion. Florence v. Bd. of Chosen Freeholders of County of Burlington, _U.S._, 132 S.Ct. 1510 (2012).

[512] *See* G.L. c. 276, § 1 (1974) (restricting scope of search incident to arrest to weapons or evidence of arrest crime).

[513] United States v. Robinson, 414 U.S. 218 (1973). In *Robinson* the court upheld the search of a cigarette package found on a person who had been arrested for operating a motor vehicle after revocation of his license, even though the cigarette package could not have contained a weapon or evidence of the crime for which the arrest was made. The rationale of *Robinson* is that the arrest and not the exigencies of the situation provides the justification for the search. The *Robinson* bright-line rule applies only to the suspect's person. When the search extends into the area surrounding the suspect, the case-by-case approach of Chimel v. California, 395 U.S. 952 (1969), once again comes into play.

[514] G.L. c. 276, § 1, states in pertinent part: "A search conducted incident to an arrest may be made only for the purpose of seizing fruits, instrumentalities, contraband and other evidence the crime for which the arrest has been made, in order to prevent its destruction or concealment, and removing any weapons that the arrestee might use to resist arrest or effect his escape. Property seized as a result of a violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings." A search incident to arrest under the statute allows the officer to seize a "hard object" because it might be a weapon. Commonwealth v. Blevines, 438 Mass. 604, 609 (2003) (seizure of keys from arrestee's pocket deemed valid). See Commonwealth v. Dessources, 74 Mass. App. Ct. 232 (2009) ("hard object" turned out to be drugs – no violation of statute). But a roving search for arrestee's true identity or other information is beyond scope of the statute. Commonwealth v. Blevines, supra, 611. Compare Commonwealth v. Starkweather, 79 Mass.App.Ct. 791,797 (2011) (statute allows for search for

The effect of the statute is to limit the scope of the search incident to arrest in two ways. *First*, the *search for evidence* of the arrest crime may not go beyond areas in which such evidence might reasonably be found.[515] Thus an arrest for speeding could not justify a search of the vehicle for evidence.[516] The statute may not require that the officers have probable cause to search for the evidence, but to the extent that there is little likelihood of finding evidence of the arrest crime in the area searched, the court is likely to find that the stated purpose was a pretext.[517] If the officers are justifiably searching for *evidence* of the arrest crime, it makes no difference *under the statute* whether the area searched was accessible to the arrestee.[518] *Second*, if the search is conducted for the purpose of *seizing weapons*, it may extend only to areas accessible to the arrestee at the time of the search.[519] If, for example, the suspect is handcuffed outside the vehicle, a search for weapons is prohibited by the statute.

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evidence of arrest crime on officers' reasonable belief it could be found in vehicle).The validity of the search incident depends on an objective assessment of the facts and not the subjective intention of the officer. *Blevines*, supra at 609.

The statute was intended to adopt the principles set forth in Justice Marshall's dissenting opinion in *Robinson.* Commonwealth v. Toole, 389 Mass. 159, 161 (1983).

[515] *See* Commonwealth v. Pacheco, 51 Mass. App. Ct. 736, 741 (2001) (search of vehicle after suspect arrested on default warrant deemed invalid); Commonwealth v. Cassidy, 32 Mass. App. Ct. 160 (1992) (after arrest of kidnapping suspect warrantless search of bag found in backpack not valid search for evidence); Commonwealth v. Rose, 25 Mass. App. Ct. 905 (1987) (search of tote bag and suitcase in car of person arrested for operating under the influence was not designed to find evidence of offense for which arrest was made). *See also* Commonwealth v. Toole, 389 Mass. 159 (1983) (search of vehicle of person arrested for simple assault and battery could not be justified as search for evidence of arrest crime). However, if the officers are properly searching for evidence of the arrest crime and find evidence of another crime, that evidence is admissible under the statute. *See* Commonwealth v. Beasley, 13 Mass. App. Ct. 62 (1982) (suspect arrested for possession of marijuana; search of glove compartment revealing envelope containing money was valid). The police may not engage in a general exploratory search for evidence of the identity of an arrestee. Commonwealth v. Blevines, 438 Mass. 604, 611 (2003)

[516] *See* Commonwealth v. Lucido, 18 Mass. App. Ct. 941 (1984) (search of glove compartment after arrest for speeding not valid as incident to arrest).

[517] *Cf*. Commonwealth v. Blevines, 438 Mass. 604, 611 (2003) (true identity of suspect not proper object of search for evidence of arrest crime). Cf. also Arizona v. Gant, __ U.S. __, 129 S. Ct. 1710 (2009) (search of passenger compartment of automobile of arrested occupant justified as search incident if officers have "reason to believe evidence of the arrest crime will be found").

[518] *See* Commonwealth v. Madera, 402 Mass. 156 (1987) (search of gym bag seized from arrestee for evidence of arrest crime valid under statute). *See also* Commonwealth v. Harding, 27 Mass. App. Ct. 430 (1989) (search of car for evidence of arrest crime valid even under statute though arrestee handcuffed in cruiser). The fourth amendment requires that the officers have "reason to believe evidence of the arrest crime will be found" in an automobile recently occupied by the arrestee to justify evidence prong of search incident to arrest of a vehicle. Arizona v. Gant, _U.S._, 129 S.Ct. 1710, 1723 (2009). Art. 14 may require that the officers have probable cause to search for evidence of the arrest crime. Commonwealth v. Madera, *supra*; *see also* Commonwealth v. Starkweather, 79 Mass. App. Ct. 791,797 n.3 (2011) (discussing statute and art.14 applied to search of automobile incident to arrest).

2. The Search Is Limited to the Area Within the Arrestee's Immediate Control

In *Chimel v. California* [520] the Supreme Court struck down as unreasonable an intensive search of the entire house of a person arrested for burglary but recognized as legitimate the search of an arrestee and the area within his immediate control for weapons he could reach or evidence he could destroy. Probable cause to search the area is not necessary because the search is justified by the exigencies of the arrest.[521] However, under *Chimel* the scope of the search is limited to the area within which the arrestee might gain possession of a weapon or destructible evidence, commonly known as the "grabbing area."[522]

How far the grabbing area extends from the arrestee depends on the circumstances surrounding the arrest, such as the number of police involved, the presence of other suspects, the positioning of the police and suspect in relation to the area searched, and the extent to which the suspect is restrained prior to the search.[523] The arresting officers may search any area into which the suspect might conceivably reach with due regard for the fact that an arrestee may act irrationally but "assuming

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[519] The statute allows for a search "for weapons *that the arrestee might use* to resist arrest or effect his escape." G.L. c. 276, § 1 (emphasis added). Commonwealth v. Blevines, 438 Mass. 604, 609 (2003) (keys in arrestee's pocket seen as "hard object" properly seized under statute). *Compare* Commonwealth v. Johnson, 413 Mass. 598, 602 (1992) (search and removal of bag from suspect's pants justified under statute as search for weapon) *with* Commonwealth v. Cassidy, 32 Mass. App. Ct. 160 (1992) (invalid search for weapon under statute in that suspect was restrained in cruiser at time of search). *See* Commonwealth v. Toole, 389 Mass. 159 (1983) (search for weapons in vehicle of suspect handcuffed at rear of vehicle violated statute). *See also* Commonwealth v. Rose, 25 Mass. App. Ct. 905, 906 (1987) (once suspect handcuffed and placed in cruiser no danger that arrestee could reach for weapon in car); Commonwealth v. Lucido, 18 Mass. App. Ct. 941 (1984) (search of glove compartment after suspect arrested and placed in cruiser not valid as search incident to arrest but valid as protective search). *Cf.* Commonwealth v. Clermy, 421 Mass. 325, 329 (1995) (seizure of pill bottle justified as protective but opening of bottle exceeded scope of weapons search).

[520] 395 U.S. 752, 763 (1969).

[521] *See* LAFAVE, SEARCH AND SEIZURE § 6.3(c) (4th ed. 2004)

[522] See Commonwealth v. Elizondo, 428 Mass. 322, 324 n.2 (1998) (defining grabbing area as that "which the defendant could have reached with a lunge".). In *Elizondo* the search of the bathroom was within the grabbing area in that the arrestee was 4-5 feet away though handcuffed. Id. See also Commonwealth v. Netto, 438 Mass. 686 (2003) (search of motel room where murder suspects arrested and handcuffed deemed valid); Commonwealth v. George, 35 Mass. App. Ct. 551, 555 (1993) (gym bag of arrestee deemed within grabbing area when arrestee not handcuffed and officers guns not drawn).

[523] *See* United States v. McConney, 728 F.2d 1195, 1207 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984) (listing factors relevant to whether area searched was within arrestee's immediate control). *See also* Commonwealth v. Brillante, 399 Mass. 152, 155 (1987) (officers outnumbered by suspects, late at night in high-crime area, automobile door open; sufficient facts to warrant search of driver's side of vehicle for weapon or drugs); *Compare* Commonwealth v. Garcia, 34 Mass. App. Ct. 386 (1993) (mailbox not within area of suspect's immediate control following arrest by several officers). *Cf.* Commonwealth v. Elizondo, 428 Mass. 322, 324 n.3 (1998) (stating that fact the suspect was handcuffed at time of search deemed "not dispositive").

that he is neither an acrobat [nor] a Houdini."[524] Some courts have discounted the extent to which the arrestee is restrained, measuring the area of immediate control at the moment of the arrest and not the time of the search as long as the search follows immediately on the arrest.[525] In Massachusetts recent cases have measured the exigencies at the time of search. [526] And the fourth amendment seems to require it. [526.5]

The search incident to arrest may extend into closed containers that are within the arrestee's immediate control.[527] However, it is not clear whether a locked container will be deemed accessible to an arrestee so as to come within the *Chimel* rule.[528] If the container is seized from the suspect at the time of the arrest, it may be searched without a warrant immediately thereafter.[529]

The area within the suspect's immediate control may be expanded after an arrest if the suspect voluntarily moves to another location.[530] For example, it may be reasonable for the arresting officer to accompany a suspect who goes to another room

[524] United States v. Lyons, 706 F.2d 321, 330 (D.C. Cir. 1983) (quoting United States v. Mapp, 476 F.2d 67, 80 (2d Cir. 1973)). *See* United States v. Vasey, 834 F.2d 782, 787 (9th Cir. 1987) ("*Chimel* does not allow officers to presume that an arrestee is a superman").

[525] See Commonwealth v. Netto, 438 Mass. 686 (2003) (murder suspects handcuffed and removed from motel room prior to seizure and search of belongings-search deemed incident to arrest) See also Commonwealth v. Madera, 402 Mass. 156, 160 (1987) (search of arrestee's bag after exigencies had passed deemed valid as search incident); Commonwealth v. Pierre, 72 Mass App. Ct. 580,587-588 (2008) aff'd 453 Mass. 1010 (2009) (plastic bag seized on arrest of suspect but not searched until ½-1 hour later at station – not valid search incident). See also Arizona v. Gant _U.S._, 129 S.Ct. 1710,1723 (2009) (exigency measured at time of search); Commonwealth v. Vanya V., 75 Mass. App. Ct. 370,373 n.6 (2009) (search at station of backpack seized from arrestee not incident to arrest).

[526] See Commonwealth v. Pierre, 72 Mass. App. Ct. 580, 587-588 (2008) aff'd 453 Mass. 1010 (2009) (plastic bag seized on arrest and searched later at station –not valid search incident); Commonwealth v. Vanya V., 75 Mass. App. Ct. 370,373 n.6 (2009) (same). Contrast Commonwealth v. Turner, 14 Mass. App. Ct. 1023, 1024 (1982) (search of pillowcases in possession of suspects at time of arrest conducted in nearby motel room soon after arrest). See Sec. 17.9D (4), infra.

[526.5] See Arizona v. Gant, _U.S._, 129 S.Ct. 1710,1723 (2009) (exigency measured at time of search).

[527] *See* Chimel v. California, 345 U.S. 752, 763 (1969). *See also* Commonwealth v. Madera, 402 Mass. 156 (1988) (search of closed gym bag carried by arrestee). Cf. Commonwealth v. Netto, 438 Mass. 686 (2003) (search of items including bag and pocketbook deemed to have occurred at time of arrest and restraint of suspects).

[528] *Cf.* United States v. Chadwick, 433 U.S. 1, 17 n.2 (1977) (Brennan, J., concurring) ("not obvious to me that the contents of the heavy, securely-locked footlocker were within the area of their 'immediate control' for purposes of the search-incident-to-arrest doctrine").

[529] *See* Commonwealth v. Madera, 402 Mass. 156 (1987) (search of closed gym bag carried by arrestee).

[530] *See generally* 2 LAFAVE, SEARCH AND SEIZURE § 6.4(a) (4th ed. 2004). *Cf.* Washington v. Chrisman, 455 U.S. 1 (1982) (arresting officer justified in entering dormitory room while accompanying arrested suspect).

to retrieve some clothing.[531] However, the officers may not move an arrestee against his will so as to expand the scope of a search incident to arrest.[532]

If the officers have reason to believe that there are other persons on the premises who are likely to destroy or remove evidence or threaten the officers' safety, they may conduct a cursory "protective sweep" to secure the premises.[533] The protective sweep is thus not an extension of the search incident to arrest but rather constitutes an exception to the warrant requirement based on exigent circumstances.[534]

3. The Bright-Line Rule of *New York v. Belton and Arizona v. Gant*

Under *Chimel* the area within the immediate control of the arrestee is determined by a case-by-case inquiry into the exigencies existing at the time of arrest and search. The rule with respect to the search of an automobile upon the arrest of an occupant appeared to have changed dramatically in *New York v. Belton*.[535] There the court adopted a bright-line rule allowing the search of the entire passenger compartment, including containers, as incident to the arrest.[536] Many courts interpreted *Belton* to justify the search as well as to define its scope**.** [537] Thus a search of the automobile was seen as valid even if the arrestee had been restrained outside the vehicle and thus no threat to grab a weapon or destroy evidence.[538] The court later extended *Belton* to apply to the arrest of a recent occupant of the vehicle.[539] In Arizona v. *Gant* the court disagreed with the broad reading of *Belton's* bright-line rule. [540]

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[531] *See, e.g.,* United States v. Ricks, 817 F.2d 692 (1st Cir. 1987) (officer justified in searching jacket retrieved by arrestee).

[532] *Cf.* United States v. Hill, 730 F.2d 1163, 1167 (8th Cir. 1984) ("We question, however, whether law enforcement officers should be allowed to maneuver an arrestee close to personal belongings in order to search all items thus brought within the arrestee's immediate control"). Nor may a container be brought to the arrestee so that it can be searched as incident to arrest. *See* United States v. Rothman, 492 F.2d 1260, 1266 (9th Cir. 1973) (arrestee's checked luggage brought to office where arrestee was detained; search invalid).

[533] *See* Maryland v. Buie. 494 U.S. 325 (1990) (security check of basement from which suspect emerged prior to arrest justified by reasonable suspicion). *See also* Commonwealth v. Bowden, 379 Mass. 472, 478 (1980) (security check of basement of house in which defendant was arrested to ensure safety of officers deemed valid). *Cf.* Commonwealth v. Walker, 370 Mass. 548, 556 (1976) (search of bedroom to check for other persons justified by concern for safety of officers and occupants).

[534] *See supra* § 17.9C(2).

[535] 453 U.S. 454 (1981).

[536] The search under *Belton* does not extend to the trunk (*see* New York v. Belton, 453 U.S. 454, 460–01, n.4 (1981)), but is limited to the area within the vehicle to which an occupant may have access without exiting the vehicle. *See* Commonwealth v. Bongarzone, 390 Mass. 326, 351–52 (1983) (search of rear area of van justified under *Belton* because "it was within reach of the defendants without their alighting from the vehicle").

[537] See Thornton v.United States, 541 U.S. 615,624 (2004) (O'Connor, J., concurring).

[538] See Arizona v. Gant, __U.S.__, 129 S. Ct. 1710, 1718 n.2 (2009) (collecting and comparing cases). See also Commonwealth v. Toole, 389 Mass. 159, 160-161 (1983) (search of truck cab after suspect arrested and handcuffed at rear of vehicle valid under fourth amendment but in violation of statute).

[539] Thornton v. United States, 541 U.S. 615 (2004)

[540] __U.S.__, 129 S. Ct. 1710 (2009).

Thus, to justify the search of the automobile for weapons, the principle of *Chimel* still applies. That is, the police may search only if the arrestee is "within reaching distance of the passenger compartment at the time of the search."[541] A search incident to the arrest for evidence or contraband must meet the same exigency unless it is for evidence of the arrest crime. In that event the search of the passenger compartment is justified if it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[542] The rule in *Gant* brings the fourth amendment closely in line with the Massachusetts statute.[543] It is not clear what showing is required under the fourth amendment to satisfy the standard of "reasonable to believe."[544]

4. The Search Must Be Contemporaneous with the Arrest

The rationales of *Chimel* and *Belton* are in some conflict, even after *Gant* [545] but both require that the search incident be contemporaneous with the arrest.[546] The search need not occur exactly at the moment of arrest, but it must be a "natural part of the arrest transaction."[547] A search "remote in time and place" from the point of the arrest may not be justified as a search incident.[548] For example, a locked container seized at the time of the arrest may not be searched later without a warrant.[549] The

[541] *Id* at 1723.

[542] *Id*.

[543] *See* Sec. 17.9 D (1), *supra*.

[544] *See* LAFAVE, SEARCH AND SEIZURE §7.1 (e) (4th ed. 2004) (standard may be equivalent of reasonable suspicion or perhaps based only on nature of offense). See Commonwealth v. Starkweather, 79 Mass.App.Ct. 791,798 (2011) (search of truck for evidence of arrest crime justified under statute applying "reasonably believe" language). Commonwealth v. Young, 78 Mass.App.Ct. 548,555 n.8 (2011) (not comparing 'reasonable to believe' against probable cause under automobile exception).

[545] See Arizona v. Gant __U.S.__, 129 S. Ct. 1710 (2009) (requiring exigency for weapons search of automobile but not for search for evidence of arrest crime).

[546] New York v. Belton, 453 U.S. 454, 460 (1981) (search justified as "contemporaneous incident" of arrest of occupant of car); Chimel v. California, 395 U.S. 752, 764 (1969). Under *Gant* the exigency is measured at the time of the search for weapons. See Gant, supra at 1723.

[547] Commonwealth v. Turner, 14 Mass. App. Ct. 1023, 1024 (1982) (search of pillowcases in possession of suspects at time of arrest conducted in nearby motel room soon after arrest).

[548] *See* Preston v. United States, 376 U.S. 364, 367 (1964) (automobile search conducted after vehicle impounded too remote from arrest to be justified as incident to arrest). *See also* Commonwealth v. Pierre, 72 Mass. App. Ct. 580, 587-588 (2008), aff'd 453 Mass. 1010 (2009) (bag seized from arrestee and searched later at station-not valid search incident); Commonwealth v. Alvarado, 420 Mass. 542, 554 (1995) (retrieval and search of coffee maker from car after arrest not contemporaneous).

[549] *See, e.g.*, United States v. Chadwick, 433 U.S. 1 (1977). In *Chadwick* federal agents arrested two men suspected of transporting narcotics and seized a locked footlocker from the trunk of a car they were standing next to. The agents searched the footlocker an hour and a half after the arrest at a different location and discovered drugs. The court held that the warrantless search of the container was not valid as a search incident to arrest.

search incident may precede the arrest provided that the officers have probable cause to arrest prior to the search and the arrest follows quickly upon the search.[550]

The contemporaneity requirement does not apply if there are special circumstances justifying the delayed search of an arrestee.[551] In *United States v. Edwards* [552] the Supreme Court upheld the warrantless seizure of an arrestee's clothing ten hours after he had been arrested and jailed. In upholding the search as properly incident to arrest the *Edwards* court relied on the fact that the police had probable cause to believe that the clothing contained evidence of the crime that, at the time of the seizure, was subject to destruction or removal by the arrestee, an exigency that continued after arrest until the seizure.[553]

5. Search Incident to Arrest Under Article 14

The search incident to arrest doctrine does not require that the officers have probable cause to search the area within the arrestee's immediate control.[554] Although article 14 has not yet been interpreted to impose greater limits than the Fourth Amendment on a search incident to the arrest, the amount of suspicion entertained by the arresting officers may be relevant to the scope of the search under the state constitution. In *Commonwealth v. Madera* [555] the Supreme Judicial Court upheld the search of a gym bag seized from a person arrested for drug trafficking. Because the bag had been seized and the defendant restrained, the court conceded that there were no exigencies present at the time of the search such as the risk that the arrestee would grab a weapon or destroy evidence. In upholding the search under article 14, the court emphasized that the officers had probable cause to search the bag for evidence of the arrest crime. Thus, requiring a search warrant "would afford insignificant protection to a defendant and would unnecessarily burden the criminal justice system."[556]

§ 17.9E. AUTOMOBILE EXCEPTION

1. Probable Cause Required

[550] Commonwealth v. Stephens, 451 Mass. 370 (2008); Commonwealth v. Prophete, 443 Mass. 548, 553 (2005); Commonwealth v. Brillante, 399 Mass. 152, 154–55 n.6 (1987). *See* Rawlings v. Kentucky, 448 U.S. 98, 111 (1980); Commonwealth v. Moscat, 49 Mass. App. Ct. 622, 625-626 (2000) (search on probable cause to arrest for minor in possession of alcohol valid though prior to arrest). *But see* Commonwealth v. Stafford, 18 Mass. App. Ct. 964 (1984) (questioning whether Massachusetts statute precludes search preceding arrest).

[551] See generally Butterfoss, *As Time Goes By: The Elimination of Contemporaneity and Brevity as Factors in Search and Seizure Cases*, 21 HARV. C.R. — C.L. L. REV. 603, 620–34 (1986) (questioning whether United States v. Edwards eliminated contemporaneity requirement).

[552] 415 U.S. 800 (1974).

[553] United States v. Edwards, 415 U.S. 800, 805 (1974).

[554] *See generally*, LA FAVE, SEARCH AND SEIZURE § 6.3(c) (4th ed. 2004).

[555] 402 Mass. 156 (1987).

[556] Commonwealth v. Madera, 402 Mass. 156, 160 (1987). Cf. Commonwealth v. Starkweather, 79 Mass.App.Ct. 791,798 n.8 (2011) (not comparing 'reasonable to believe' and 'probable cause')

If the police have probable cause to search a vehicle that has been stopped in transit or is located in a public place, they may search it without a warrant.[557] The inherent mobility of the vehicle and the reduced expectation of privacy attached to automobiles justify the warrantless search without a showing of exigent circumstances.[558] If the police had the authority to search the vehicle at the moment it was stopped or seized, they may impound or remove the vehicle to a more secure or convenient place and search it there.[559] But the search must be conducted "without unreasonable delay."[560]

Where the police have probable cause to search a vehicle that is parked on private property and unoccupied, there must be some exigent circumstance beyond its inherent mobility to justify a warrantless search.[561] A finding of exigent circumstances depends on the possibility that the evidence could have been removed or destroyed

[557] Pennsylvania v. Labron, 518 U.S. 938 (1996) (Fourth Amendment); Commonwealth v. Motta, 424 Mass. 117, 122 (1997) (art. 14). See Commonwealth v. Cruz, 459 Mass. 459, 474 2011) (no probable cause of criminal activity based on odor of burnt marijuana); Commonwealth v. Bostock, 450 Mass. 616, 625-626 (2008) (sufficient probable cause to search). See also Commonwealth v. Bell, 78 Mass. App. Ct. 135, 142 (2010) (large parking lot of apartment complex deemed "public place").

[558] Commonwealth v. Motta, 424 Mass. 117, 123 (1997).

[559] *See* Chambers v. Maroney, 399 U.S. 42 (1970) (Fourth Amendment); Commonwealth v. Motta, 424 Mass. 117, 125 (1997) (search conducted after car removed to police station valid under art. 14); Commonwealth v. Moses, 408 Mass. 136, 146 (1990) (search of containers in automobile begun at car and concluded later at station valid). Commonwealth v. Lugo, 64 Mass. App. Ct. 12, 16 (2005) (automobile removed to police station for search).

[560] Commonwealth v. Motta, 424 Mass. 117,125 (1997). See Commonwealth v. Bell, 78 Mass. App. Ct. 135, 143 (2010) (two and a half hour delay not unreasonable). Commonwealth v. Markou, 391 Mass. 27, 30 (1984) (valid search "reasonably immediate" after the stop). *Compare* Commonwealth v. Agosto, 428 Mass. 31, 35 (1998) (impounded car searched without warrant ten times over twenty-one days); Commonwealth v. Woodman, 11 Mass. App. Ct. 965, 966 (1981) (48-hour delay from stop to search unreasonable). However, the U.S. Supreme Court has upheld, under the automobile exception, the opening of bags containing marijuana three days after they were seized. United States v. Johns, 469 Mass. 478, 484–87 (1985). Delaying the seizure and search of a vehicle which is "readily mobile" is constitutionally acceptable if the officers have an objectively reasonable basis to delay the seizure and are not acting solely to avoid the warrant requirement. Commonwealth v. Eggleston, 453 Mass. 554, 560 (2009) (investigative considerations deemed reasonable).

[561] *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion). In *Coolidge* the officers had probable cause to believe that a murder suspect's car, which was parked in his driveway, contained evidence of the crime. They obtained a search warrant, later deemed invalid, and searched the car. Because there was little likelihood that the car would have been moved and because the officers had had probable cause for some time prior to the search, a plurality of the court held that the search did not come within the automobile exception. Compare California v. Carney, 471 U.S. 386 (1985) (motor home parked in public parking lot — warrantless search upheld). But see Commonwealth v. Fernandez, 458 Mass. 137,147 n. 13 (2010) (leaving open whether auto parked within curtilage can be searched under exception based on probable cause alone). *See also* Commonwealth v. Sergienko, 399 Mass, 291, 296 (1987) (exigent circumstances required): Commonwealth v. Myers, 16 Mass. App. Ct. 554 (1983) (search of car parked in apartment complex parking lot justified by likelihood of removal of contraband); Commonwealth v. Avery, 365 Mass. 59, 64 (1974) (search of parked car containing heroin and handgun justified in part by information about known drug users in neighborhood); Commonwealth v. Ortiz, 376 Mass. 349 (1978) (search of parked car justified because of possibility that it could be moved by others after owner was arrested).

during the time necessary to obtain a warrant.[562] The officers are not required to post a guard over the vehicle while a warrant is sought.[563] However, the exigency must be real and not simply the foreseeable result of the officer's unreasonable delay.[564]

Probable cause: There must be probable cause to search the vehicle to activate the automobile exception. The officers must be aware of sufficient facts to justify a person of reasonable caution to believe that the vehicle contains contraband or the fruits, instrumentalities, or evidence of crime.[565] The probable cause must point to the vehicle and must sufficiently tie the object of the search to criminal activity.[566] The

[562] *See, e.g.*, Commonwealth v. A Juvenile (No. 2), 411 Mass. 157, 164 (1991) (warrantless seizure of defendant's car from driveway justified by exigent circumstances; *Coolidge* distinguished in that suspect was not in custody and probable cause arose just prior to seizure). But see Commonwealth v. Fernandez, 458 Mass. 137,147 n.13 (2010) (leaving open the possibility that the search of an automobile on private property may be justified by probable cause alone).

[563] *See* Commonwealth v. Bakoian, 412 Mass. 295 (1992) (ability to post guard while obtaining warrant "not heavily weighed").

[564] If the officers have a "plain and ample" opportunity to obtain a warrant they must do so. Commonwealth v. Bongarzone, 390 Mass. 326, 351 (1983), (quoting United States v. Newborn, 600 F.2d 452, 457 (4th Cir. 1979)). *See* Commonwealth v. Sergienko, 399 Mass. 291, 296 (1987) (search conducted four and one-half hours after probable cause arose); Commonwealth v. Agosto, 428 Mass. 31, 35 (1998) (impounded car searched without warrant ten times over twenty-one days). See also Commonwealth v. Eggleston, 453 Mass. 554, 559 (2009) (explaining "plain and ample opportunity").

[565] For example, the smell of burnt marijuana provides probable cause that marijuana will be found in the passenger compartment of the vehicle, *Commonwealth v. Garden*, 451 Mass. 43, 53 (2008). But, after decriminalization of possession of a small amount of marijuana, the odor of burnt marijuana alone does not give rise to probable cause of criminal activity. *Commonwealth v. Cruz*, 459 Mass. 459, 474 (2011). See e.g. *Commonwealth v. Bostock*, 450 Mass. 616, 624-625 (2008) (sufficient probable cause that suspect's truck contained recently stolen items) *See* Commonwealth v. Alvarado, 420 Mass. 542, 555 (1995) (seizure of drugs from person of passenger not sufficient probable cause to search automobile); Commonwealth v. Garcia, 34 Mass. App. Ct. 645, 650 (1993) (observation of baggie with powder residue not sufficient to establish probable cause); Commonwealth v. Santiago, 410 Mass. 737, 745 (1991) (no probable cause to search automobile stating, "A mere leaning or bending motion when exiting automobile is notnecessarily suspicious"); Commonwealth v. Moon, 380 Mass. 751, 760 (1980) (fact that suspect assailant arrived at scene of assault in automobile not sufficient to establish nexus between vehicle and criminal activity). *Compare* Commonwealth v. Owens, 414 Mass. 595 (1993) ("discovery of illegally possessed firearm and ammunition that did not match gave cause to search the vehicle for other concealed objects"); Commonwealth v. Vasquez, 426 Mass. 99, 103–04 (1997)(immediately after armed assault suspect standing next to vehicle — probable cause to search car for gun); Commonwealth v. Motta, 424 Mass. 117, 121 (1997) (several undercover buys from suspect before and scheduled buy that day — probable cause that drugs were in vehicle); Commonwealth v. Pena, 69 Mass. App. Ct. 713, 717-718 (2007) (discovery of plastic bags of marijuana on person of suspect passenger removed from vehicle did not give rise to search under automobile exception). *But see* Commonwealth v. Villatoro, 76 Mass. App. Ct. 645, 649 (2010)(discovery of marijuana on driver's person allowed for search of entire vehicle).

[566] Commonwealth v. Cruz, 459 Mass. 459, 474 (2011) (probable cause to believe marijuana in automobile but not enough to believe possession was criminal). See Commonwealth v. Moon, 380 Mass. 751 (1980) (probable cause to believe handgun in vehicle but no probable cause to believe that it was illegal weapon); Commonwealth v. Toole, 389 Mass. 159, 163–64 (1983) (same); Commonwealth v. Couture, 407 Mass. 178, 180 (1990) (same).

object of the search must be specific, although the degree of particularity required for a search warrant may not be necessary for the warrantless search of an automobile.[567]

2. The Search of Containers Within the Vehicle

If there is probable cause to search the vehicle, the authorities generally may search the entire vehicle including locked compartments and closed containers.[568] However, the scope of the search depends on the nature of the probable cause. [568.5] For example if the officers have probable cause to believe that the vehicle contains an illegal weapon, they may search only those areas that could conceivably contain the weapon.[569] If the probable cause is limited to a specific container within the vehicle rather than the entire vehicle, the officers may search the container without a warrant under the automobile exception.[570] However, probable cause to search the container does not justify the warrantless search of the entire automobile.[571]

§ 17.9F. INVENTORY AND STORAGE SEARCHES

Inventory searches occur in two contexts. If a suspect has been lawfully arrested and placed in custody, the police may conduct an inventory of her personal

[567] *See* Commonwealth v. Markou, 391 Mass. 27, 32–33 (1984) (probable cause to search for "stolen stereo equipment" sufficiently specific).

[568] United States v. Ross, 456 U.S. 798 (1982) (search of paper bag justified by probable cause to search vehicle for contraband). *See* Wyoming v. Houghton, 526 U.S. 295 (1999) (officers with probable cause to search automobile for drugs justified in searching passenger's handbag); Commonwealth v. Cast, 407 Mass. 891 (1990) (art. 14 does not preclude opening of closed containers during search under automobile exception); Commonwealth v. Bostock, 450 Mass. 616,624 (2008) (quoting *Cast*); Commonwealth v. Wunder, 407 Mass. 909 (1990) (same). *See also* Commonwealth v. King, 389 Mass. 233, 247 (1983) (search of duffel bag inside car).

[568.5] See Commonwealth v. Garden, 451 Mass. 43, 53 (2008) (odor of burnt marijuana alone did not justify search of trunk under automobile exception). Compare Commonwealth v. DeGray, 77 Mass. App. Ct. 122, 127-128 (2010) (discovery of contraband in the vehicle justifies search of trunk under exception).

[569] *Cf.* Commonwealth v. Silva, 366 Mass. 402 (1974) (protective search of car for weapon valid but extending search into small packet that could not have contained weapon violated suspect's Fourth Amendment rights).

[570] California v. Acevedo, 500 U.S. 565 (1991).

[571] California v. Acevedo, 500 U.S. 565 (1991). In *Acevedo* the court in effect overruled United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979), which had struck down the warrantless search of containers seized from an automobile reasoning that the suspects had a separate expectation of privacy in the container and the seizure had vitiated the exigency. In United States v. Ross, 456 U.S. 798 (1982), the court had distinguished *Chadwick* and *Sanders* by the fact that the officers in *Ross* had probable cause to search the entire vehicle. The rationale of *Ross* is that the authority to search under the automobile exception is commensurate with the authority to search a vehicle with a warrant. Thus if there is probable cause to search the vehicle the officers have authority to search anywhere that the evidence or contraband might be found. *Ross, supra*, 456 U.S. at 823–24. See Commonwealth v. Cast, 407 Mass. 891, 902-903 (1990) (although probable cause focused on suitcase other facts suggested contraband could be found elsewhere in vehicle).

effects.[572] Also, if an automobile has been lawfully seized and is subject to impoundment, the police may search the vehicle to inventory and secure the personal property of the owner.[573] A storage search occurs when an officer seizes personal effects and secures them in a storage area to ensure that they will not be lost, stolen, or damaged. Although there may be relevant differences between the inventory and storage search, the latter is subject to the same constitutional standards as are applied to inventory searches.[574]

1. Fourth Amendment Standards

An inventory search requires neither warrant nor probable cause,[575] but because it is an intrusion on constitutionally protected privacy rights it must be reasonable to be constitutional.[576] The reasonableness of an inventory search is measured by balancing the interests of the government against the nature and extent of the intrusion on individual privacy.[577] In both contexts the general measure of reasonableness is the conformity to standard police procedures for conducting the inventory search.[578] If the procedures narrowly circumscribe the discretion of the officer[579] and if the officer

[572] Commonwealth v. Seng, 436 Mass. 537, 551 (2002) (stating purpose "to protect police from later claims of theft or lost property and keep weapons and contraband from the prison population"); Commonwealth v. Cullen, 79 Mass. App. Ct. 618, 622 (2011) (unfolding of papers properly subject to inventory and looking at them valid under inventory exception); Commonwealth v. Sullo, 26 Mass. App. 766 (1989) (perusal of business cards seized from arrestee held invalid); Commonwealth v. Gliniewicz, 398 Mass. 744 (1986) (seizure of arrestee's boots valid); Commonwealth v. Wilson, 389 Mass. 115 (1983) (inventory search of arrestee's wallet valid); Illinois v. Lafayette, 462 U.S. 640 (1982) (search of arrestee's shoulder bag upheld).

[573] There are two inquiries under the automobile inventory exception: 1) whether the decision to impound the vehicle was valid; and 2) whether the scope of the search was within constitutional limits. Commonwealth v. Eddington, 459 Mass. 102, 108 (2011). The impoundment decision is justified "by public safety concerns or by the danger of theft or vandalism to a vehicle left unattended". Commonwealth v. Daley, 423 Mass. 747, 750 (1996). See Commonwealth v. Brinson, 440 Mass. 609, 612 (2003) (car parked in commercial lot at time of suspect's arrest gave rise to no threat of vandalism or theft or to public safety). Compare Commonwealth v. Eddington, supra at 109 (impoundment of automobile stopped on public street and owner not present and no one authorized to control vehicle). See also Commonwealth v. Caceres, 413 Mass. 749, 751 (1992) (owner present and proposed reasonable alternative).

[574] *See* Commonwealth v. Ford, 394 Mass. 421, 426 (1985) ("any such search must at least be conducted pursuant to standard procedures established by the police department").

[575] *See, e.g.,* South Dakota v. Opperman, 428 U.S. 364, 369–70 (1976) (policies underlying warrant and probable-cause requirements not implicated in noninvestigatory context).

[576] *See, e.g.,* Colorado v. Bertine, 479 U.S. 367, 371 (1987).

[577] *See, e.g.,* South Dakota v. Opperman, 428 U.S. 364, 370 (1976).

[578] *See* Colorado v. Bertine, 479 U.S. 367, 374 n.6 (1987). *See also* Florida v. Wells, 495 U.S. 1, 5 (1990) (no policy with respect to opening closed container – inventory search invalid).

[579] *First*, the procedures must describe the circumstances under which an inventory search will be conducted thereby narrowing the discretion of the officer to decide whom to search. *See* Colorado v. Bertine, 479 U.S. 367, 375–76 (1987) (discretion of officer to impound

follows the procedures in good faith and not merely as subterfuge for an investigatory search,[580] the inventory will likely be upheld. Any evidence, fruits, or instrumentalities of crime or contraband encountered in plain view during a lawful inventory search will be admissible at a criminal trial.[581]

The Supreme Court has identified three purposes that justify the inventory search: "(1) the protection of the owner's property while it remains in police custody; (2) the protection of the police against claims or disputes over lost or stolen property; and (3) the protection of police from danger."[582] However, under the Fourth Amendment the validity of a particular inventory search does not depend on how well those purposes were served or whether they could have been served as well by a less intrusive alternative.[583] Instead, the Supreme Court has established a bright-line rule allowing the inventory search as long as it was conducted pursuant to standard police procedures.[584]

2. Article 14 Standards

Although the standard of reasonableness for inventory searches under the Fourth Amendment appears somewhat deferential, the standard under article 14 is likely to be applied more strictly. For example, article 14 requires that the standard

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and inventory seized vehicle based on standardized criteria). *Second*, the procedures must delineate the scope of the inventory search to ensure that it does not become a general exploratory search for evidence of crime. *See* Commonwealth v. Bishop, 402 Mass. 449 (1988) (state police procedures that failed to specify inventory procedure for closed containers invalid under art. 14); *See also* Commonwealth v. Peters, 48 Mass. App. Ct. 15, 20–21 (1999) (written policy on inventory search of arrestee too broad so as to invite discretion).

[580] *See* South Dakota v. Opperman, 428 U.S. 364, 383 (1972) (Powell, J. concurring) (noting that inventory searches are not discretionary or conducted to discover evidence of crime).

[581] *See, e.g.*, Commonwealth v. Garcia, 409 Mass. 675, 685 (1990) (open bag indicating presence of contraband by its "look and feel" discovered during lawful inventory search admissible under Fourth Amendment and art. 14).

[582] South Dakota v. Opperman, 428 U.S. 364, 369 (1976). In Illinois v. Lafayette, 462 U.S. 640, 646 (1983), the court identified two additional purposes relevant to the postarrest inventory: protecting the arrestee from injuring himself and assisting in the verification of the arrestee's identity.

[583] *See* Colorado v. Bertine, 479 U.S. 367, 374 (1987) (quoting Illinois v. Lafayette, 462 U.S. 640, 647 (1983)).

[584] *See* Colorado v. Bertine, 479 U.S. 367 (1987). In *Bertine*, the suspect was arrested for drunk driving and an officer searched his van prior to the arrival of a tow truck. He discovered cocaine in a closed backpack and the owner was charged with possession. The court upheld the search because the police officer followed local procedures requiring that all containers be opened and their contents listed in the inventory. Even though the procedures gave the officer some discretion to decide whether to impound the vehicle and conduct the inventory or simply to park and lock the vehicle in a public parking area, the court upheld the search because the officer's decision was based on standardized criteria rather than suspicion of criminal activity.

Even if the local procedures do not *require* the opening of closed containers, the inventory search of a container found in an impounded vehicle might be constitutional if the officers' discretion is limited by the procedures. *See* Florida v. Wells, 495 U.S. 1 (1990) (holding inventory search of container seized from impounded vehicle invalid because of the lack of procedures but stating that regulations leaving some discretion to officers may be valid).

police procedures governing inventory and storage searches not only be specific but also be in writing.[585] Furthermore, the Supreme Judicial Court may be more willing to consider the availability of less intrusive means for protecting the property in assessing the reasonableness of the inventory search.[586] Written guidelines requiring the open of closed containers do not violate article 14.[587] Because the inventory search is an exception to the warrant and probable cause requirements of the Fourth Amendment and article 14, the prosecution bears the burden of proving that the search was reasonable.[588] *First*, they must show that the underlying arrest of the individual or seizure of the automobile was lawful.[589] Second, the prosecution must show that there

[585] Commonwealth v. Bishop, 402 Mass. 449, 451 (1988) (policy for conducting motor vehicle inventory searches that failed to set guidelines for search of closed containers held inadequate under art. 14). A written policy directing the police to inventory the contents of a lawfully impounded vehicle is sufficient to authorize the opening of a locked trunk. Commonwealth v. Garcia, 409 Mass. 675, 684 (1990) (upholding inventory search under Fourth Amendment and art. 14). But see Commonwealth v. Vanya V., 75 Mass. App. Ct. 370, 374-375 (2009) (policy not specific as to search of locked container deemed insufficiently precise). See also Commonwealth v. Difalco, 73 Mass. App. Ct. 401, 404 (2008) (no written authority to open locked container); A written policy directing police to "search the arrestee and make an inventory of all items collected" is not sufficient to authorize the opening of the arrestee's zippered handbag. Commonwealth v. Rostad, 410 Mass. 618, 623 (1991) (relying on art. 14). The initial decision to impound the vehicle must satisfy constitutional standards. Commonwealth v. Caceres, 413 Mass. 749, 751 (1992) (no opinion on whether impoundment decision must be pursuant to written guidelines in view of no other alternative).

[586] *See* Commonwealth v. Ford, 394 Mass. 421, 425–26 & n.3 (1985) (suggesting that personal property could have been adequately protected without intrusion into locked trunk and stating that "we have consistently noted in recent years the possibility that art. 14 affords more substantive protection to criminal defendant than prevails under the Constitution of the United States"). The court has stated that if the owner proposes that a licensed passenger be allowed to operate the vehicle such an alternative should be honored. Commonwealth v. Caceres, 413 Mass. 749, 751 n.1 (1992) (dictum). *But see* Commonwealth v. Ellerbe, 430 Mass. 769, 774 (2000) (court found "no practicable alternative" to impoundment where passenger did not have license in her possession); Commonwealth v. Daley, 423 Mass. 747, 750 (1996) (unregistered and uninsured vehicle — no practical alternative to impoundment). The Supreme Judicial Court has declined to adopt a per se rule with respect to the ability of any authorized individual to remove the vehicle. Commonwealth v. Eddington, 459 Mass. 102, 109 n.12 (2011).

[587] *See* Commonwealth v. Caceres, 413 Mass. 749, 755 (1992) (written guidelines required opening of all containers except "locked personal containers"). *See also* Commonwealth v. Muckle, 61 Mass. App. Ct. 678, 684 (2004) (antiquated policy did not contain instructions with respect to closed containers). *Compare* Commonwealth v. Allen, 76 Mass.App.Ct. 21, 24-25 (2009) (written policy requiring search of closed containers). *Cf.* Commonwealth v. Wilson, 389 Mass. 115, 117 (1983) (upholding under Fourth Amendment preincarceration search of arrestee's wallet pursuant to standard procedures).

[588] Commonwealth v. Sullo, 26 Mass. App. Ct. 766 (1989) (inventory search "carefully circumscribed by law because, as an exception to the ordinary constitutional requirements, the search may be conducted without a warrant or probable cause"). See Commonwealth v. Seng, 436 Mass. 537, 556 (2002) (inventory of personal belongings of suspect arrested for murder was proper but closer examination of numbers on bank card exceeded scope of inventory search). See also Commonwealth v. Vanya, 75 Mass. App. Ct. 370 (2009) (no right to damage or destroy locked container pursuant to inventory search).

[589] See Commonwealth v. Eddington, 459 Mass. 102 (2011) (car lawfully stopped on highway and owner not present to discuss disposition of vehicle – impoundment valid). Compare Commonwealth v. Brinson, 440 Mass. 609, 615-616 (2003) (car legally parked in private lot and no evidence of threat to vehicle or to public – impoundment invalid). The

were written procedures governing the conduct and scope of the inventory [590] Perhaps most important is the requirement that the inventory be conducted in good faith and not merely as a pretext to conduct an investigatory search.[591] Although the fact that the officers had some suspicion that a search would disclose evidence of criminal activity is not necessarily fatal,[592] such suspicion may contribute to the conclusion that the inventory was pretextual.[593]

§ 17.9G. ADMINISTRATIVE SEARCHES

Supreme Judicial Court has not required that the decision to impound the vehicle must be governed by written policy. See *Eddington*, supra. at 112 (Gant, J. concurring) (suggesting that written guidelines for the impoundment decision should be required to reduce the opportunity for pretextual inventory searches). See also Commonwealth v. Goncalves, 62 Mass. App. Ct. 153, 156-157 (2004) (distinguishing between impoundment and inventory search and finding impoundment not subject to Bishop requirements). See also Commonwealth v. Caceres, 413 Mass. 749, 752 (1992) (impoundment not justified); Commonwealth v. Ellerbe, 430 Mass. 769, 775-776 (2000) (impoundment justified where passenger not in possession of license). Cf. Commonwealth v. Murphy, 63 Mass. App. Ct. 11, 17 (2005) (decision to impound vehicle was result of investigative use of keys to vehicle seized from defendant).

[590] Commonwealth v. Silva, 61 Mass. App. Ct. 28, 37-38 (2005) (no inventory policy produced by prosecution). See Commonwealth v. Bishop, 402 Mass. 449, 451 (1988) (standard procedures must be in writing). See also Commonwealth v. Figueroa, 412 Mass. 745 (1992)(officers' looking into opening between panel and wall in back seat required by written guidelines). Commonwealth v. Muckle, 61 Mass. App. Ct. 678, 680 (2004) (crumpled Dunkin Donuts bag in car opened in inventory search deemed a container and no requirement to open closed containers in policy).

[591] See Commonwealth v. Seng, 436 Mass. 537, 553-554 (2002) (reading and recording of numbers of suspect's bank card deemed investigatory). Commonwealth v. Matchett, 386 Mass. 492, 510 (1982) (upholding trial court's determination that inventory search of murder suspect's vehicle was not a pretext to search for evidence of crime). *Compare* Commonwealth v. Alvarado, 420 Mass. 542, 553 (1995) (using sniffer dog made search investigatory and opening coffee maker exceeded scope of inventory guidelines).

[592] See Commonwealth v. Garcia, 409 Mass. 675, 679–80 (1990) (fact that officer had some suspicion that contraband would be found did not vitiate otherwise lawful inventory search where trial court found no pretext). See also Commonwealth v. Baptiste, 65 Mass. App. Ct. 511, 519 (2006) (suspicion of presence of contraband did not vitiate inventory search required by policy); Commonwealth v. Horton, 63 Mass. App. Ct. 571, 577 (2005) (inventory search conducted after arrest of defendant deemed valid inventory search as contemplated from moment of stop).

[593] *See* Commonwealth v. Seng, 436 Mass. 537, 554 (2002) (reading and recording numbers on bank card seized during inventory search deemed investigatory). Compare Commonwealth v. Eddington, 459 Mass. 102,109 (2011) (impoundment of vehicle deemed noninvestigatory). See also Commonwealth v. Sullo, 26 Mass. App. Ct. 766, 772 (1989) (perusal of business cards seized at booking went beyond necessities of inventory search and revealed "telltale signs of investigative search"). *Compare* Commonwealth v. Garcia, 409 Mass. 675, 679–80 (1990) (fact that officer had some suspicion that contraband would be found did not vitiate otherwise lawful inventory search where trial court found no pretext) *with* Commonwealth v. Woodman, 11 Mass. App. Ct. 965 (1981) (search conducted for purpose of inventory and to look for evidence of crime invalid).

A search may be necessary to enforce a regulatory scheme rather than to investigate possible violations of criminal laws.[594] For example, a city health department may need to enter and inspect a residential apartment for the presence of health code violations[595] or a federal agency may be authorized to inspect the records and premises of a licensed gun dealer.[596]

Such administrative inspections implicate privacy rights under the fourth amendment and article 14 of the Massachusetts Constitution Declaration of Rights, but the standards for judging their constitutionality are different in important respects from those governing a criminal investigative search.[597]

As a general rule, in the absence of consent or exigent circumstances, the administrative inspection of residential or commercial premises requires a warrant authorizing the inspection and carefully limiting its scope.[598] However, some businesses are so pervasively regulated that a warrantless inspection may be authorized under a narrowly drawn statute that adequately protects the privacy interests of the owner.[599] The Supreme Judicial Court has also applied the administrative search exception to seizures and searches conducted at the entrances to areas deemed sensitive for security purposes. [599.5]

1. Administrative Searches Under Warrant

[594] *See* New York v. Burger, 482 U.S. 691 (1987) (state program for inspection of automobile junkyards). *See also* Commonwealth v. Tart, 408 Mass. 249 (1990) (inspection of vessels engaged in fishing industry); Commonwealth v. Eagleton, 402 Mass. 199 (1988) (state inspection of licensed auto body shop); Commonwealth v. Frodyma, 386 Mass. 434 (1982) (inspection of licensed pharmacy); Commonwealth v. Lipomi, 385 Mass. 370 (1982) (same); Commonwealth v. Accaputo, 380 Mass. 435 (1980) (same); Donovan v. Dewey, 452 U.S. 594 (1981) (inspection of stone quarries under Federal Mine Safety and Health Act of 1977); Marshall v. Barlow's Inc., 436 U.S. 307 (1978) (inspection of businesses under Occupational Health and Safety Act); Colonnade Corp v. United States, 397 U.S. 72 (1970) (federal inspection of liquor dealers); See v. City of Seattle, 387 U.S. 541 (1967) (fire department inspection of warehouse).

[595] *See* Camara v. Municipal Court, 387 U.S. 523, 540 (1967) (warrant necessary for nonemergency inspections of dwellings for violations of health code).

[596] *See* United States v. Biswell, 406 U.S. 311 (1972) (approving warrantless inspection of gun dealer's premises).

[597] Commonwealth v. Eagleton, 402 Mass. 199, 202 n.5 (1985).

[598] *See, e.g.*, Marshall v. Barlow's Inc., 436 U.S. 307, 313 (1978) (warrant required for OSHA inspections).

[599] *See, e.g.*, New York v. Burger, 482 U.S. 691, 703–07 (1987) (automobile junkyards a closely regulated industry); Commonwealth v. Lipomi, 385 Mass. 370 (1982).

[599.5] Commonwealth v. Roland R., 448 Mass. 278, 282 (2007) (routine security check of juvenile's bag at entrance to courthouse deemed reasonable administrative search); Commonwealth v. Carkhuff, 441 Mass. 122, 128 (2004) (assuming that preventing contamination of water supply by potential terrorist saboteurs constitutes adequate basis for administrative search). However, the nature and degree of the intrusion must be minimized by adequate procedures to be deemed reasonable. Id. at 129-130 (failure to provide some prior notice to reduce intrusiveness of stop and search deemed unreasonable).

Where an administrative warrant is issued, it must be based on adequate grounds to ensure that the decision to inspect the particular premises is not arbitrary.[600] The standard for issuance of an administrative warrant is less than the probable cause used in criminal cases in two ways.[601] *First*, it may be satisfied by "specific evidence of an existing violation" that falls short of the quantum required for criminal probable cause.[602] *Second*, it may result not from evidence of any violation but from the neutral application of "reasonable legislative or administrative standards" to a particular residence or business.[603] For example, the routine inspection of a business may be appropriate simply because the premises have not been inspected before.[604]

Because of the relaxed standard of probable cause used in administrative warrant cases, the courts have emphasized that the scope of the administrative search is narrower than that of a criminal investigative search.[605] The administrative warrant must announce the purposes of the inspection and must narrowly limit the discretion of the inspector.[606] The particularity requirement of the Fourth Amendment warrant clause applies with particular force to administrative warrants.[607]

If an administrative inspection is in reality a pretext for a criminal investigative search, the search must satisfy the higher standards applicable to criminal searches.[608]

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[600] *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 321 (1978) (reasonableness of inspection ensured by showing that it is based on "neutral criteria"). *See also* Commonwealth v. Eagleton, 402 Mass. 199, 203 n.7 (1988) (use of systematic guidelines may justify issuance of administrative search warrant).

[601] *See* Commonwealth v. Frodyma, 386 Mass. 434, 441 (1982) (characterizing grounds for issuance of administrative warrant as "relaxed standard of probable cause").

[602] *See* Commonwealth v. Frodyma, 386 Mass. 434, 442 (1982) (lesser standard may be satisfied merely by complaints to a regulatory agency). *See generally* LAFAVE, SEARCH AND SEIZURE § 10.2(d) (4th ed. 2004) (suggesting that standard is less than criminal probable cause but characterizing issue as uncertain).

[603] *See* Camara v. Municipal Court, 387 U.S. 523, 538 (1967) ("it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling"); Marshall v. Barlow's Inc., 436 U.S. 307, 321 (1978) ("A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources . . . would protect an employer's Fourth Amendment rights").

[604] *See* Commonwealth v. Frodyma, 386 Mass. 434, 442 (1982).

[605] *See* Commonwealth v. Accaputo, 380 Mass. 435, 441 (1980).

[606] *See* Commonwealth v. Lipomi, 385 Mass. 370, 374 (1982) (required not only by statute in this case but also by Fourth Amendment).

[607] *See* Commonwealth v. Frodyma, 386 Mass. 434, 446–47 (1982) (warrant may not simply track language of statute but must be specific as to type of records and documents subject to inspection). *Cf.* Commonwealth v. Lipomi, 385 Mass. 370, 375 (1982) ("serve[s] not only to circumscribe the discretion of the executing officers but also to inform the person subject to the search and seizure what the officers are entitled to take [or inspect]," quoting Commonwealth v. Accaputo, 380 Mass. 435, 446 (1980)).

[608] *See* Commonwealth v. Krisco Corp. 421 Mass. 37, 41 (1995) (search of business not valid administrative inspection, as it was subterfuge for investigative search); Commonwealth v. Frodyma, 386 Mass. 434, 439–40 (1982).

However, the fact that the officers conducting an administrative inspection have some suspicions of a criminal violation will not necessarily vitiate the search.[609]

2. Warrantless Inspections of Closely Regulated Businesses

If the business to be inspected is in a "closely regulated industry" and if a statute or regulation provides specifically for warrantless inspections, an administrative warrant may not be required.[610] In determining what is a closely regulated industry, the court will examine the pervasiveness and regularity of the regulation as well as the amount of time the industry has been so regulated.[611] The exception has been applied to the sale of liquor,[612] firearms,[613] controlled substances,[614] the mining of coal,[615] and the operation of automobile junkyards.[616] The Supreme Court refused to apply the exception to federal safety regulation of all businesses that operate in interstate commerce.[617]

If the industry is classified as "closely regulated," three criteria must be satisfied to justify as reasonable a warrantless inspection of a particular business within the industry: (1) the government must have a "substantial interest" in regulating the industry; (2) the regulation must "reasonably serve" that interest; and (3) the statutory program, which allows for the warrantless inspection, must provide in its regularity and

[609] In New York v. Burger, 482 U.S. 691 (1987), the Supreme Court upheld an administrative search of an automobile junkyard conducted by police officers even though they had already determined that the owner had violated every provision of the administrative scheme. The officers' inspection of the owner's inventory revealed evidence of possession of stolen property and the owner was charged. *See also* Commonwealth v. Eagleton, 402 Mass. 199, 206–07 (1988) (test under Fourth Amendment is whether the actions of the officers were objectively reasonable; avoids suggesting how the issue would be resolved under art. 14); Commonwealth v. Tremblay, 43 Mass. App. Ct. 454, 460 (2000) (fact that tip about stolen cars precipitated administrative inspection of salvage company did not make search pretextual).

[610] Commonwealth v. Leboeuf, 78 Mass.App.Ct. 45,49 (2010) (commercial trucking); Commonwealth v. Tart, 408 Mass. 249 (1990) (fishing vessels); Commonwealth v. Eagleton, 402 Mass. 199 (1988) (licensed autobody shop); New York v. Burger, 482 U.S. 691 (1987) (automobile junkyards); Commonwealth v. Frodyma, 386 Mass. 434 (1982) (retail pharmacies); Donovan v. Dewey, 452 U.S. 594 (1981) (mining industry); United States v. Biswell, 406 U.S. 311 (1972) (retail sale of guns); Colonnade Corp v. United States, 397 U.S. 72 (1970) (retail sale of liquor). The rationale for justifying the warrantless search of closely regulated industries is that the owner of such a business has a reduced expectation of privacy because of the degree of governmental oversight and the acquiescence of the owner. *See Burger, supra*, 482 U.S. at 701.

[611] New York v. Burger, 482 U.S. 691, 701 (1987) (length of time industry was regulated an important factor); Donovan v. Dewey, 452 U.S. 594, 606 (1981) (same).

[612] Colonnade Corp. v. United States, 397 U.S. 72 (1970).

[613] United States v. Biswell, 406 U.S. 311 (1972).

[614] Commonwealth v. Lipomi, 385 Mass. 370 (1982).

[615] Donovan v. Dewey, 452 U.S. 594 (1981).

[616] Commonwealth v. Eagleton, 402 Mass. 199 (1988); New York v. Burger, 482 U.S. 691 (1987). *But cf.* Commonwealth v. Bizarria, 31 Mass. App. Ct. 370, 376 (1991) (suggesting garage owners and repairmen not part of "closely regulated" industry).

[617] Marshall v. Barlow's Inc.. 436 U.S. 307 (1978).

certainty an adequate substitute for a warrant.[618] To satisfy the third requirement, the regulatory scheme must specifically limit the time, place, and scope of the inspection so as to limit the discretion of the inspecting officers.[619]

§ 17.9H. SPECIAL NEEDS SEARCHES

1. Generally

Most government searches are conducted by law enforcement officers in the course of a criminal investigation. However, other government officials often find it necessary to conduct searches for other purposes, such as maintaining school discipline or investigating employee misconduct in the public workplace. The Supreme Court has addressed nontraditional searches in several contexts.[620] What has emerged from these cases is a category of "special needs" searches in which the court has dispensed with the usual Fourth Amendment requirement of a warrant and probable cause in favor of an ad hoc balancing of interests to determine whether a particular search was reasonable.[621] The court has used this mode of analysis in school searches,[622] searches

[618] New York v. Burger, 482 U.S. 691. 702–03 (1987). The criteria were drawn from Donovan v. Dewey, 452 U.S. 594 (1981), although the *Burger* court seems to have relaxed the second criterion, which *Dewey* had articulated as 'necessary to further [the] regulatory scheme." *Dewey*, *supra*, 452 U.S. at 600. *See also* Commonwealth v. Tart, 408 Mass. 249, 255 (1990) (applying balancing test to warrantless inspection of fishing vessel for permit and finding no violation of Fourth Amendment or art. 14).

[619] Commonwealth v. Leboeuf, 78 Mass. App. Ct. 45,52 (2011) (random suspicionless stop of commercial vehicle for safety inspection valid under fourth amendment). *Compare* Commonwealth v. Tart, 408 Mass. 249, 256–57 (1990) (statute providing for warrantless inspection of vessel that officer has reason to know is landing raw fish limits scope of inspection to determine whether vessel has state permit — valid under Fourth Amendment and art. 14) *with* Commonwealth v. Bizarria, 31 Mass. App. Ct. 370, 377–78 (1991) (statute providing for inspection of garage owners and repairmen contains no standard procedures for deciding to search particular garage and fails to adequately limit scope of search — invalid under art. 14).

[620] *See* City of Ontario, Cal. v. Quon, __ U.S. __, 130 S. Ct. 2619 (2010) (text messages on pagers provided by city to police personnel); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (drug testing of Customs Service personnel); Skinner v. Railway Labor Executive Ass'n, 489 U.S. 602, (1989) (drug testing of railroad employees involved in train accidents); Griffin v. Wisconsin, 483 U.S. 868 (1987) (search of probationer's home); O'Connor v. Ortega, 480 U.S. 709 (1987) (search of office of state hospital employee); New Jersey v. TLO, 469 U.S. 325 (1985) (search of high school student's purse).

[621] *See, e.g.*, Skinner v. Railway Labor Executive Ass'n, 489 U.S. 602, 619 (1989) ("When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in particular context"); New Jersey v. TLO, 469 U.S. 325, 337 (1985) (quoting Camara v. Municipal Court, 387 U.S. 523, 536–37 (1967)).

In his concurring opinion in New Jersey v. TLO, *supra*, 469 U.S. at 352, Justice Blackmun set out the analytical framework for cases involving special needs searches: "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." Thus, for Justice Blackmun, the analysis of nontraditional searches entails two steps. *First* the court must determine whether there are "special needs" to dispense with the warrant and probable-cause requirements. *Second*, and only then should it balance the interests to determine if the search was "reasonable." *See*

by government employers[623] and probation officers,[624] and drug testing.[625] Administrative searches invoke a different doctrine addressed *supra* at § 17.9G.

The Supreme Judicial Court has shown a willingness to undertake an independent analysis of special needs searches under article 14.[626] In balancing the interests under article 14, the court has accorded greater weight to privacy interests and has been less likely to dispense with the warrant requirement than has the Supreme Court. Thus, it appears that in "special need" cases the Supreme Judicial Court will limit the state's authority to what is necessary to accomplish its purposes rather than to what is merely reasonable.

2. School Searches

The first of the special needs cases was *New Jersey v. TLO* [627] in which the Supreme Court upheld a school official's warrantless search of a high school student's purse. Although the court concluded that the fourth amendment applied to the search of a student's personal effects, it decided that school officials needed neither a warrant nor probable cause to justify the search, preferring to apply a standard of reasonableness under all the circumstances. Having balanced the need to maintain school discipline against the student's privacy rights, the court held that the search of a student is justified "when there are reasonable grounds for suspecting that the student has violated or is violating the law or the rules of the school."[628] The search must also be justified as reasonable in scope.[629]

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also O'Connor v. Ortega, 480 U.S. 709. 741 (1987) (Blackmun, J., dissenting) ("In sum, only when the practical realities of a particular situation suggest that government official cannot obtain a warrant based upon probable-cause without sacrificing the ultimate goals to which a search would contribute, does the court turn to a 'balancing' test to formulate a standard of reasonableness for this context").

[622] New Jersey v. TLO, 469 U.S. 325 (1985).

[623] O'Connor v. Ortega, 480 U.S. 709 (1987).

[624] Griffin v. Wisconsin, 483 U.S. 868 (1987).

[625] National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989).

[626] *See* Commonwealth v. LaFrance, 402 Mass. 789 (1988) (requiring reasonable suspicion and warrant in probationer search cases). *See also* Horsemen's Benevolent & Protective Ass'n v. State Racing Comm'n, 403 Mass. 692 (1989) (striking down drug testing program for licensed persons in racing industry). *But see* Landry v. Attorney General, 429 Mass. 336, 350 (1999) (upholding statute requiring certain convicted persons to provide blood sample for DNA bank emphasizing reduced expectation of privacy and minimal intrusion).

[627] 469 U.S. 325 (1985).

[628] New Jersey v. TLO, 469 U.S. 325, 343 (1985). Because the student was suspected of smoking cigarettes on school property, the search of her purse for cigarettes was deemed reasonable, and a further search for marijuana was justified when the principal noticed a package of cigarette rolling papers. The Supreme Judicial Court has not decided whether art.14 requires more than reasonable suspicion. Commonwealth v. Lawrence L., 439 Mass. 817,825 (2003). See Commonwealth v. Smith, 72 Mass. App. Ct. 175, 180-181 (2008) (applying reasonable suspicion standard to search of student who had not entered school through metal detectors). See also Commonwealth v. Damian D., 434 Mass. 725,730-731 (2001) (search must be connected to the alleged rule violation in that it must be for evidence of the violation). In Damian D. the violation of truancy rules did not give rise to a right to search for contraband. Id

3. Employee Searches

In *O'Connor v. Ortega* [630] a state hospital psychiatrist sued his employer after hospital employees searched his desk and files, based on suspicion that the psychiatrist had wrongfully acquired a computer and sexually harassed two female employees. A plurality of the Supreme Court found that the doctor had a reasonable expectation of privacy in his desk and files[631] but concluded that neither a warrant nor probable cause was required for work-related searches because of the government's special need for the efficient operation of the workplace. Relying on *New Jersey v. TLO* the Court held that a search of a government employee's office by a supervisor will be justified

> when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a non-investigatory work-related purpose such as to retrieve a needed file.[632]

The scope of the work-related search will be valid if it is "reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the [misconduct]."[633]

4. Search of Probationers

In *Griffin v. Wisconsin* [634] the Supreme Court upheld the search of a probationer conducted by a probation officer pursuant to a state regulation permitting a

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at 731. But see Commonwealth v. Smith, supra, at 182. (search of student found in "unauthorized area" of school justified by additional facts suggesting safety risk).

[629] See Safford Unified School Dist. No. 1 v. Redding, __U.S.__, 129 S.Ct.2633,2643 (2009) (search of student's underwear for pills deemed unreasonable in light of nature of pills and lack of cause to believe they would be found there). See also Commonwealth v. Carey, 407 Mass. 528,536 (1990) upholding search of student's locker as "reasonable both at its inception and in its scope"); Commonwealth v. Snyder, 413 Mass. 521,528 (1992) (search of locker for drugs based on probable cause). If the school officials are acting as agents of the police a search must be consistent with the requirements of the fourth amendment and art.14. See Commonwealth v. Lawrence L., 439 Mass. 817, 821-822 (2003) (memorandum of understanding between city's schools and police for responding to criminal activity did not make school officials agents of police). See also Commonwealth v. Buccella, 434 Mass. 473,487 n.11 (2001) (assembling and turning over student's schoolwork to police not in response to police request).

[630] 480 U.S. 709 (1987).

[631] The plurality did not decide whether Ortega had a reasonable expectation of privacy in his office, but five members of the court concluded that he did. *See* O'Connor v. Ortega, 480 U.S. 709, 718 (1987).

[632] O'Connor v. Ortega, 480 U.S 709, 726 (1987). See City of Ontario, Cal. v. Quon, _U.S._, 130 S.Ct.2619, 2630 (2010) (search of text messages on pager provided by city to police officer deemed reasonable under *O'Connor*).

[633] O'Connor v. Ortega, 480 U.S 709, 726 (1987); New Jersey v. TLO, 469 U.S. 325, 342 (1985). The extent of one's expectation of privacy is "relevant to assessing whether the search was too intrusive." City of Ontario, Cal. v. Quon, __U.S.__, 130 S.Ct. 2619, 2631 (2010).

[634] 483 U.S. 868 (1987).

warrantless search of a probationer's home on "reasonable grounds to believe" that contraband is present.[635] The Supreme Court dispensed with the warrant requirement because of the state's special need to rehabilitate offenders and protect the community and with a probable-cause requirement because it would undermine the deterrent effect of the probation relationship.[636]

The Supreme Judicial Court examined probation searches in *Commonwealth v. Lafrance* [637] and agreed with Justice Blackmun's dissent in *Griffin.* The court held that under article 14 reasonable suspicion is sufficient to justify a search of the probationer's home or personal effects but that a warrant is required in the absence of exigent circumstances.[638] Making drug and alcohol testing a condition of probation violates article 14 unless it is "reasonably related to one or more of the goals of probation:" [638.5]

5. Drug Testing

The United States Supreme Court has decided two cases involving the mandatory drug testing of federal employees, upholding blood and urine tests on all railroad employees involved in a serious train accident[639] and urine testing of all persons seeking promotion or transfer to certain positions in the United States Customs Service.[640] In both cases the court recognized that drug testing is a search under the Fourth Amendment[641] but concluded that the special needs of the government made inapplicable the fourth amendment's traditional requirements of a warrant and probable cause.[642] Applying the same balancing formula, the court has upheld random drug

[635] Griffin v. Wisconsin, 483 U.S. 868, 871 (1987) (citing Wis. Admin. Code HHS §§ 328.16(1), 328.21(4) (1981)).

[636] Griffin v. Wisconsin, 483 U.S. 868, 878 (1987). The search of a parolee, authorized as a condition of parole, does not require individualized suspicion for it to be reasonable under the fourth amendment. Samson v. California, 547 U.S. 843, 857 (2006).

[637] 402 Mass. 789 (1988).

[638] Commonwealth v. Lafrance, 402 Mass. 789, 793 & n.4 (1988). The court set out several factors relevant to the finding of reasonable suspicion: "the terms of probation, the nature of the supervision required, and, of course, the nature of the information on which the probation officer relied in deciding that a probation violation was reasonably suspected." Also, "the extent to which less intrusive means than a search would fulfill the needs of the probation officer."

[638.5] Commonwealth v. Gomes, 73 Mass. App. Ct. 857,859 (2009) (no reasonable relation as applied to probationer who never used drugs or alcohol).

[639] Skinner v. Railway Labor Executive Ass'n, 489 U.S. 602 (1989).

[640] National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). The program applied only to positions within the Customs Service that met one or more of three criteria: (1) "direct involvement in drug interdiction"; (2) position that required carrying of a firearm; (3) position that required handling of classified information. *Von Raab, supra,* 489 U.S. at 660–661. The court held that the program was constitutional as to the first two criteria. As to the third, the court declined to decide the validity of the program and remanded the case to the Court of Appeals for further proceedings. *Von Raab, supra,* 489 U.S. at 677–678.

[641] The court in *Skinner* identified the collection and testing of urine as separate fourth amendment intrusions. Skinner v. Railway Labor Executive Ass'n, 489 U.S. 602, 617 (1989). It declined to decide if the detention of the individual for purposes of testing would he considered a Fourth Amendment seizure.

[642] In *Skinner* the Court found the safety interest in deterring the impairment of railroad employees and gathering evidence of the causes of serious accidents to be compelling. Skinner

testing for public school students engaged in extra-curricular activities,[643] but has rejected testing for political candidates[644] and pregnant women.[644.5]

The Supreme Judicial Court has applied a similar balancing test to a drug testing program applied to all licensed persons involved in horse and dog racing in Massachusetts and found the program unconstitutional under article 14.[645] Considering a program that allowed both random drug testing and testing based on reasonable suspicion of drug use, the court struck down both aspects because the racing commission failed to advance a sufficiently compelling reason to justify the "highly invasive monitored urine specimen collection it seeks to impose on all licensees."[646]

The court has upheld the random drug testing of police cadets applying the balancing test,[647] but has struck down a similar program for Boston Police Department personnel calling into question the balancing of interests as the appropriate standard under article 14.[648]

v. Railway Labor Executive Ass'n, 489 U.S. 602, 628 (1989). In *Von Raab* the court pointed to the need to ensure the physical fitness and integrity of "front-line interdiction personnel" as well as the safety interest in monitoring those required to carry firearms. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 670 (1989).

[643] Board of Education of Independent School District No. 92 of Pottawatomie City v. Earls, 536 U.S. 822 (2002) (competitive extracurricular activities); Vernonia School District 475 v. Acton, 515 U.S. 646 (1995) (high school athletes).

[644] Chandler v. Miller, 520 U.S. 305 (1997).

[644.5] Ferguson v. City of Charleston, 532 U.S. 67 (2001) (program at state hospital involving law enforcement as means of reducing drug abuse by mothers).

[645] Horsemen's Benevolent & Protective Ass'n v. State Racing Comm'n, 403 Mass. 692 (1989) (Liacos, J., concurring) (criticizing majority's balancing approach).

[646] Horsemen's Benevolent & Protective Ass'n v. State Racing Comm'n, 403 Mass. 692, 705 (1989). As to the reasonable suspicion standard the court stated: "Thus, there must be facts and circumstances sufficient to warrant a prudent person's belief that a licensee more probably than not has used illicit drugs." *Id.* at 706.

[647] O'Connor v. Police Comm'n, 408 Mass. 324, 327–29 (1990) (applying *Von Raab* balancing test under art. 14, including as factor that cadets had "agreed to urinalysis testing before accepting employment"); Gauthier v. Police Comm'r, 408 Mass. 335 (1900) (same).

[648] Guiney v. Police Comm'r, 411 Mass. 328, 333 (1991) ("Thus whether one rejects the balancing of interests test as a standard for protecting article 14 rights or whether one might apply such a test on a proper showing of a compelling reason for nonconsensual random drug testing, [the rule] violates article 14 to the extent that it purports to authorize random searches").