Search and Seizure

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PART I: THE EXCLUSIONARY RULE

§ 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. The principle was made applicable to the states in Mapp v. Ohio.

There are three purposes served by the exclusionary rule. 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, using an ad hoc cost-benefit analysis that tends to overemphasize the interest in effective law enforcement. In United States v. Leon, the Court held that drugs seized pursuant to an invalid search...
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.” The good faith exception has been expanded to cover good faith reliance by officers on a statute later deemed unconstitutional and on a mistake by court personnel. More recent cases have made clear that good faith errors of any type will not result in suppression. 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.

§ 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.” 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.

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).


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).


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*. 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. Exclusion of evidence in *Upton* was dictated by statute, but the court soon held that article 14 itself requires the exclusion of illegally seized evidence. 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. Thus unlike the Fourth Amendment,
article 14 has been interpreted to provide additional protection against warrantless electronic eavesdropping by one party to a conversation with another and mandatory employee drug testing, and to impose stricter standards for inventory searches and searches of probationers. 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.

§ 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


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);


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). 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; (2) G.L. c. 276, §§ 2 through 2C, defining the requirements for search warrants in Massachusetts; (3) G.L. c. 276, § 33A, entitling arrestees to prompt use of a telephone; and (4) Mass. R. Crim. P. 11, relating to pretrial conference discovery agreements and orders.

§ 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 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.

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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;\(^{35}\)

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


\(^{32}\) 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).

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


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. 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. 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. 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. The inevitable discovery rule will not apply if the officers have acted in bad faith.

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. Thus, for example, the Supreme Judicial Court has upheld the admission of court-ordered fingerprints of a defendant despite the


fact that his arrest had been unlawful.\textsuperscript{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.\textsuperscript{49} The more serious the illegality, the less likely it is that the court will find the taint to have dissipated.\textsuperscript{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.\textsuperscript{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.\textsuperscript{52} The exclusionary rule does not apply because the

\textsuperscript{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.


\textsuperscript{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).

\textsuperscript{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


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


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. Domainique, 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.\textsuperscript{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.\textsuperscript{58} An unintentional

\textsuperscript{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, \textsuperscript{ }392 U.S. 1, 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, 818 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).


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

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


criminal activity. The more intrusive the seizure, the greater is the amount of suspicion required to justify it.

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

2. A “stop” and brief detention may be based on “reasonable suspicion” that the suspect has committed or is about to commit a crime. 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. Under article 14 the pursuit of a suspect for the

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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. But under the Fourth Amendment, there is no seizure until the suspect has been actually restrained.

3. The police may approach and question an individual 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. A seizure occurs "only if


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

§ 17.4 THE TERRY DOCTRINE: STOP AND FRISK

§ 17.4A. STANDARD OF REASONABLE SUSPICION

In Terry v. Ohio 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," that a crime is about to be committed. The principle applies as well to reasonable suspicion that the suspect has already committed a felony or misdemeanor involving a threat to public safety. 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

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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”).


“Reasonable suspicion” is a quantum of evidence less than probable cause but more than a “mere hunch.”\footnote{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. Ct. 468, 472 (1996) (eight “innocuous observations” deemed hunch, not reasonable suspicion).} It must be based on specific and articulable facts measured in the light of the officer's experience.\footnote{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).} 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.\footnote{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}

not give rise to reasonable suspicion.\textsuperscript{80} “Drug courier profiles” have provided some of the closest cases applying the reasonable suspicion standard.\textsuperscript{81} The mere desire to assist a motorist does not justify a stop,\textsuperscript{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.\textsuperscript{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.\textsuperscript{84} However, an inference of criminal


\textsuperscript{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.”

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. Under the Fourth Amendment, reliability is measured by the “totality of the circumstances.” Under article 14 the tip must satisfy the two-fold inquiry established in *Aguilar v. Texas* and *Spinelli v. United States* for reliability in determining probable cause to search or arrest. That is, there must be some facts to establish the informant's basis of knowledge and the informant's veracity. The *Aguilar-Spinelli* test is addressed in detail in the discussion of search


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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{96} 


\textsuperscript{94} Terry v. Ohio, 392 U.S. 1, 20 (1968).

\textsuperscript{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).

\textsuperscript{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

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\(^98\) 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).

a brief period.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{103} It is not necessary that the suspect have been placed formally under


\textsuperscript{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. 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. 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.”

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. Even a detention

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


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 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 foot because there is less opportunity for a face-to-face encounter with the suspect, a greater chance that the officer will 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).


search for weapons.\textsuperscript{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.\textsuperscript{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,\textsuperscript{113} but even the nature of the crime itself may warrant the protective search.\textsuperscript{114}


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. 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, the protective search of the passenger compartment of an automobile while the suspect was detained outside of the vehicle, and a search of containers accessible to the suspect which may have contained a weapon. However, the extent of the search must be limited to what is necessary to protect the officer's safety.

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).


§ 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. 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.

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. In some cases, it has been characterized as the conclusion that it is “more probable than not” that the suspect has committed a crime. The touchstone of probable cause is “fair probability” from the “totality of the circumstances,” and the courts have made clear that the standard is to be applied in a practical and nontechnical fashion.

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.


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, or flight from the police, or implausible, evasive, or false answers to police questions. Furtive actions taken at the approach of a police officer may be an important ingredient in the determination of probable cause. However,


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.  

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.

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. Under article 14 such a showing must include two elements drawn from Aguilar v. Texas and Spinelli v. United States: (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);


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").


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

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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”).
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. 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.

When executing an arrest warrant the officer's authority is statewide. When executing an arrest warrant the officer's authority is statewide. Without a warrant the right to arrest for a misdemeanor extends only to the boundaries of the officer's jurisdiction 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. However, a police officer may arrest a person suspected of a felony if


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).


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

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
(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
sufficient evidence of probable cause for OUI even though officer did not conclude so prior to
continued pursuit of OUI suspect justified extraterritorial arrest).


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).


open to public upheld). See also Commonwealth v. Celestino, 47 Mass. App. Ct. 916, 917

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
apply to arrest made in home of third party where suspect was lawful visitor).

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).
( 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.
(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\textsuperscript{154} but will not justify the entry into a third-party's home to search for the subject of the warrant.\textsuperscript{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.\textsuperscript{156}

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

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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”).


\textsuperscript{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, the possibility of violence or the escape of the suspect, 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.


Exigent circumstances will not justify a warrantless entry into a dwelling if the officers have created the exigency. The officers will be held to have created the exigency if the exigent circumstances were reasonably foreseeable. 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. 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.”

§ 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. However, the courts have upheld brief detentions without individualized suspicion when necessary to accomplish particularly important purposes. 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

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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).


government's purposes. 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 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. Similarly, in Delaware v. Prouse 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. The Supreme Court has approved the use of sobriety checkpoints because of the overriding interest in highway safety. But roadblocks for the detection of narcotics have been struck down because they are for the purpose of investigating crime.

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. 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; (2) be placed at a site chosen on the basis of neutral criteria that insure safety and minimize inconvenience.

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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).
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;\(^\text{179}\) (4) be sufficiently illuminated and identified so as to protect the safety and reduce the fear of oncoming motorists;\(^\text{180}\) and (5) be limited to brief questions and visual inspection of the interior of the vehicle.\(^\text{181}\)

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.\(^\text{182}\) 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.\(^\text{183}\)

Roadblocks conducted for other purposes may also be reasonable,\(^\text{184}\) 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,\(^\text{185}\) and has also suggested that roadblocks to check licenses and registrations will violate article 14 because the state’s interest is not sufficiently weighty.\(^\text{186}\)

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).


\(^\text{180}\) 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).


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


\(^{187.5}\) 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).


\(^{189}\) 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.


intruded on his legitimate expectations of privacy.\textsuperscript{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.\textsuperscript{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.\textsuperscript{193} In \textit{Commonwealth v. Amendola}\textsuperscript{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.\textsuperscript{195} But the seizure must result from a search in the

\textsuperscript{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).

\textsuperscript{192} Rawlings v. Kentucky, 448 U.S. 98 (1980). The decision in \textit{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. \textit{Compare} Minnesota v. Olson, 495 U.S. 91 (1990) (overnight guest had legitimate expectation of privacy in home of third party).

\textsuperscript{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.” \textit{Commonwealth v. Williams}, 453 Mass. 203, 209 (2010) (deciding defendant had standing because of possessory interest in her papers). But see \textit{Commonwealth v. Bryant}, 447 Mass. 494 (2006) (no standing to attack search of computer files of law firm defendant worked for): \textit{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); \textit{Commonwealth v. Santoro}, 406 Mass. 421 (1990) (no standing where defendant neither was present at search nor had interest in property).


\textsuperscript{194} 406 Mass. 592 (1990). In \textit{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.

\textsuperscript{195} \textit{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 \textit{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


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).

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.\textsuperscript{200} However counsel should be alert to claims of an abandonment that was triggered by a prior intrusion.\textsuperscript{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.\textsuperscript{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.\textsuperscript{203}

\textbf{§ 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 \emph{Katz v. United States}.\textsuperscript{204} \textbf{First}, has the person demonstrated an actual subjective expectation of privacy in the area searched or the item seized? \textbf{Second}, is this expectation one that society is prepared to recognize as reasonable?\textsuperscript{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).


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


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. 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. The warrantless taking of a blood sample from a suspected drunk driver was upheld because the evidence was evanescent, but in Massachusetts an adversary hearing is required to compel an indicted defendant to provide a blood sample for identification purposes. Even an

208 See, e.g., Winston v. Lee, 470 U.S. 753, 760 (1985) (stating balancing test); Rodriguez v. Furtado, 410 Mass. 878 (1991). In Rodriguez, the court stated that future body cavity searches should require “a strong showing of particularized need supported by a high degree of probable cause.” Rodriguez, 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).


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.\footnote{211}{See Winston v. Lee, 470 U.S. 753 (1985). In applying the balance in \textit{Winston}, the court emphasized the fact that the government had other evidence than the bullet to support its case against the defendant.} Blood and urine drug testing of public employees has been treated differently under the federal and state constitutions.\footnote{212}{See infra § 17.9H(5).}

2. Communications

conversations involving the investigation of a designated offense. 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. And illegally taped conversations may not be used even for impeachment purposes. 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.

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. This protection extends to virtually any


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).

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).


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

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.” 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. For example, a fenced-in backyard

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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-


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


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).

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.\footnote{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).}

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.\footnote{Commonwealth v. Bloom, 18 Mass. App. Ct. 951 (1984).}

6. Commercial Premises

Business premises as well as residences are subject to the requirements of the Fourth Amendment and article 14,\footnote{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).} but employees may not have a reasonable expectation of privacy in certain areas of the premises.\footnote{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).} 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.\footnote{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).}

Searches that are unrelated to a criminal investigation may occur on commercial property. Work-related searches are addressed \textit{infra} at § 17.9H(3). Administrative inspections are addressed \textit{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.\footnote{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). \textit{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. Thus the sticking of one's head into the open cargo door of a van was deemed a “search” requiring at least probable cause and the opening of a car door after a plain view observation of marijuana was held to require separate justification. 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. However, if the container is open or transparent so that the nature of its contents is disclosed, or if the nature of the contents can be readily inferred from the nature of the container, 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). 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 suspect's vehicle deemed not search).


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).


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.\footnote{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 \textit{Hudson v. Palmer}.\footnote{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.\footnote{244} The U.S. Supreme Court has upheld routine strip searches of pretrial detainees held within the general prison population.\footnote{244.5} Other custodial or semicustodial situations, including searches of probationers, school children, and defendants on arrest or booking, are addressed \textit{infra} at § 17.9.

10. Abandoned Property

When property is voluntarily abandoned or discarded, there is usually no reasonable expectation of privacy.\footnote{245} However, the act of discarding the property may

\textit{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).

\textit{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


\textit{But cf.} \textit{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 footware was seized to compare with crime scene footprints).

be the fruit of an unconstitutional police stop or other illegality (as often is the case with “drop-see” testimony). 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.

§ 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. Thus the defendant must show that the warrant was invalid or that the search exceeded the scope of the warrant. However, a warrantless search is presumed unreasonable, and the government must show that it fell within one of the exceptions to a warrant requirement. 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.

§ 17.8 SEARCH UNDER A WARRANT


§ 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. Any Massachusetts court of justice has authority to issue a search warrant for any location within the state. The applicant must present to the clerk or justice a sworn statement in writing 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.”

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. 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. The applicant need not rely solely on her own affidavit but may attach sworn statements of other officers to the application.

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.

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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).


to issue the warrant. The magistrate may use common knowledge and “draw reasonable inferences from the facts,” but she may not use any specialized knowledge or experience in evaluating the affidavit.

2. Technical Defects

Search warrant affidavits are to be read in a “commonsense, not a hyper technical manner.” 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. Although the failure to sign the affidavit will vitiate the warrant because an unsigned affidavit is a nullity, the failure to sign each page attached to the affidavit is not fatal. And an unsigned warrant was deemed a technical violation not warranting suppression in circumstances demonstrating that the judge's failure to sign was inadvertent. Similarly, a reviewing court will overlook

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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).


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.  

§ 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. The showing must comport with the requirements of the federal constitution and state constitutional and statutory law. Probable cause is “less than evidence which would justify . . . conviction” but “more than bare suspicion,” and observations as consistent with innocence as criminal activity do not satisfy the standard. However courts have made clear that “affidavits should be read as a whole, not parsed, severed, and subjected to hypercritical analysis.” 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.”

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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).


The evidentiary standard of probable cause is the same for both search and arrest,\textsuperscript{278} but there are important analytical distinctions between probable cause to arrest and to search.\textsuperscript{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?\textsuperscript{280} On the other hand, probable cause to arrest relates solely to the likelihood that the person to be arrested has committed an offense.\textsuperscript{281}

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

Although the Supreme Court has abandoned this doctrine,\textsuperscript{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 \textit{Aguilar v. Texas} \textsuperscript{283} and \textit{Spinelli v. United States}.\textsuperscript{284} Under the \textit{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).”\textsuperscript{285} If the informant's tip fails either prong of the \textit{Aguilar-Spinelli} test, other allegations in the affidavit that corroborate the information could support a finding of probable cause,\textsuperscript{286} but “each


\textsuperscript{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 \textit{infra} at § 17.8B(4).

\textsuperscript{282} Illinois v. Gates, 462 U.S. 213 (1983) (substituting a “totality of the circumstances test” for the \textit{Aguilar-Spinelli} test).

\textsuperscript{283} 378 U.S. 108 (1964).


element of the test must be separately considered and satisfied or supplemented in some way.\textsuperscript{287}

\textit{a. Basis of Knowledge Test}

The most probative hearsay information in a search warrant affidavit is a statement that the informant \textit{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.\textsuperscript{288} The detailed nature of the tip may justify an inference of personal observation.\textsuperscript{289}

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


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. Corroboration of facts "suggestive of criminal conduct" will be given more weight than corroboration of innocent details.

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. 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.


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).

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.\textsuperscript{295} If more than one informant is used, the reliability of each must be scrutinized.\textsuperscript{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.\textsuperscript{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).


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


\(^{299}\) 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).


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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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


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


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.  

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. 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.

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. 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).


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).


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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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 after 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

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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 splattered 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).


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. 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. But information merely establishing that a person committed a crime will not necessarily support an inference of probable cause to search his home.

A court will usually infer from the discovery of drugs in a vehicle or residence that additional drugs will be located there. 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. But whether there is a sufficient nexus between the place to be searched

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").

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).


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).


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.\textsuperscript{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.\textsuperscript{331}

\textsuperscript{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.

The omission from the affidavit of facts concerning the time when the relevant observations were made is a serious defect. 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.

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. 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.”

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. 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.

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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

\(^{338}\) 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).


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

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. 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.” 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. And the knowledge of executing officers of the correct location may overcome an ambiguity in the warrant description of the place to be searched.


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”).


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. 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.

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. 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. 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.


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. 143–44 (1987) (search warrant void that described place to be searched solely relying on designated officer to identify premises prior to execution).


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.” The more public the place to be searched, the less likely it is that such a search of persons present will be valid.

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. 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.

§ 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.

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).


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.\textsuperscript{357} By statute the warrant must be returned within seven days, after which it is void.\textsuperscript{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.\textsuperscript{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.\textsuperscript{360}

Unless the warrant specifically authorizes a nighttime search, the search must be conducted during the day.\textsuperscript{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.\textsuperscript{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.\textsuperscript{363} If an unauthorized nighttime search has been conducted, the defendant may have to show prejudice before the items seized will be suppressed.\textsuperscript{364}

\textbf{2. Knock and Announce Requirement}

Except in limited circumstances, the police “cannot make an unannounced entry into a dwelling house.”\textsuperscript{365} A “no-knock” warrant may be issued if the officers


\textsuperscript{361} G.L. c. 276, § 2.


\textsuperscript{363} Commonwealth v. Grimshaw, 413 Mass. 73, 81 (1992).

\textsuperscript{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.

“inform the issuing magistrate of the circumstances which give the police probable cause to believe that the evidence... will be destroyed.” 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. 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.” Any reasons for an 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. The common justifications for a no-knock warrant are (1) police safety, (2)


the likely destruction of evidence, and (3) the probability that the target of the search will flee. 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. Once the officers have knocked and announced their purpose, they need not wait long for a response before using force to enter.

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. 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.” 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.


373 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. Thus the nature of the object sought determines the appropriate scope of the search. Once the items described in the warrant have been found, the authority to search under the warrant is terminated. Items not listed on the search warrant may be seized under the plain-view doctrine or some other exception to the warrant requirement, with the burden on the Commonwealth to demonstrate the legality of the search.

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. The failure to return the warrant within seven days has been held to be ministerial error, which will not vitiate an otherwise valid search. So too, when the return was signed by an officer steps taken by the resident to protect the area from observations by people passing by."


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.\textsuperscript{383}

\section*{§ 17.8E. MISREPRESENTATIONS IN THE SEARCH WARRANT AFFIDAVIT}

\subsection*{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.\textsuperscript{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.\textsuperscript{385} Police misrepresentations may warrant dismissal of the charges if the defendant can show that such misconduct prejudiced the defendant by causing irredeemable harm to her opportunity for a fair trial.\textsuperscript{386} Even without a showing of prejudice, egregious deliberate and intentional misconduct could result in dismissal of the indictment.\textsuperscript{387}

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

\begin{itemize}
\item \textsuperscript{383} Commonwealth v. Ocasio, 434 Mass. 1, 7-8 (2001) (warrant lost but supporting documents available).
\item \textsuperscript{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).
\item \textsuperscript{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”).
\end{itemize}
affidavit that were negligently made. 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.

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. Under Franks v. Delaware, it

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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.

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-\textit{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

\textbf{b. Discretionary Franks-type Hearing}

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


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.


§ 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

\(^{402}\) See Katz v. United States, 389 U.S. 347, 357 (1967).


Similarly, the proper scope of a consensual search is no greater than the consent given. Thus the consent to search a house does not authorize tearing down the walls, and the consent to search for drugs does not confer authority to examine documents. 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.”

3. Voluntariness of Consent

The consent to a search must be voluntary to be constitutional. 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.” 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. However, a claim that the consent

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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”).


412 See Schnneckloth 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).


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

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. The Supreme Court has held that voluntariness is to be determined from the totality of the circumstances. Unawareness of the right to refuse is merely a factor to be weighed in assessing the totality of the circumstances.

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. The fact that the consenting party has been arrested is not of itself sufficient evidence of coercion, but the circumstances of the arrest may be so coercive as to invalidate the consent as involuntary.


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.\(^{426}\)
A cooperative course of conduct on the part of the consenting party will tend to override other factors suggesting involuntariness.\textsuperscript{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.\textsuperscript{428} Other courts have rejected this reasoning,\textsuperscript{429} and the Supreme Judicial Court has stated that such circumstances do not automatically preclude a finding of voluntary consent.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{428} 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).

\textsuperscript{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).


\textsuperscript{431} See Commonwealth v. Angivoni, 383 Mass. 30 (1961). 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).

effects sought to be inspected.” 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. A co-tenant who is present and objects to the search can override the consent given by the other tenant.

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, 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. 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.

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. The owner of a home generally maintains


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. Deear, 364 Mass. 193, 195 (1973) (consent by wife to search husband's dresser drawer valid).

the authority to consent to a search of the rooms occupied by a guest.\textsuperscript{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.\textsuperscript{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.\textsuperscript{441} However, if the guest or tenant abandons the premises, the owner's authority is restored.\textsuperscript{442} The driver of an automobile may consent to a search of the car to the extent of his authority over the vehicle.\textsuperscript{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.\textsuperscript{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.\textsuperscript{445}

\textit{b. Apparent Authority}


\textsuperscript{441} Stoner v. California, 376 U.S. 483, 490 (1964).


\textsuperscript{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).

\textsuperscript{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”).

\textsuperscript{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 valid.
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.\footnote{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.”

\section*{§ 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.\footnote{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.\footnote{448} There are two prerequisites to the application of the plain-view doctrine.\footnote{449} First, the officer must have a prior


justification for being in the place from which the observation was made.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{452} Under art. 14 inadvertence is still required.\textsuperscript{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,\textsuperscript{453} pursuant to a warrant or an exception to the warrant requirement\textsuperscript{454} and they characterize seizures from public places as “open view.” Other courts include both situations within the plain-view doctrine.\textsuperscript{455} In either

\begin{itemize}
  \item suspicion'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. \textit{Coolidge, supra}, 403 U.S. at 471–72.
\end{itemize}

\textsuperscript{453} See generally Moylan, \textit{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). \textit{Cf.} Arizona v. Hicks, 480 U.S. 321, 323 (1986) (characterizing plain-view seizure as occurring “during lawful search of private area”).

\textsuperscript{454} \textit{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).

\textsuperscript{455} \textit{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). \textit{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. \textit{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.\footnote{10}{That fact alone, however, does not justify a
subsequent intrusion on the suspect's privacy in order to seize the property.}\footnote{11}

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.\footnote{12}{The nexus requirement is satisfied if
the officer has probable cause to believe that the item is associated with criminal
activity.\footnote{13}{The connection to criminal activity must be immediately apparent without a
closer investigation that may be characterized as a search.}}

\textit{Sullivan} the court recognized that it was “not necessary to invoke the so called plain view
doctrine . . . to resolve the case.” \textit{Sullivan, supra, 384 Mass. at 743 n.8. See also
view observation” and “plain view doctrine”).}

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). \textit{Cf.
Commonwealth v. Swartz, 454 Mass. 330,335 (2009) (lawful position to observe contraband);
drugs).}}

suspect's car after plain-view observation of marijuana cigarette inside not justified by exigent
of marijuana inside suspect's apartment from adjoining building does not justify entry in
absence of exigent circumstances).}

(immediately apparent that bag contained contraband drugs).}

\footnote{13}{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
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.” \textit{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. \textit{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
(probable cause to believe jewelry found on suspect was stolen); Commonwealth v. Halsey, 41
mentioned in warrant-sufficient nexus to sexual abuse relying on officer's opinion of role of

93}
It is important to distinguish between probable cause that an item is incriminating property and probable cause that it contains such property. 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. However, if the container is open or transparent so that the officers can identify its contents without searching it, they may seize the contents. And some containers may be seized because, by their very nature or by their odor or feel, they disclose what is inside.


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”).


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).

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

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. 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.

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. The Supreme Judicial Court has refused to abandon the inadvertence requirement under article 14.

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.” 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. The requirement of inadvertent discovery did not apply to the plain-view seizure of contraband, stolen property or objects dangerous in themselves.

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


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).


§ 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).


\(^{474}\) 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”).

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. 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. 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. 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.”

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. Hot pursuit is a narrow category of exigent circumstances connoting “some sort of chase”, if there is “no immediate and

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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


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).


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


\(^{491}\) 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”).


\(^{494}\) 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{497}


\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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. Although the police need not seek a warrant the moment they have probable cause, 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.

4. Emergency Searches for Other Purposes


If the police must act immediately in response to an emergency to protect life or property, they may do so without a warrant. 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. 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


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.

warrant requirement. 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.

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.” The officers may not expand the warrantless search by taking actions unrelated to the purposes of the authorized intrusion. The intensity and duration of the search must be reasonable in the light of the exigent circumstances. Some courts require that the police use the least intrusive alternative when conducting an exigent search. 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.

§ 17.9D. SEARCH INCIDENT TO ARREST


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).


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).

A search incident to arrest must be based on a valid custodial arrest.\footnote{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).} Assuming such an arrest, the police may conduct a limited warrantless search of the arrestee and the area within his immediate control.\footnote{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).} In Massachusetts the limits on the search incident to arrest are governed by statute as well as the Fourth Amendment and article 14.\footnote{See G.L. c. 276, § 1 (1974) (restricting scope of search incident to arrest to weapons or evidence of arrest crime).} 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\footnote{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).} 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.\footnote{See 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.}
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. Thus an arrest for speeding could not justify a search of the vehicle for evidence. 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. If the officers are justifiably searching for evidence of the arrest crime, it makes no difference whether the area searched was accessible to the arrestee. 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. If, for example, the suspect is handcuffed outside the vehicle, a search for weapons is prohibited by the statute.

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).


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


\(^{521}\) 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).

that he is neither an acrobat [nor] a Houdini.”\textsuperscript{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.\textsuperscript{525} In Massachusetts recent cases have measured the exigencies at the time of search.\textsuperscript{526} And the fourth amendment seems to require it.\textsuperscript{526.5}

The search incident to arrest may extend into closed containers that are within the arrestee's immediate control.\textsuperscript{527} However, it is not clear whether a locked container will be deemed accessible to an arrestee so as to come within the \textit{Chimel} rule.\textsuperscript{528} If the container is seized from the suspect at the time of the arrest, it may be searched without a warrant immediately thereafter.\textsuperscript{529}

The area within the suspect's immediate control may be expanded after an arrest if the suspect voluntarily moves to another location.\textsuperscript{530} For example, it may be reasonable for the arresting officer to accompany a suspect who goes to another room

\textsuperscript{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)). \textit{See} United States v. Vasey, 834 F.2d 782, 787 (9th Cir. 1987) (“\textit{Chimel} does not allow officers to presume that an arrestee is a superman”).


\textsuperscript{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”).


to retrieve some clothing. However, the officers may not move an arrestee against his will so as to expand the scope of a search incident to arrest.

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. 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.


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. There the court adopted a bright-line rule allowing the search of the entire passenger compartment, including containers, as incident to the arrest. Many courts interpreted Belton to justify the search as well as to define its scope. 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. The court later extended Belton to apply to the arrest of a recent occupant of the vehicle. In Arizona v. Gant the court disagreed with the broad reading of Belton's bright-line rule.

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).


534 See supra § 17.9C(2).


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”).


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.”\footnote{Id at 1723.} 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.”\footnote{Id.} The rule in Gant brings the fourth amendment closely in line with the Massachusetts statute.\footnote{See Sec. 17.9 D (1), supra.} It is not clear what showing is required under the fourth amendment to satisfy the standard of “reasonable to believe.”\footnote{See LAFAYE, 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).}

4. The Search Must Be Contemporaneous with the Arrest

The rationales of Chimel and Belton are in some conflict, even after Gant\footnote{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).} but both require that the search incident be contemporaneous with the arrest.\footnote{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.} The search need not occur exactly at the moment of arrest, but it must be a “natural part of the arrest transaction.”\footnote{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).} A search “remote in time and place” from the point of the arrest may not be justified as a search incident.\footnote{See Preston v. United States, 376 U.S. 364, 367 (1964) (automobile search conducted after arrest 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).} For example, a locked container seized at the time of the arrest may not be searched later without a warrant.\footnote{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.\textsuperscript{550}

The contemporaneity requirement does not apply if there are special circumstances justifying the delayed search of an arrestee.\textsuperscript{551} In \textit{United States v. Edwards} \textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{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 \textit{Commonwealth v. Madera} \textsuperscript{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."\textsuperscript{556}

\section*{§ 17.9E. AUTOMOBILE EXCEPTION}

1. Probable Cause Required


\textsuperscript{552} 415 U.S. 800 (1974).


\textsuperscript{554} See generally, L A FAVE, SEARCH AND SEIZURE § 6.3(c) (4th ed. 2004).

\textsuperscript{555} 402 Mass. 156 (1987).

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. 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. 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. But the search must be conducted “without unreasonable delay.”

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. A finding of exigent circumstances depends on the possibility that the evidence could have been removed or destroyed.


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. The officers are not required to post a
guard over the vehicle while a warrant is sought. However, the exigency must be real
and not simply the foreseeable result of the officer's unreasonable delay.

**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. The probable cause must point to the
vehicle and must sufficiently tie the object of the search to criminal activity.

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(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
the possibility that the search of an automobile on private property may be justified by probable
cause alone).

obtaining warrant "not heavily weighed").

564 If the officers have a "plain and ample" opportunity to obtain a warrant they must do
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);
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.
Mass. 616, 624-625 (2008) (sufficient probable cause that suspect’s truck contained recently
from person of passenger not sufficient probable cause to search automobile); Commonwealth
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 not necessarily 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,
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
(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

search for “stolen stereo equipment” sufficiently specific).

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.
bag inside car).

alone did not justify search of trunk under automobile exception). Compare Commonwealth v.
justifies search of trunk under exception).

weapon valid but extending search into small packet that could not have contained weapon
violated suspect's Fourth Amendment rights).


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. 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. 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.

1. Fourth Amendment Standards

An inventory search requires neither warrant nor probable cause, but because it is an intrusion on constitutionally protected privacy rights it must be reasonable to be constitutional. 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. In both contexts the general measure of reasonableness is the conformity to standard police procedures for conducting the inventory search. If the procedures narrowly circumscribe the discretion of the officer and if the officer

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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”).


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,\footnote{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).} 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.\footnote{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).}

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.”\footnote{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.} 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.\footnote{See Colorado v. Bertine, 479 U.S. 367, 374 (1987) (quoting Illinois v. Lafayette, 462 U.S. 640, 647 (1983)).} 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.\footnote{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.}

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 and inventory seized vehicle based on standardized criteria). \textit{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).
police procedures governing inventory and storage searches not only be specific but also be in writing.\textsuperscript{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.\textsuperscript{586} Written guidelines requiring the open of closed containers do not violate article 14.\textsuperscript{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.\textsuperscript{588} \textit{First}, they must show that the underlying arrest of the individual or seizure of the automobile was lawful.\textsuperscript{589} \textit{Second}, the prosecution must show that there


\textsuperscript{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). \textit{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).


\textsuperscript{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).

were written procedures governing the conduct and scope of the inventory. 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. Although the fact that the officers had some suspicion that a search would disclose evidence of criminal activity is not necessarily fatal, such suspicion may contribute to the conclusion that the inventory was pretextual.

§ 17.9G. ADMINISTRATIVE SEARCHES


A search may be necessary to enforce a regulatory scheme rather than to investigate possible violations of criminal laws. For example, a city health department may need to enter and inspect a residential apartment for the presence of health code violations or a federal agency may be authorized to inspect the records and premises of a licensed gun dealer.

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.

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. 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. 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.

1. Administrative Searches Under Warrant


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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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”).


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)).

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).


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.

§ 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. 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. The court has used this mode of analysis in school searches, searches


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\textsuperscript{623} and probation officers,\textsuperscript{624} and drug testing.\textsuperscript{625} Administrative searches invoke a different doctrine addressed \textit{supra} at § 17.9G. The Supreme Judicial Court has shown a willingness to undertake an independent analysis of special needs searches under article 14.\textsuperscript{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 \textit{New Jersey v. TLO} \textsuperscript{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.”\textsuperscript{628} The search must also be justified as reasonable in scope.\textsuperscript{629}

\textit{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”).

\textsuperscript{622} New Jersey v. TLO, 469 U.S. 325 (1985).
\textsuperscript{624} Griffin v. Wisconsin, 483 U.S. 868 (1987).
\textsuperscript{627} 469 U.S. 325 (1985).
\textsuperscript{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 files631 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

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).


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).


warrantless search of a probationer's home on “reasonable grounds to believe” that contraband is present. 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.

The Supreme Judicial Court examined probation searches in Commonwealth v. Lafrance 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. 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.”

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 and urine testing of all persons seeking promotion or transfer to certain positions in the United States Customs Service. In both cases the court recognized that drug testing is a search under the Fourth Amendment but concluded that the special needs of the government made inapplicable the fourth amendment's traditional requirements of a warrant and probable cause. Applying the same balancing formula, the court has upheld random drug tests.

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637 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.”


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 be 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, but has rejected testing for political candidates and pregnant women.

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. 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.”

The court has upheld the random drug testing of police cadets applying the balancing test, 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.

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).


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.


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”).