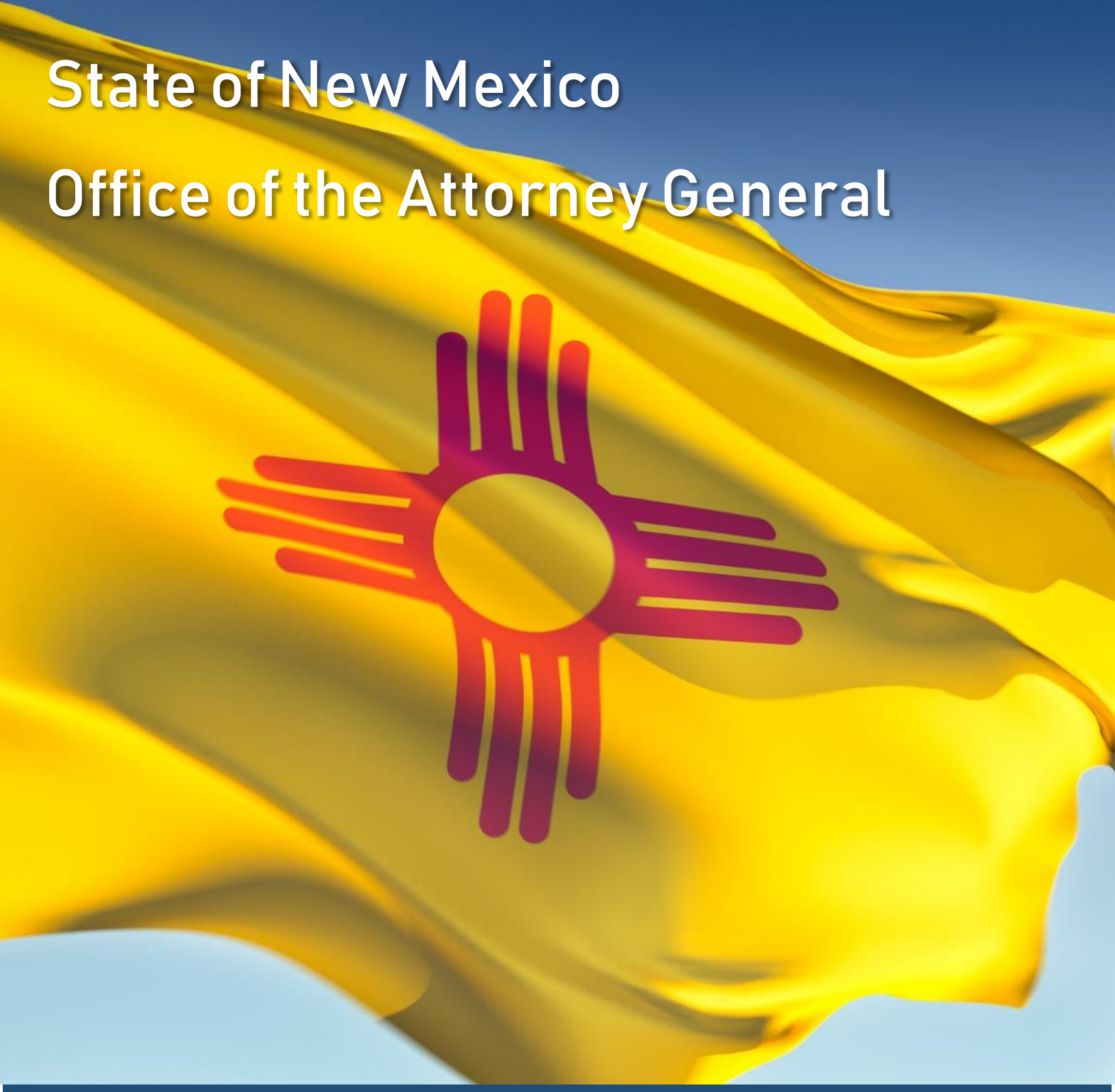

State of New Mexico
Office of the Attorney General

SEARCH AND SEIZURE
FOR POLICE AND PROSECUTORS
Checklists and Case law Summaries

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HOW TO USE THIS MANUAL

The purpose of this manual is to assist police officers and prosecutors in understanding the warrant requirement and its exceptions and providing guidance in (1) writing an affidavit that establishes probable cause for the issuance of a search warrant, (2) preparing for or defending the execution of a search warrant, and (3) conducting and defending a warrantless search or arrest.

The manual is divided into three chapters, and each chapter section is divided into several sections in which specific kinds of searches and seizures are addressed. For example, the first chapter, "Search Warrant Affidavits" is divided into six sections. The first section, "Requirements for All Affidavits," describes the information that must be included in every search warrant affidavit. The remaining five sections describe the information required in a search warrant affidavit based on the source of the information provided in the affidavit, such as confidential informants and anonymous informants. Chapter Two, "Executing a Search Warrant," is divided into three sections: (1) Meeting the Knock and Announce Requirement, (2) Detaining and Searching People in the Premises to be Searched, and (3) Seizing Items Found in Plain View. Chapter Three, "Warrantless Searches and Seizures," addresses various situations in which a search or seizure may occur without a warrant. It is divided into six sections: (1) Consent to Stop and Search, (2) Stopping a Person or Vehicle, (3) Searching a Person, (4) Searching a Vehicle, (5) Searching a Place, and (6) Making an Arrest.

Each section is divided into three parts. First, each section contains an outline, which may be used as a checklist of requirements for a valid search or seizure. The outlines are intended to provide a quick reference for the officer or prosecutor to determine (1) whether there is enough information to support a search warrant, (2) what procedures to follow in executing a warrant, and (3) whether an exception to the warrant requirement applies.

Next, each section contains a summary. Each summary is intended to be an explanation of the requirements included in the outline, as well as a resource for prosecutors in preparing arguments and memoranda in response to motions to suppress.

Finally, each section includes a set of endnotes, which are the citations to the case law on which the summaries are based. The endnotes do not contain an exhaustive list of cases supporting the principles stated in the summaries. However, the cases included in the endnotes

are the most prominent cases. Like the summaries, the endnotes are intended to assist prosecutors in defending against motions to suppress. Because each case is different, and the outcome of a motion to suppress depends on the facts of each case, the cases cited in the endnotes should be considered a starting point, not the ending point, of the prosecutor's argument.

SEARCH WARRANT AFFIDAVITS

INTRODUCTION

Both the Fourth Amendment and Article II, Section 10 of the New Mexico Constitution protect individuals against unreasonable searches and seizures by government officials. Both provisions require police to obtain a warrant before conducting a search or seizure. Both provisions allow warrantless searches and seizures when recognized exceptions to the warrant requirement apply. Both provisions limit exceptions to the warrant requirement to circumstances in which a warrantless search or seizure is reasonable. Under both provisions, the reasonableness of a warrantless search or seizure is measured by weighing the manner and degree of intrusion against the individual's legitimate expectation of privacy.

In interpreting Article II, Section 10, however, New Mexico courts have concluded that New Mexico has a "strong preference for warrants."[1] Our strong preference for warrants means that warrantless searches are disfavored, and are to be avoided, particularly with respect to the home, where the individual's expectation of privacy is at its highest. Our strong preference for warrants has caused New Mexico courts to recognize expectations of privacy that are not recognized under the Fourth Amendment.[2] Our strong preference for warrants has prompted New Mexico courts to limit the exceptions to the warrant requirement, often beyond what is required by the Fourth Amendment.[3] And because of our strong preference for warrants, our courts have imposed requirements on the process of obtaining a warrant that do not apply under the Fourth Amendment.[4]

Consequently, our courts have interpreted Article II, § 10 as requiring that "when the application for a search warrant is based on an affidavit, the affidavit must contain sufficient facts to enable the issuing magistrate to independently" determine the existence of probable cause.[5] "[P]robable cause is a flexible, common-sense standard."[6] As such, it merely requires that the facts known to the officer seeking a warrant would justify a person of reasonable caution in believing the items sought are evidence of a crime and may be found on the premises to be searched.[7] Probable cause "does not require that an officer's belief be correct or more likely true than false. Rather, there need only be a probability that incriminating evidence is involved."[8]

Thus, a showing of probable cause is a less rigorous standard than the standard of proof required at trial to convict.[9]

INTRODUCTION

ENDNOTES

[1] State v. Crane, 2014-NMSC-026, ¶ 16, 329 P.3d 689.

[2] *See* State v. Granville, 2006-NMCA-098, ¶ 24, 140 N.M. 345, 142 P.3d 933. In Granville, the Court of Appeals held that, unlike the Fourth Amendment, Article II, Section 10 protects an individual from warrantless searches of his or her garbage. As a result, in New Mexico, officers must obtain a warrant to search through garbage left inside a garbage can at a residence, or in an opaque bag discarded in a motel garbage bin. Id. ¶¶ 25-27; *see also* Crane, 2014-NMSC-026, ¶ 34.

[3] *See* State v. Rivera, 2010-NMSC-046, ¶ 16, 148 N.M. 659, 241 P.3d 1099. In Rivera, the Court held that police may search without a warrant a package that was opened by a private individual, but police must obtain a warrant before exceeding the scope of that private search. Id. In that case, a package opened by bus company employees was sent to a government agent, who not only re-opened the package, but also cut open the plastic-wrapped bundles contained in the package. Although the Fourth Amendment permits such action, under Article II, Section 10, the agent was required to obtain a warrant before cutting open the bundles. Id. ¶ 34.

[4] *See* State v. Cordova, 1989-NMSC-083, ¶ 6, 109 N.M. 211, 784 P.2d 30.

[5] Id. ¶ 5. The requirement of probable cause also applies to an application for an order permitting a wiretap. Therefore, an application for a wiretap is reviewed in the same manner as an affidavit for a search warrant. State v. Knight, 2000-NMCA-016, ¶ 13, 128 N.M. 591, 995 P.2d 1035.

[6] State v. Williams, 1994-NMSC-050, ¶ 16, 117 N.M. 551, 874 P.2d 12, *overruled on other grounds by* State v. Tollardo, 2012-NMSC-008, 275 P.3d 110.

[7] Id.; State v. Steinzig, 1999-NMCA-107, ¶ 14, 127 N.M. 752, 987 P.2d 409.

[8] Williams, 1994-NMSC-050, ¶ 16.

[9] State v. Perea,1973-NMCA-123, ¶ 7, 85 N.M. 505, 513 P.2d 1287.

REQUIREMENTS FOR ALL AFFIDAVITS

OUTLINE

I. Introductory information.

A. **Provide information about the affiant.**

1. State the date and time the affidavit is completed.
2. Provide the affiant's name, occupation or title and place of employment.
3. Briefly describe the affiant's experience as it relates to the investigation for which the warrant is sought (i.e., if investigation involves drugs, describe previous investigation in drug cases, or experience identifying drugs and drug related contraband).

B. **Provide information about the place to be searched.**
(provide as many of the following as possible)

1. Give the address of the place.
2. Describe the physical appearance of the place.
3. Describe the location of the place.

II. Information about the evidence sought.

A. Specifically describe each item of evidence sought to be seized.

B. Establish the affiant's reason for believing the items are evidence of a crime by providing one or more of the following types of information:

1. Affiant's personal observation of the crime (provide the information required for police investigation or reports – see relevant outline),
2. Affiant's personal observation of illegal contraband (provide the information required for police investigation or reports – see relevant outline),
3. Police investigation by another officer or agency (provide the information required for police investigation or reports – see relevant outline),
4. Information received from an informant (provide the information required for each type of informant – see relevant outlines).

III. Establish a connection between the place and the evidence sought.
(Always provide information under A, plus information under either B or C.)

A. State reasons for believing the evidence is still at the place.
(Provide as many of the following as possible)

1. Place is suspect's residence and evidence sought is the type of item likely to be kept in a residence (i.e. handgun, clothing, receipts).
2. Suspect is unaware of police suspicion or believes he has deflected suspicion.
3. The criminal activity has been ongoing over a period of time (state how much time and how many times affiant knows or has reason to believe the criminal activity has occurred; this is especially important if the items to be seized are disposable, such as drugs).
4. Information about the suspect indicates he frequently engages in similar criminal activity (prior convictions, prior arrests, prior specific criminal acts).
5. Police investigation corroborates facts that indicate the evidence is still at the place.
6. Provide information required for each different source of information (informant, police investigation, controlled buy, etc.) - see relevant outlines.

AND B. Establish that the place to be searched is the defendant's residence.

1. Describe why the defendant is a suspect, AND
2. Describe how the affiant knows it is currently the defendant's residence (i.e. utility records, police records, motel registration records, information from an informant), AND
3. Provide information required for each different source of information (informant, police investigation, controlled buy, etc.) - see relevant outlines

OR C. Establish that the evidence was seen or known to be at the place.

1. Establish how the affiant knows the evidence was seen or known to be at the place, AND
2. Establish when the evidence was seen or known to be at the place (give a date, if possible, or indicate how many hours, days or weeks prior to the application for the search warrant), AND
3. Provide information required for each different source of information (informant, police investigation, controlled buy, etc.) - see relevant outlines.

REQUIREMENTS FOR ALL AFFIDAVITS

SUMMARY

As discussed in the introduction, a search warrant can be issued only if it is supported by probable cause. Thus, all search warrant affidavits must meet the probable cause requirement. To do so, every search warrant affidavit must provide sufficient information to allow the issuing judge or magistrate to conclude "(1) that the items sought to be seized are evidence of a crime; and (2) that the criminal evidence sought is located at the place to be searched."[1]

Provide information about the place to be searched.

Besides identifying the affiant, one of the first things an affidavit must do is **particularly describe** the premises to be searched.[2] "A description in a search warrant is sufficient if the description enables the officer to identify the place intended to be searched with reasonable effort."[3] However, the description should leave no doubt or discretion as to the premises to be searched.[4] If the description in the affidavit will undoubtedly lead the officers serving the warrant to the correct premises, the description is sufficient, even if there is a mistake in the description.[5] In determining what or how much information to include in the description of the premises, the affiant should keep in mind that the goal is always to provide enough information to allow another person to locate the correct premises simply by using the affiant's description.[6]

Provide information about the evidence sought.

In establishing the first requirement for probable cause, that the items sought to be seized are evidence of a crime, the affiant must begin by **particularly describing** each item of evidence sought to be seized.[7] A particular description of each item "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another."[8] How specific the description of each item must be depends on the "circumstances and nature of activity under investigation[.]"[9] If the crime under investigation is complex and involves the use of items that ordinarily do not appear to be incriminating, the description may be less specific than under other circumstances.[10] For example, if the investigation involves a complex scheme to sell stolen property through a legitimate business, officers may not be able to describe exactly which particular documents sought contain the records of the illegal transactions. In such a situation, the affidavit is sufficient if it generally describes the items sought as invoices, inventory cards, checkbooks and bank records.[11] The affidavit does not have to specifically identify which invoices, inventory cards, checkbooks and bank records kept in the suspect's

residence were evidence of a crime.[12] Similarly, when the investigation involves drug dealing, and there is evidence of dealing or possession of more than one illegal drug, a description of the items to be seized as "controlled substances" is sufficiently particular.[13] However, a general description of the items simply as evidence of criminal activity is not sufficient.[14]

After describing the items to be seized, the affidavit must provide information to establish a basis for believing the items are evidence of a crime. This information includes any information regarding how the investigation began, the nature of the suspected crime, a description of how the crime was committed, and a description of the evidence believed to exist. In providing this information, the affiant must disclose the nature of the affiant's source of information. The source of information provided in a search warrant affidavit can include the affiant's personal observations of the crime, the crime scene, the results of the crime, or the evidence of the crime, as well as such observations of others that have been relayed to the affiant. A large part of the search warrant affidavit must discuss the source of the affiant's information and establish reasons why the issuing judge or magistrate should believe that information.[15] The requirements for establishing the reasons to believe the information are contained below in the outlines and corresponding summaries relevant to each of the following sources: Confidential Informants, Citizen Informants, Anonymous Informants and Crimestoppers Tips, Police Investigation or Reports, and Controlled Buys.

Establish a connection between the place to be searched and the evidence sought.

Not only must the affidavit establish that the items to be seized are evidence of a crime, as discussed above, the affidavit must also establish that the items sought are located at the place to be searched.[16] In other words, every search warrant affidavit must establish a connection between the evidence of criminal activity to be seized and the place to be searched.

Evidence of this connection may take one of two forms. First, the affidavit may contain information that "evidence relating to the commission of a crime exists on the premises sought to be searched."[17] For example, an affidavit may state that certain vehicles, known to be stolen, were seen on the premises to be searched.[18] In this example, the connection between the evidence of a crime and the place to be searched is established by the fact that the evidence was seen on the premises.

Second, the affidavit may contain information that a particular person, who is suspected of committing a crime, resides at the premises to be searched. For example, the affidavit may

state that the suspect was seen shooting at people in a vehicle while wearing dark sunglasses and that the suspect lives at the premises to be searched. In this example, the connection between the evidence sought (the gun and the sunglasses) and the place to be searched is the fact that the suspect resides at the place to be searched.[19] Thus, for this method, it is essential to establish that the suspect in fact resides at the place to be searched.[20] It is equally essential to establish that the evidence sought is the sort that would likely be found at the suspect's residence.[21] Without information that the suspect resides at the place to be searched, the affiant must rely on the other method of establishing a connection between the items sought and the place to be searched.[22]

Regardless of which method of establishing the connection between the premises and the evidence is used, it is essential to establish an existing connection. That is, the connection must not be "stale." If information that evidence of a crime was seen on the premises, or information establishing the premises as the suspect's residence, is "stale," the connection between the evidence and the premises is stale and, therefore, will not establish probable cause.[23] In other words, the affidavit must establish probable cause to believe that the evidence is still on the premises at the time of the application for the search warrant.[24]

Staleness is a matter of time. The more time that has elapsed between the observations on which the information in the affidavit is based and the application for the warrant, the more stale the information becomes. Whether the elapse of a particular amount of time renders the information stale depends on the nature of the place to be searched and the nature of the items to be seized.[25] For example, the transitory nature of a motel room requires a short amount of time between the observance of the evidence in the room and the application for the search warrant.[26] On the other hand, a longer period of time between the observance of the evidence and the application for the warrant may be acceptable when the place to be searched is a permanent residence.[27]

Moreover, the nature of the items to be seized also affects the issue of staleness. A suspect is more likely to keep permanent items, such as weapons, receipts, ammunition and sunglasses, for a longer period of time.[28] Therefore, a police officer can expect to find such items at a suspect's residence, since those items are not inherently incriminating and are usually kept at one's home.[29] This expectation is even more reasonable if the suspect is not aware that he is a suspect or believes that he has deflected police suspicion.[30]

If the items to be seized are easily disposable, consumable or movable, such as drugs, the information becomes stale more quickly. [31] A search warrant for such items must be based on information that raises a reasonable inference that such items are at the place to be searched, such as evidence of criminal activity of an ongoing continuous nature. For example, information that illegal drugs were recently seen at the place to be searched on several different occasions, by either the same person or several different people, raises a reasonable inference that the drugs are still at the place to be searched at the time of the application for the search warrant.[32] Similarly, information regarding observations of frequent, short visits by known drug users or dealers to the location which is identified by investigation or reports as a site of illegal drug activity might raise the same inference. [33]

A staleness problem that may exist can be cured by further police investigation. For example, if an affidavit is based on information that an informant observed illegal drugs in the suspect's motel room three days before the application for the search warrant, the information will be deemed stale without more information.[34] However, that staleness problem can be cured if further investigation corroborates the informant's information and raises reasonable inferences that the suspect is still residing at the motel room and drugs are still in the motel room.[35] Such investigation might include a controlled buy, confirmation with the motel management that the room is rented to the suspect, and police observation of continuing activity consistent with drug dealing occurring at the motel room.

Because the issue of staleness depends on so many factors, such as the nature of the evidence and the place to be searched, there is no definitive time period which will defeat a claim of staleness. Thus, the best approach is to act on information as quickly as possible and recite information in the affidavit placing the items in the premises to be searched as close in time to the application for the warrant as possible. In addition, further police investigation of information received from an informant should be conducted whenever practical, the results of which should be included in the affidavit.

REQUIREMENTS FOR ALL AFFIDAVITS

ENDNOTES

[1] State v. Herrera, 1985-NMSC-005, ¶ 6, 102 N.M. 254, 694 P.2d 510; State v. Sabeerin, 2014-NMCA-110, ¶ 9, 336 P.3d 990.

[2] State v. Sero, 1970-NMCA-102, ¶ 20, 82 N.M. 17, 474 P.2d 503; State v. Robiti, 1994-NMCA-003, ¶ 24, 117 N.M. 108, 869 P.2d 296; State v. Hamilton, 2012-NMCA-115, ¶ 13, 290 P.3d 271.

[3] Robiti, 1994-NMCA-003, ¶ 24.

[4] Hamilton, 2012-NMCA-115, ¶ 13

[5] Robiti, 1994-NMCA-003, ¶ 24.

[6] Sero, 1970-NMCA-102, ¶ 20.

[7] State v. Turkal, 1979-NMSC-071, ¶ 15, 93 N.M. 248, 599 P.2d 1045 (quoting Marron v. United States, 275 U.S. 192, 196 (1927)); State v. Jones, 1988-NMCA-058, ¶ 5, 107 N.M. 503, 760 P.2d 796 (citing Stanford v. Texas, 379 U.S. 476 (1965)).

[8] Turkal, 1979-NMSC-071, ¶ 15 (quoting Marron , 275 U.S. at 196).

[9] Jones, 1988-NMCA-058, ¶ 13; State v. Patscheck, 2000-NMCA-062, ¶ 7, 129 N.M. 296, 6 P.3d 498.

[10] Jones, 1988-NMCA-058, ¶ 13; State v. Hinahara, 2007-NMCA-116, ¶¶ 9-10, 142 N.M. 475, 166 P.3d 1129 (reference in affidavit to computers and computer disks was sufficient for police to seize the hard drive of the computer where affidavit also included information that the defendant possessed child pornography on his computer).

[11] Jones, 1988-NMCA-058, ¶ 13.

[12] Id.

[13] State v. Quintana, 1975-NMCA-034, ¶ 12, 87 N.M. 414, 534 P.2d 1126.

[14] *See* Turkal, 1979-NMSC-071, ¶ 15; Jones, 1988-NMCA-058, ¶ 13.

[15] State v. Cordova, 1989-NMSC-083, ¶ 6, 109 N.M. 211, 784 P.2d 30.

[16] Id.

[17] State v. Donaldson, 1983-NMCA-064, ¶ 9, 100 N.M. 111, 666 P.2d 1258.

[18] State v. Barker, 1992-NMCA-117, ¶ 5, 114 N.M. 589, 844 P.2d 839 (first-hand observations are sufficient to establish the basis for believing evidence will be found on the premises); *See* State v. Wisdom, 1990-NMCA-099, ¶ 18, 110 N.M. 772, 800 P.2d 206 (affidavit was sufficient because it indicated that the confidential informants personally observed stolen items and controlled substances at the locations to be searched).

[19] State v. Pargas, 1997-NMCA-110, ¶ 15, 124 N.M. 249, 948 P.2d 267.

[20] Id. ¶ 8 (citing State v. Lovato, 1994-NMCA-042, ¶ 9, 118 N.M. 155, 879 P.2d 787).

[21] State v. Evans, 2009-NMSC-027, ¶¶ 24-25, 146 N.M. 319, 210 P.3d 216 ("The fundamental inquiry is whether there is probable cause to believe there will be evidence of a crime at a particular location. Residence may be a component of this, but residence is not necessary, nor is it always sufficient, to establish probable cause to believe that the location to be searched contains evidence of a crime. Police must give the issuing magistrate probable cause to believe that evidence will be at the particular location in question, whether it is a suspect's home or not." (internal citation omitted)).

[22] Id. Decisions by the Court of Appeals seem to suggest that the affidavit must always establish that the suspect resides at the place to be searched. That is not an accurate view of the caselaw. The affidavit must always establish that the suspect resides at the place to be searched when the connection between the items sought and the place to be searched is the fact that the suspect resides at the place. However, if the affiant does not know who resides at the place to be searched, but has reliable and credible information that evidence of a crime is located at the place to be searched, who lives at the place is not relevant to the magistrate's determination that evidence of a crime will probably be found at the place to be searched. It is only relevant when the sole connection between the place and the evidence is the person who committed the crime. *Compare* State v. Lovato, 1994-NMCA-042, ¶ 9, *with* State v. Donaldson, 1983-NMCA-064, ¶ 9.

[23] Lovato, 1994-NMCA-042, ¶ 9; State v. Whitley, 1999-NMCA-155, ¶ 8, 128 N.M. 403, 993 P.2d 117.

[24] Whitley, 1999-NMCA-155, ¶ 8.

[25] State v. Gonzales, 2003-NMCA-008, ¶ 19, 133 N.M. 158, 61 P.3d 867.

[26] Lovato, 1994-NMCA-042, ¶ 9; Whitley, 1999-NMCA-155, ¶ 8.

[27] Pargas, 1997-NMCA-110, ¶¶ 15, 22; Gonzales, 2003-NMCA-008, ¶¶ 27, 29.

[28] Pargas, 1997-NMCA-110, ¶ 22.

[29] Id. ¶ 16.

[30] Id. ¶¶ 15, 22 (citing out-of-state cases).

[31] Id. ¶ 15.

[32] Lovato, 1994-NMCA-042, ¶ 9.

[33] State v. Eskridge, 1997-NMCA-106, ¶ 20, 124 N.M. 227; State v. Garcia, 1977-NMCA-056, ¶ 7, 90 N.M. 577, 566 P.2d 426.

[34] Lovato, 1994-NMCA-042, ¶ 9.

[35] Id. at ¶ 10.

CONFIDENTIAL INFORMANTS

OUTLINE

This is an outline designed to be used as a checklist to assist the user in drafting an affidavit for a search warrant when information from a confidential informant is used as a basis for probable cause. It is always best to provide as many items on the checklist as possible.

I. Provide a reason to believe the informant is telling the truth.
(Provide at least one of the following)

A. Establish that the informant has provided reliable information in the past.

1. State how many times informant has provided information, AND
2. Describe the results of the past information (arrest, conviction, etc.).

OR B. Describe any details of the informant's tip that are corroborated by police investigation.

1. Establish how the details were corroborated, AND
2. Establish that the corroborated details are facts not readily available to any member of the public, and that the details indicate the informant's inside knowledge, OR
3. Establish that the details of the tip predicted behavior or events that did in fact occur.
4. Provide information required for each different source of information (informant, police investigation, controlled buy, etc.) - see relevant outlines.

OR C. Provide facts that help establish the informant's credibility.
(Provide two or more of the following.)

1. Establish that the informant gave a statement against his own penal interest,
2. Establish that the informant was in police custody when he gave his statement,
3. Establish that the informant was not threatened or promised leniency,
4. Provide the informant's name (if the name cannot be provided, state why),
5. Establish that the informant's identity is known by affiant or other police officers,
6. Establish that another informant, also named or discussed in the affidavit, independently provided the same information.

II. <u>Establish how the informant knows the information</u>.
(Provide at least one of the following)

A. Establish that the informant knows the information through his own personal observation.

1. Describe the informant's observations (what informant observed, and where and how informant observed it).
2. Establish when the informant made his observation.
   a. Provide exact date and time, or
   b. Establish that observation was made within a certain number of hours, days or weeks prior to the application for search warrant.

OR B. Describe any details of the informant's tip that are corroborated by police investigation.

1. Establish how the details were corroborated, AND
2. Establish that the corroborated details are facts not readily available to any member of the public, and that the details indicate the informant's inside knowledge, OR
3. Establish that the details of the tip predicted behavior or events that did in fact occur.
4. Provide information required for each different source of information (informant, police investigation, controlled buy, etc.) - see relevant outlines.

CONFIDENTIAL INFORMANTS

SUMMARY

Probable cause for the issuance of a search warrant "may be determined on the basis of evidence which at trial would not be legally competent."[1] Hearsay, such as information from a confidential informant, can be sufficient to establish probable cause to issue a search warrant, regardless of whether the hearsay would be admissible in a trial.[2] When probable cause to issue a search warrant is based on hearsay information from a confidential informant, the affidavit must establish (1) the veracity or credibility of the informant, and (2) the basis of the informant's knowledge of the information.[3] Both requirements must be met for each confidential informant from whom information for the affidavit was obtained.

Provide a reason to believe the informant is telling the truth.

To establish the veracity or credibility of the informant the affidavit must provide the magistrate or issuing judge with a reason to believe the informant is telling the truth. In so doing, the affidavit must do more than simply state that the affiant knows the informant to be reliable or truthful.[4] For example, the affiant may establish the informants veracity by showing that

> (1) the informant has given reliable information to police officers in the past; (2) the informant is a volunteer citizen-informant; (3) the informant has made statements against his or her penal interest; (4) independent investigation by police corroborates [the] informant's reliability or information given; and (5) facts and circumstance disclosed impute reliability.[5]

The simplest method of establishing the veracity of the informant is to establish that the informant has provided reliable information in the past that was relevant to a police investigation of criminal activity.[6] Preferably, the informant has provided information in the past that has led to the seizure of evidence, or to arrests or convictions.[7] Naturally, the more times an informant has provided reliable information in past investigations, the more credible the informant can be considered in the present investigation.[8]

When probable cause for the search warrant is based on information from an informant who does not have a past record of providing information, the informant's veracity may be established by other means. For example, the issuing magistrate or judge may have reason to believe the informant is telling the truth if specific details of the informant's tip are corroborated

by police investigation.[9] However, the police investigation must corroborate details that are not readily available to any member of the public.[10] Thus, corroboration of the informant's description of a particular residence or vehicles parked at the residence is not sufficient to establish the veracity of the informant.[11] On the other hand, corroboration of information from a confidential informant regarding the telephone number for a particular residence, the ownership of a vehicle parked at the residence, or the occupation of the owner of the residence is sufficient.[12]

Other methods of establishing the informant's veracity include providing the informant's name or establishing that the affiant knows the informant's identity.[13] The issuing magistrate or judge can reasonably infer that an informant who is named in the affidavit has a "greater incentive to provide truthful information because he or she is subject to unfavorable consequences for providing false or inaccurate information to a greater degree than an unnamed or anonymous individual."[14] However, the informant's identity alone would not be sufficient to establish the informant's veracity. Additional information would be necessary, such as corroboration of some details through police investigation, as discussed above, or corroboration through statements from other informants.[15] Thus, the fact that two or more informants independently provided the same information indicates the veracity of the informants.[16] This is true even if one of the informants did not provide information sufficient to establish the informant's basis of knowledge, as long as one of the informants establishes a basis of knowledge of the information.[17] Likewise, information from an informant that is against the informant's penal interest also indicates the veracity of the informant.[18] Finally, circumstances that establish the informant's cooperation with police during an investigation can indicate the informant's veracity. For example, officers can establish the veracity of an informant by describing the informant's "history of repeated sessions and extensive cooperation with the investigating officers" and details of "the [informant's] reported contacts with the suspect."[19]

Establish how the informant knows the information.

In addition to establishing the veracity of the informant, the affidavit must also establish how the informant knows the information.[20] This requirement is designed to eliminate the use of rumor or innuendo as a basis for issuing a search warrant. This requirement can be met in only two ways. First, the affidavit may establish that the informant knows the information from his or her own personal observations.[21] In other words, if the informant heard, watched or participated

in the illegal activity, or saw evidence of illegal activity at a particular location, the issuing magistrate or judge may believe the informant has a reliable basis for the information he or she provides. Second, the affidavit may establish the informant's basis of knowledge through police corroboration of details of the informant's tip. Just as corroboration of details to establish the informant's veracity must corroborate facts not readily available to the general public, so must corroboration to establish the informant's basis of knowledge.[22]

CONFIDENTIAL INFORMANTS

ENDNOTES

[1] State v. Perea, 1973-NMCA-123, ¶ 7, 85 N.M. 505, 513 P.2d 1287.

[2] Id.; State v. Dietrich, 2009-NMCA-031, ¶ 6, 145 N.M. 733, 204 P.3d 733.

[3] Perea, 1973-NMCA-123, ¶ 7; State v. Cordova, 1973-NMSC-083, ¶ 11, 109 N.M. 211, 784 P.2d 30. This two part test is often described as the "*Aguilar-Spinelli* test" in reference to the United States Supreme Court decisions in Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1968), which were adopted by the New Mexico Supreme Court in Cordova.

[4] State v. Therrien, 1990-NMCA-060, ¶¶ 5-7, 110 N.M. 261, 794 P.2d 735.

[5] State v. Steinzig, 1999-NMCA-107, ¶ 18 (quoting In re Shon Daniel K., 1998-NMCA-069, ¶ 12, 125 N.M. 219, 959 P.2d 553); a*ccord* State v. Knight, 2000-NMCA-016, ¶ 20, 128 N.M. 591, 995 P.2d 1033.

[6] *See* State v. Cervantes, 1979-NMCA-029, ¶¶ 13-16, 92 N.M. 643, 593 P.2d 478.

[7] *See* State v. Lujan, 1998-NMCA-032, ¶¶ 14-15, 124 N.M. 494, 953 P.2d 29. *But see* State v. Vest, 2011-NMCA-037, ¶ 18, 149 N.M. 548, 252 P.3d 772 (statement that informant has participated in past controlled buys is insufficient because it fails to state that the informant provided information that proved to be true).

[8] *See* State v. Montoya, 1992-NMCA-067, ¶ 14, 114 N.M. 221, 836 P.2d 667.

[9] Shon Daniel K., 1998-NMCA-069, ¶ 12; Steinzig, 1999-NMCA-107, ¶ 23.

[10] Therrien, 1990-NMCA-060, ¶¶ 14-15.

[11] Id.

[12] Steinzig, 1999-NMCA-107, ¶ 23.

[13] Id. ¶ 19.

[14] Id. (citing State v. O'Connor, 692 P.2d 208, 213 (Wash.Ct.App. 1984)).

[15] *See* Steinzig, 1999-NMCA-107, ¶¶ 19-23.

[16] Id. ¶¶ 21-22 (citing State v. Hasselback, 637 P.2d 1316, 1319 (Or. Ct. App. 1981) and State v. Hall, 766 P.2d 512, 514-15 (Wash. Ct. App. 1989)).

[17] Knight, 2000-NMCA-016, ¶ 22.

[18] Shon Daniel K., 1998-NMCA-069, ¶ 12.

[19] Knight, 2000-NMCA-016, ¶ 21.

[20] Cordova, 1973-NMSC-083, ¶¶ 21-24.

[21] State v. Barker, 1992-NMCA-117, ¶ 5, 114 N.M. 589, 835 P.2d 839; Lujan, 1998-NMCA-032, ¶ 8.

[22] State v. Baca, 1982-NMSC-016, ¶ 12, 97 N.M. 379, 640 P.2d 485; State v. Donaldson, 1983-NMCA-064, ¶ 14, 100 N.M. 111, 666 P.2d 1258.

CITIZEN-INFORMANTS

OUTLINE

This is an outline designed to be used as a checklist to assist the user in drafting an affidavit for a search warrant when information from a citizen informant (usually a victim or witness of a crime) is used as a basis for probable cause. It is always best to provide as many items on the checklist as possible.

I. Provide details to show status and reliability of the informant.

A. Identify informant as a witness to a crime or victim of a crime.

(Provide as many of the following as possible.)

1. What the informant saw or heard,
2. How affiant came into contact with informant; include whether informant voluntarily approached police,
3. Informant's name,
4. If the informant's name cannot be given for some reason, state **all** of the following:
   a. whether affiant knows the informant's name,
   b. why informant's name is not given in affidavit,
   c. whether informant is being paid for the information.
   d. whether informant is avoiding prosecution by giving information.
   e. what steps were taken to verify that there were no criminal charges pending against informant when informant gave information.
   f. provide any additional information to show informant is telling the truth and should be believed.
5. Any other important circumstances about informant, including any relationship to or involvement in the criminal activity.

B. Describe any details of the informant's tip that are corroborated by police investigation

1. Establish how the details were corroborated, AND
2. Establish that the corroborated details are facts not readily available to any member of the public, and that the details indicate the informant's inside knowledge, OR
3. Establish that that details of the tip predicted behavior or events that did in fact occur.
4. Provide information required for each different source of information (informant, police investigation, controlled buy, etc.) - see relevant outlines.

II. <u>Establish the basis of the informant's knowledge of the information</u>.
(Provide at least one of the following.)

A. Establish that the informant knows the information through his own personal observation.

1. Describe the informant's observations (what informant observed, and where and how informant observed it).
2. Establish when the informant made his observations
   a. Provide exact date and time, or
   b. Establish that the observation was made within a certain number of hours, days or weeks prior to the application for search warrant.

OR B. Describe details of the informant's tip that are corroborated by police investigation.

1. Establish how the details were corroborated, AND
2. Establish that the corroborated details are facts not readily available to any member of the public, and that the details indicate the informant's inside knowledge, OR
3. Establish that the details of the tip predicted behavior or events that did in fact occur.
4. Provide information required for each different source of information (informant, police investigation, controlled buy, etc.) - see relevant outlines.

CITIZEN-INFORMANTS

SUMMARY

Provide details to show the status and reliability of the informant.

Persons who are witnesses or victims of a crime are presumed to be reliable.[1] Their reliability may be established by the mere fact that they were willing to approach an official with information.[2] The presumption of reliability is stronger if the informant is named in the affidavit.[3] Even if the informant is not named, the affidavit is sufficient if it states that the affiant knows the informant's identity, explains the reason for not disclosing the identity, and provides facts establishing the informant's status in the affidavit.[4]

An affidavit is not sufficient if it merely asserts that the informant is a "citizen-informant"; the affidavit must set forth sufficient facts to allow the magistrate to determine that the informant qualifies as a citizen-informant—rather than a paid informant or a person providing information to avoid criminal prosecution.[5] Conclusory statements that the informant is not working off criminal charges, or not receiving payment or preferential treatment, are not sufficient; the affidavit should set forth an explanation of what steps were taken to verify the assertions that there is no payment and there are no criminal charges pending.[6]

Citizen-informants are presumed reliable because it is assumed their motivation is to assist officers in carrying out their law enforcement duties.[7] The presumption of reliability may not hold if the facts suggest otherwise. If the facts suggest that the informant was involved in the criminal activity reported, the presumption may vanish.[8] Similarly, the relationship between the informant and the person informed against may deprive the informant of the presumption of reliability if that relationship suggests that the informant has an ax to grind or some motive to get the other person into trouble.[9] For example, if the informant is an estranged husband involved in a custody dispute, that relationship may prevent the husband from being presumed reliable when providing information that his wife is involved in criminal activity.

Establish the basis of the informant's knowledge of the information.

The affidavit must establish the basis of the citizen-informant's knowledge, providing sufficient information to allow the magistrate judge to evaluate whether the information was gathered in a reliable way.[10] Information from a victim or witness of a crime ordinarily is based on personal observation, which provides a sufficient basis of knowledge.[11] The affidavit should set forth when and how the informant made the observations clearly enough to show they are

based on the informant's first-hand knowledge rather than mere rumor (e.g., the informant saw X, the informant heard X); a conclusory statement that the informant "had personal knowledge" is not sufficient.[12] However, even without an explicit statement of the informant's basis of knowledge, an affidavit may be sufficient if it describes the criminal activity in such detail to allow a reasonable inference that the informant had obtained the information in a reliable way and was not relying on mere rumor or on the suspect's general reputation.[13] The affidavit may also establish the informant's basis of knowledge through police corroboration of details of the informant's tip. Just as corroboration of details to establish the informant's veracity must corroborate facts not readily available to the general public, so must corroboration to establish the informant's basis of knowledge.[14]

CITIZEN INFORMANTS

ENDNOTES

[1] In re Shon Daniel K., 1998-NMCA-069, 125 N.M. 219; State v. Gibson, 1992-NMCA-017, ¶ 27, 113 N.M. 547, 828 P.2d 980; State v. Hernandez, 1990-NMCA-127, ¶ 5, 111 N.M. 226, 804 P.2d 417; State ex rel. Taxation & Revenue Dep't Motor Vehicle Div'n v. Van Ruiten, 1988-NMCA-059, ¶¶ 9-11, 107 N.M. 536, 760 P.2d 1302 (involving reasonable suspicion for investigatory stop) (citing State v. Michael G., 1989-NMCA-142, ¶ 10, 106 N.M. 644, 748 P.2d 17).

[2] Michael G., 1989-NMCA-142, ¶¶ 8-10 (applying "reasonable grounds" standard for warrantless search of student locker by school principals).

[3] Shon Daniel K., 1998-NMCA-069, ¶¶ 11-16.

[4] Id. ¶ 13.

[5] Id. ¶¶ 14-18; Hernandez, 1990-NMCA-127, ¶¶ 6.

[6] Shon Daniel K., 1998-NMCA-069, ¶¶ 17-18.

[7] Id. ¶ 14; Hernandez, 1990-NMCA-127, ¶¶ 6, 8.

[8] Shon Daniel K., 1998-NMCA-069, ¶ 16.

[9] Michael G., 1989-NMCA-142, ¶ 10 (if facts indicate informant has reason to lie, police are under obligation to investigate circumstances further).

[10] Shon Daniel K., 1998-NMCA-069, ¶ 9.

[11] *See* State v. Lujan, 1998-NMCA-032, ¶¶ 8-12, 124 N.M. 494, 953 P.2d 1087; State v. Barker, 1992-NMCA-117, ¶ 5, 114 N.M. 589, 844 P.2d 839.

[12] State v. Baca, 1982-NMSC-016, ¶ 16, 97 N.M. 379, 640 P.2d 485.

[13] Id.; Spinelli v. United States, 393 U.S. 410, 416-17 (1969).

[14] Baca, 1982-NMSC-016, ¶ 16; State v. Bedolla, 1991-NMCA-002, ¶ 14, 111 N.M. 448, 806 P.2d 588.

ANONYMOUS INFORMANT OR CRIMESTOPPERS TIP

OUTLINE

This is an outline designed to be used as a checklist to assist the user in drafting an affidavit for a search warrant when information from an anonymous tip, including a Crimestoppers tip, is used as a basis for probable cause. It is always best to provide as many items as possible.

I. Provide reasons to believe the informant is telling the truth.
(Always provide information under both A and B)

A. Provide the details of the tip.

1. State the source of the tip (phone call, face-to-face, letter).
2. State the substance of the tip.
3. State who received the tip.
4. State when the tip was received:
   a. Give exact date and time, or
   b. State the tip was received within a certain number of hours, days, weeks, of the application for search warrant.

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AND B. Establish that the substance of the tip was corroborated by police investigation. (Provide as many of the following as possible)

1. Establish what details were corroborated.
2. Establish how the details were corroborated.
3. Establish that the corroborated details are facts not readily available to any member of the public, and that the details indicate the informant's inside knowledge.
4. Establish that details of the tip predicted behavior or events that did in fact occur.
5. Provide information required when source is police investigation or report - see relevant outlines.

II. Establish the basis of the informant's knowledge of the information.

A. Establish that the informant knows the information through his own personal observation.

1. Describe the informant's observations (what informant observed, and where and how informant observed it).

2. Establish when the informant made his observations.
   a. Provide the exact date and time, or
   b. Establish that the observation was made within a certain number of hours, days or weeks prior to the application for search warrant.

OR B. Describe details of the informant's tip that are corroborated by police investigation.

1. If the information is not based on the anonymous informant's personal observations, corroborated details must be indicative of criminal activity or behavior and events predicted by the informant
2. If information from police investigation or other informants is used to corroborate the anonymous informant's tip, provide the information required for that source – see relevant outlines.

ANONYMOUS INFORMANT OR CRIMESTOPPERS TIP

SUMMARY

Provide reasons to believe the informant is telling the truth.

The veracity of an informant who provides information anonymously, including through a Crimestoppers tip, must be established.[1] There is no presumption of reliability.

An anonymous tip must be sufficiently corroborated before it can provide probable cause for issuance of a warrant.[2] Such corroboration could come from independent information or observations of the police. Corroboration is not sufficient if it consists only of innocent information which is readily available to any member of the public.[3] Particularly persuasive and helpful is corroboration of facts indicative of criminal activity, or corroboration that some behavior and events predicted by the informant actually occured.[4] The affidavit should set forth in detail what facts were corroborated, and what steps were taken to corroborate them.

Establish the basis of the informant's knowledge of the information.

The affidavit must establish the basis of the informant's knowledge, providing sufficient information to allow the magistrate judge to evaluate whether the information was gathered in a reliable way.[5] Personal observation by the informant provides a sufficient basis of knowledge.[6] The affidavit should set forth when and how the informant made the observations clearly enough to show they are based on the informant's first-hand knowledge rather than mere rumor (e.g., the informant saw X, the informant heard X); a conclusory statement that the informant "had personal knowledge" is not sufficient.[7] However, even without an explicit statement of the informant's basis of knowledge, an affidavit may be sufficient if it describes the criminal activity in such detail to allow a reasonable inference that the informant had obtained the information in a reliable way and was not relying on mere rumor or on the suspect's general reputation.[8] Moreover, the affidavit may establish the informant's basis of knowledge through police corroboration of details of the informant's tip. Just as corroboration of details to establish the informant's veracity must corroborate facts not readily available to the general public, so must corroboration to establish the informant's basis of knowledge.[9]

ANONYMOUS INFORMANT OR CRIMESTOPPER'S TIP

ENDNOTES

[1] State v. Therrien, 1990-NMCA-060, ¶¶ 8-10, 110 N.M. 261, 794 P.2d 735.

[2] *See* State v. Contreras, 2003-NMCA-129, ¶ 5, 134 N.M. 503, 79 P.3d 1111 (citing Florida v. J.L., 529 U.S. 255, 270 (2000) and requiring corroboration of an anonymous tip to establish reasonable suspicion for an investigatory stop of a vehicle).

[3] Therrien, 1990-NMCA-129, ¶¶ 8-10.

[4] State v. Flores, 1996-NMCA-059, ¶¶ 8-10, 122 N.M. 84, 920 P.2d 1038 (reasonable suspicion for stop); State v. Bedolla, 1991-NMCA-002, ¶ 16, 111 N.M. 448, 806 P.2d 588 (same) (citing Alabama v. White, 496 U.S. 325 (1990)).

[5] In re Shon Daniel K., 1998-NMCA-069, ¶ 9.

[6] State v. Lujan, 1998-NMCA-032, ¶¶ 8-12, 124 N.M. 494; State v. Barker, 1992-NMCA-117, ¶ 5, 114 N.M. 589, 844 P.2d 839.

[7] State v. Baca, 1982-NMSC-016, ¶ 16, 97 N.M. 379, 640 P.2d 485.

[8] Id., ¶ 13; Spinelli v. United States, 393 U.S. 410, 416-17 (1969).

[9] Baca, 1982-NMSC-016, ¶¶ 15-16.

CONTROLLED BUY

OUTLINE

This outline is designed to be used as a checklist for guidance in preparing an affidavit in support of a search warrant based on a controlled buy. A controlled buy is a specific type of confidential informant (CI) investigation. The more details provided, the stronger the showing of probable cause, so provide as many details from the checklist as possible.

I. Establish the factual basis for the information (basis of knowledge) by describing the controlled buy.

A. Describe the information leading to attempted buy.

(provide information required for source of information – see relevant checklists, e.g., Confidential Informants, Citizen Informants, etc.)

B. Describe the steps taken during the controlled buy.

1. Prior to buy, affiant searched CI—no drugs or money found.
2. Affiant gave CI money and observed CI enter and exit place to be searched (state how long CI was inside premises).
3. Affiant obtained drugs or other contraband from CI (state amount of time lapsed since the buy).
4. CI informed affiant the drugs or other contraband was purchased from a person (named or described) at the place to be searched.
5. CI informed affiant that CI observed more drugs or other contraband at the place to be searched or on the suspect.

II. Establish the credibility (veracity) of the buyer (CI).

A. Establish the knowledge and experience of CI in identifying drugs or contraband to be seized.

1. Establish that CI is drug user, has record of convictions for drug use or possession.
2. Describe CI's training or experience relating to identification of type of item to be seized (e.g., familiar with heroin packaging).

B. Describe the track record of the CI, if any.

1. State how many times CI has provided information in the past
2. Describe the results of the past information (conviction, arrest, etc.)

CONTROLLED BUY

SUMMARY

Establish the factual basis for the information by describing the controlled buy.

First-hand observation by a reliable informant meets the "basis of knowledge" prong of the Aguilar-Spinelli test.[1] In a controlled buy, the informant's first-hand observation of contraband drugs is sufficient alone to establish the informant's basis of knowledge.[2] This assumes the affidavit recites a controlled buy, meaning the informant was searched prior to entering the location and had no drugs but did have money, the informant was observed exiting the location a short time later, was intercepted and reported buying drugs, as confirmed by a search of the informant's person which yields the drugs.[3]

The staleness of the information is only relevant to the degree it helps determine whether probable cause to search exists when the affidavit is submitted to the magistrate; establishing a lack of bad faith or justification for the delay in presenting the information to the magistrate is not unnecessary, because it is not relevant to the existence of present probable cause.[4] Since drugs are an item usually disposed of quickly, recent personal observation of drugs or information showing ongoing sales activity at the location is required in order to draw the reasonable inference of present probable cause.[5]

Establish the credibility (veracity) of the buyer (confidential informant).

There must be information in the affidavit which establishes the buyer's credibility or veracity.[6] The buyer may be inherently credible, as with a police officer purchase.[7] Without a showing of the informant's inherent credibility, the affidavit must include facts which show reliability on this occasion, as with a proven track record of accurate information on past occasions. Credibility may also be established by establishing that the information includes a statement against the buyer's penal interest which is closely linked to the information about the evidence to be seized.[8] In addition, the accuracy of information about illegal drugs is enhanced by information showing the buyer's familiarity with the drug, as when the buyer is a known or admitted user of the drug.[9]

CONTROLLED BUY

ENDNOTES

[1] State v. Barker, 1992-NMCA-117, ¶ 5, 114 N.M. 589, 844 P.2d 839.

[2] State v. Lujan, 1998-NMCA-032, ¶ 8, 124 N.M. 494, 953 P.2d 29.

[3] Id. ¶ 12.

[4] State v. Pargas, 1997-NMCA-110, ¶ 23, 124 N.M. 249, 946 P.2d 267.

[5] State v. Lovato, 1994-NMCA-042, ¶ 10, 118 N.M. 155, 879 P.2d 787; State v. Rubio, 2002-NMCA-007, ¶ 8, 131 N.M. 479, 39 P.3d 144.

[6] State v. Cordova, 1989-NMSC-083, ¶ 11, 109 N.M. 211, 784 P.2d 30.

[7] Barker, 1992-NMCA-117, ¶¶ 6, 14.

[8] Lujan, 1998-NMCA-032, ¶¶ 14-15; Barker, 1992-NMCA- 117, ¶ 7; State v. Vest, 2011-NMCA-037, ¶ 14, 149 N.M. 548, 252 P.3d 772.

[9] Lujan, 1998-NMCA-032, ¶ 8.

POLICE INVESTIGATION OR REPORTS

OUTLINE

This outline is designed to be used as a checklist for guidance in preparing an affidavit for a search warrant where the information comes from a police investigation.

I. When the information is from a police source other than the affiant's personal observation.

A. Establish the basis for any information from a police source.
(Provide as many of the following as possible.)

1. Prior contact with suspect, known criminal history or criminal affiliations of suspect (gang member, known drug sale location).
2. Information given in reports relevant to the suspect or place, including date of report, and time and date of reporting officer's observations.
3. If information is based on another officer's observations establish the following:
   a. Who made the observation,
   b. What was observed,
   c. Where and how it was observed,
   d. That the officer was lawfully in the place from which the observation was made.

B. Identify and describe any non-police source relied upon by affiant during the investigation.

1. Identify as citizen informant, confidential informant, or anonymous informant.
2. Provide information required for that type of source - see relevant outline.

II. When the information is from personal observations by the affiant, describe the observations. (Include each of the following.)

A. Describe the observations.

1. Describe what was observed.
2. Establish reason for suspecting items observed are evidence of a crime.

B. Describe the circumstances of the observation.

1. Provide the date and time of the personal observations of affiant.
2. Describe where the items were located when affiant observed them.
3. Establish that the affiant was lawfully in the place from which the observations were made.

POLICE INVESTIGATION OR REPORTS

SUMMARY

A tip can be sufficient to support the existence of probable cause if the source satisfies the basis of knowledge and veracity requirements of the Aguilar-Spinelli test, meaning the affidavit provides a substantial basis for believing that any hearsay statements are credible and there is a factual basis for the information furnished.[1] *See* the outline regarding information from confidential informants, which discusses specifics for showing basis of knowledge and veracity for confidential informants (track record, self-incrimination, etc.).

Establish the basis for any information from a police source.

Police officers are permitted to rely on information contained in routine police reports, as when a search warrant affiant learns a suspect's address from police department records.[2]

Identify and describe any non-police source relied upon by affiant during the investigation.

As for non-police sources of information, see the outline and summary regarding confidential informants for CI information in the affidavit. As for citizen informants, they are presumed reliable since their presumed motivation is to assist law enforcement officers.[3] Any informant meets the basis of knowledge test by reporting first-hand observations made by the informant.[4] *See* the outline and summary regarding citizen informants. A statement against the person's own penal interest supports the reliability of a hearsay statement in a search warrant affidavit, as does independent police corroboration of details in the informant's statement.[5] A "controlled buy" establishes both the basis of knowledge and veracity requirements when a police officer observes the buyer enter premises without contraband and then exit with contraband.[6]

Describe observations made by the affiant.

The age or staleness of information in a search warrant affidavit is only relevant to the extent it affects the existence or lack thereof of present probable cause to search. Therefore, a court does not look to any alleged bad faith by the police officer affiant or the justification for any delay in using the information, but only asks whether the information in the affidavit is sufficient to establish that probable cause exists at the present time.[7]

With regard to information gained by a police officer from a plain view observation, the information is properly considered in establishing probable cause as long as the affidavit shows the officer was lawfully in a position to make the observation and had a reasonable basis for

identifying the presence of contraband.[8] Thus if a police officer is invited into a home, the officer is lawfully in a position to make a plain view observation.[9] Likewise a police officer lawfully engaged in a community caretaking function is permitted to observe and report in an affidavit evidence of unlawful activity which supports the existence of probable cause to search.[10]

POLICE INVESTIGATION OR REPORTS

ENDNOTES

[1] State v. Cordova, 1989-NMSC-083, ¶ 11, 109 N.M. 211, 784 P.2d 30; State v. Steinzig, 1999-NMCA-107, ¶ 17, 127 N.M. 752, 987 P.2d 409.

[2] State v. Pargas, 1997-NMCA-110, ¶ 10, 124 N.M. 249, 948 P.2d 267.

[3] In re Shon Daniel K., 1998-NMCA-069, ¶ 14, 125 N.M. 219, 959 P.2d 553; State v. Hernandez, 1990-NMCA-127, ¶¶ 5-6, 111 N.M. 226, 804 P.2d 417.

[4] State v. Lujan, 1998-NMCA-032, ¶ 8, 124 N.M. 494, 953 P.2d 29.

[5] Shon Daniel K., 1998-NMCA-069, ¶ 12.

[6] Lujan, 1998-NMCA-032, ¶¶ 7-10.

[7] Pargas, 1997-NMCA-110, ¶ 23.

[8] State v. Williams, 1994-NMSC-050, ¶ 12-14, 117 N.M. 551, 874 P.2d 12.

[9] State v. Cline, 1999-NMCA-154, ¶¶ 16, 18, 126 N.M. 77, 966 P.2d 785.

[10] State v. Walters, 1997-NMCA-013, ¶ 10, 123 N.M. 88, 934 P.2d 282.

EXECUTING A SEARCH WARRANT

INTRODUCTION

Article II, § 10 of the New Mexico Constitution, and the Fourth Amendment to the United States Constitution, protect individuals from unreasonable searches and seizures. This protection extends to the execution of valid search warrants. Thus, when executing a valid search warrant, police officers must act reasonably, and must limit their search to the premises and items identified in the search warrant. This requirement gives rise to decisions which must be made during the execution of a search warrant, such as how to enter the premises to be searched, whether to detain and search people found in the premises during the search, and what items to seize from the premises. Each of these decisions must be reasonable under the circumstances, or the search will be deemed unreasonable.

For example, a search pursuant to a valid search warrant may be deemed unreasonable if the manner of entry into the premises is unreasonable. Entry is unreasonable if the officers executing the search warrant fail to comply with the "knock and announce" requirement.[1] Similarly, in executing a valid search warrant, officers must be reasonable in their treatment of anyone occupying the premises at the time of the search. Although the resident of the premises may be detained during the search, detention of others requires the officers to have a reasonable basis for believing those people have a connection to the premises or to the suspected criminal activity.[2] Finally, the seizure of items from the premises during the execution of a valid search warrant must be reasonable. To be reasonable, seizure of items from the premises is limited to items specifically named in the search warrant,[3] or found in "plain view" by the officers during the search.[4]

INTRODUCTION

ENDNOTES

[1] State v. Attaway, 1994-NMSC-011, ¶ 22, 117 N.M. 141, 870 P.2d 103.

[2] State v. Graves, 1994-NMCA-151, ¶ 8, 119 N.M 89, 888 P.2d 971.

[3] *See* State v. Patscheck, 2000-NMCA-062, ¶¶ 14-15, 129 N.M. 296, 6 P.3d 498. In Patscheck, suppression of evidence seized pursuant to a warrant was not required because the evidence in question was described in the warrant. In dicta, the court stated that if the officers had seized evidence not described in the warrant, the trial court would have been required to suppress only that evidence, but not other evidence seized during the search that was described in the warrant. In other words, blanket suppression of all evidence is not necessary when some evidence not authorized under the warrant is seized. Also in dicta, the Supreme Court cited Patscheck for the same proposition in State v. Jacobs, 2000-NMSC-026, ¶ 43, 129 N.M. 448, 10 P.3d 127.

[4] State v. Williams, 1994-NMSC-050, ¶ 11, 117 N.M. 551, 874 P.2d 12.

MEETING THE KNOCK AND ANNOUNCE REQUIREMENT

OUTLINE

This outline is for guidance in preparing for the execution of a valid search warrant. Officers executing a search warrant should be aware of the following guidelines for the initial entry into the premises to be searched.

I. The knock and announce rule: Officers executing a search warrant must announce their presence and purpose before entering the premises to be searched.

A. Knock and announce.

1. Officers must identify themselves as police officers.
2. Officers must inform the occupants that the purpose of their presence is to execute a search warrant.
3. Officers must wait a reasonable period of time to allow the occupants to give their permission for the entry. Thirty seconds is generally deemed reasonable.

B. Enter the premises after receiving permission.

C. Forcibly enter the premises after permission is denied, or after permission to enter is not given within a reasonable period of time.

II. Under exigent circumstances, officers executing a search warrant may enter the premises to be searched without announcement or without waiting for permission to enter.

A. Exigent circumstances require reasonable belief that delayed entry creates imminent danger to the officers or possible destruction of evidence. Such circumstances may include:

1. Officers know the occupants are already aware of the presence of the police.
2. Officers have information that weapons are present in the premises.
3. Officers detect movement in the building or flight of an occupant after they announce their presence.

B. **Entry without waiting a reasonable period of time and without exigent circumstances is not excused by a "good faith" exception.**

III. Under certain circumstances, officers may enter the premises to be searched immediately after announcing themselves, without waiting for permission to enter.

A. Officers may enter immediately once the occupants have opened the door for any reason.

B. If the door to the premises is already open, officers may enter the premises immediately upon announcing their presence.

C. If officers use a ruse to announce their presence, they should wait a reasonable period of time after the announcement for permission to enter, unless exigent circumstances exist.

MEETING THE KNOCK AND ANNOUNCE REQUIREMENT

SUMMARY

Officers executing a search warrant must announce their presence and purpose.

The courts of New Mexico follow the common law "rule of announcement" which dates from 1603. That rule requires officers executing a valid search warrant to announce their presence and purpose to anyone occupying the premises to be searched, request entry and be denied entry before forcing entry into the premises.[1] The "announcement requirement" is incorporated into the reasonableness standard of Art. II, § 10 of the New Mexico Constitution.[2] The purposes for the knock and announce requirement are (1) to make the occupants aware of the authority and purpose of the police in entering, (2) to avoid needless destruction of property, (3) to protect individual privacy, and (4) to protect the occupant and police from the possible violent response of a startled occupant suddenly confronted with an unannounced entry by an unknown person.[3]

To comply with this requirement, officers must "knock" and "announce" their presence and purpose to the occupants of the premises. A knock includes a rapping on or near the door, or some other loud indication reasonably likely to draw the occupants' attention to the announcement.[4] An "announcement" is a loud declaration which conveys the intended message regarding the officers' presence and purpose.

The knock and announce requirement necessarily includes a requirement that police wait for a reasonable amount of time after knocking and announcing before entering the premises. This waiting period gives the occupants time to "collect themselves and to prepare for the entry of the police before answering the door."[5]

There is no bright-line rule for determining what is a reasonable amount of time to wait before entering after the knock and announce; it will depend on the circumstances.[6] For example, a ten-second wait before forcible entry into a very small motel room has been found reasonable when the occupants saw the police approach the room and failed to respond to the knocking.[7] On the other hand, a ten to twelve-second wait before forcible entry into a house has been found insufficient when the entry occurred late at night, officers knew that the suspects were not home, and knew that an elderly, disabled person also lived on the premises.[8] Generally, the length of the wait is judged by the surrounding circumstances, including the time of day or night, the size of the dwelling, which affects the amount of time it would reasonably take for an

occupant to respond, and the identity of any likely occupants.[9] Other circumstances, such as movement within the premises, can justify a shorter wait period before forcing entry.[10]

Officers may enter without announcement, or without waiting for permission to enter, under exigent circumstances.

Under certain circumstances, compliance with the announcement requirement may be excused. For example, the existence of exigent circumstances may necessitate entry without compliance with the announcement rule to ensure officer safety or prevent the destruction of evidence. Use of the exigent circumstances exception to the announcement requirement will be upheld where the officer has "good reason" to believe either that officer safety demands a no-knock entry or that an announcement or other delay will result in destruction of evidence.[11] However, a no-knock entry cannot be justified by a "good faith" exception. In other words, it is not enough that the officer has a good faith belief that a no-knock entry is justified. The officer must be able to articulate facts establishing a reasonable basis for believing exigent circumstances justify a no-knock entry.[12] For example, a no-knock entry may be justified by information that the suspects are dealing drugs, are often armed and have been violent in the past.[13] Exigency is particularly apt when the search is for drugs because persons who deal in large narcotics transactions present a serious threat to officer safety regarding the potential use of weapons.[14]

Review of an officer's on-the-spot determination that exigent circumstances require immediate action requires a practical, common sense approach to the facts and inferences available to the officer in the field.[15] New Mexico courts are "reluctant to indulge in unrealistic second-guessing of a police officer's judgment in a swiftly developing situation."[16] Thus, if police officers have been told the occupants of the premises to be searched have access to firearms, exigent circumstances may excuse incomplete compliance with the announcement requirement.[17] Similarly, the knock and announce requirement may be sufficiently met when the police executing a warrant for heroin, who fear the heroin will be destroyed and that the occupants might have a weapon, knock on the door, hear movement and possibly shouting inside and immediately enter "without waiting to be invited or denied entry."[18] As long as well-trained, reasonable police officers could believe the circumstances justified lack of or partial compliance with the knock and announce requirement in order to reduce the risks to the officer or others, less than full compliance will not require suppression because the officer's conduct is reasonable.[19]

Under federal precedent analyzing the Fourth Amendment, both partial compliance with the announcement requirement and a no-knock entry require a reasonable suspicion by the officers that either their safety, or the integrity of the investigation, would be jeopardized by meeting the announcement requirement.[20] This reasonable suspicion standard is familiar to police and courts in New Mexico from other contexts.[21] Requiring the police to demonstrate a reasonable suspicion comports with the requirement that the State establish that a reasonable, well-trained and prudent police officer would believe that greater compliance with the knock and announce requirement "would create or enhance the danger to the entering officers."[22] Thus, New Mexico courts determine the reasonableness of an officer's belief that the exigent circumstances justify dispensing with the knock and announce requirement "under a reasonable suspicion standard."[23] That standard requires the officer to give specific articulable facts that, together with the reasonable inferences from those facts, support finding the existence of exigent circumstances.[24]

Under exigent circumstances, officers executing a warrant may enter immediately after announcing themselves, without waiting for permission to enter.

One of the requirements of the knock and announce rule is that the officers must wait to be denied entry before they may use force to enter the premises. However, when exigent circumstances exist, officers may enter the premises without waiting a reasonable amount of time after knocking and announcing.[25] For example, if the people within the premises either deny or hinder entry into the premises, the officers need not wait for a response.[26] As soon as the search warrant is issued, the "governmental interests in the expeditious and safe execution of a search warrant are legitimate and strong."[27] A defendant's privacy interest is severely limited under such circumstances because the police officers' right to enter exists from the moment the search warrant is issued, so that a defendant cannot lawfully deny the police entry.[28] As a result, the appropriate reaction of the police to any attempt to lock them out or hinder entry after knocking and announcing their purpose would be to enter forcibly. That is because, under such circumstances, knocking, announcing, and waiting for permission to enter is futile.[29] Similarly, officers may force entry if the people within the premises attempt to flee, rather than open the door.[30]

A similar exception applies to the requirement that the officers announce their presence before forcibly entering the premises. If the people within the premises know of the officers'

presence, even though the officers have not actually announced their presence, the officers need not announce. However, absent exigent circumstances, the officers must wait for a reasonable amount of time under the circumstances before entering the premises, even if the door to the premises is open and the occupants are obviously aware of the officers' presence.[31] Once the officers have knocked and announced their presence, and waited a reasonable time, or identified exigent circumstances to justify immediate entry, the officers may enter the premises.[32] If the occupants attempt to stop the entry, the officers may use force to enter.[33] That is true even if the officers use a ruse to get the door open or to inform the occupants of their presence.[34] However, both the use of a ruse, and the use of force must be reasonable under the circumstances.[35] In other words, the officers must identify specific exigent circumstances to justify the use of a ruse and the use of force. Such exigent circumstances may include a "heightened risk of danger to the officers executing the warrant or an enhanced risk that evidence would be destroyed."[36]

MEETING THE KNOCK AND ANNOUNCE REQUIREMENT

ENDNOTES

[1] State v. Attaway, 1994-NMSC-011, ¶ 11, 117 N.M. 141, 870 P.2d 103 (quoting Semayne's Case, 77 Eng. Rep. 194, 195 (K.B. 1603)).

[2] Id. ¶ 22.

[3] Id. ¶ 13; State v. Jean-Paul, 2013-NMCA-032, ¶ 9, 295 P.3d 1072.

[4] Battering on a door to gain entry does not count as the knocking part of the knock and announce requirement. State v. Johnson, 2006-NMSC-049, ¶ 11, 140 N.M. 653, 146 P.3d 298.

[5] State v. Ulibarri, 2010-NMCA-084, ¶ 10, 148 N.M. 576, 240 P.3d 1050 (quoting State v. Vargas, 2008-NMSC-019, ¶ 15, 143 N.M. 692, 181 P.3d 684).

[6] Johnson, 2006-NMSC-049, ¶¶ 13-14.

[7] Id. ¶ 17.

[8] Ulibarri, 2010-NMCA-084, ¶ 19; *see also* State v. Gonzales, 2010-NMCA-023, ¶ 16, 147 N.M. 736, 228 P.3d 519 (8-second wait before entering the house of an 84-year-old woman was insufficient when officers failed to articulate any exigent circumstances).

[9] Ulibarri, 2010-NMCA-084, ¶ 19.

[10] State v. Hand, 2008-NMSC-014, ¶ 11, 143 N.M. 530, 178 P.3d 165.

[11] State v. Vargas, 1996-NMCA-016, ¶ 5, 121 N.M. 316, 910 P.2d 950.

[12] State v. Gutierrez, 1993-NMSC-062, ¶¶ 50-56, 116 N.M. 431, 863 P.2d 1052.

[13] Vargas, 1996-NMCA-016, ¶¶ 3, 13.

[14] State v. Eskridge, 1997-NMCA-106, ¶ 26, 124 N.M. 227, 947 P.2d 502; State v. Lopez, 2005-NMSC-018, ¶ 19, 138 N.M. 9, 116 P.3d 80 (known presence of weapons in suspected drug dealer's house may provide exigent circumstances to dispense with knock and announce requirement.). *But see* State v. Williams, 1992-NMCA-106, ¶ 16, 114 N.M.

485, 840 P.2d 1251 (affirming trial court's finding that there were no exigent circumstances solely from the fact that the warrant was for drugs; there must be specific evidence that the suspect is dangerous, beyond the assumption that he is armed because he is a drug dealer).

[15] *See* State v. Gomez, 1997-NMSC-006, ¶ 40, 122 N.M. 777, 932 P.2d 1 ("[I]f reasonable people might differ about whether exigent circumstances existed, we defer to the officer's good judgment.").

[16] State v. Arredondo, 1997-NMCA-081, ¶ 18, 123 N.M. 628, *overruled on other grounds*, State v. Steinzig, 1999-NMCA-107, ¶ 29, 127 N.M. 752, 987 P.2d 409.

[17] Steinzig, 1999-NMCA-107, ¶ 31.

[18] State v. Sanchez, 1975-NMSC-059, ¶ 6, 88 N.M. 402, 540 P.2d 1281, *overruled on other grounds*, Attaway, 1994-NMSC-011, ¶ 4).

[19] Vargas, 1998-NMCA-016, ¶ 3

[20] Richards v. Wisconsin, 520 U.S. 385 (1997); United States v. Ramirez, 523 U.S. 65, 69 (1998).

[21] *See* State v. Affsprung, 1993-NMCA-056, ¶ 10, 115 N.M. 546, 854 P.2d 873.

[22] Attaway, 1994-NMSC-011, ¶ 32; Vargas, 1996-NMCA-016, ¶ 6.

[23] Jean-Paul, 2013-NMCA-032, ¶ 11.

[24] Id.

[25] Id. ¶ 10; Ulibarri, 2010-NMCA-084, ¶ 10.

[26] Jean-Paul, 2013-NMCA-032, ¶ 10; *see also* Attaway, 1994-NMSC-011, ¶ 27 n.7.

[27] Attaway, 1994-NMSC-011, ¶ 26.

[28] Id.; *see also* Gutierrez, 1993-NMSC-062, ¶ 11.

[29] Jean-Paul, 2013-NMCA-032, ¶ 10. This is often referred to as the "futility exception" to the knock and announce requirement. Id.

[30] State v. Kenard, 1975-NMCA-077, ¶ 16, 88 N.M. 107, 537 P.2d 1003; *see also* Attaway, 1994-NMSC-011, ¶ 27 n.7.

[31] State v. Halpern, 2001-NMCA-049, ¶ 14, 130 N.M. 694, 30 P.3d 383.

[32] Id.

[33] *See* State v. Chandler, 1995-NMCA-033, ¶ 34, 119 N.M. 727, 895 P.2d 249 ("[O]nce the occupants have voluntarily opened the door to uniformed officers, the requirements of the knock and announce rule are satisfied"); Kenard, 1975-NMCA-077, ¶ 16 (officers may forcibly enter premises when suspects attempt to flee from an officer who has identified himself).

[34] Kenard, 1975-NMCA-077, ¶ 16 (forcible entry upheld where an officer posed as a "hippie" seeking to buy drugs and was refused entry because the suspect attempted to flee after the officer identified himself); State v. Chavez, 1974-NMCA-148, ¶¶ 6-7, 87 N.M. 180, 531 P.2d 603.

[35] State v. Reynaga, 2000-NMCA-053, ¶¶ 10-11, 129 N.M. 257, 5 P.3d 579.

[36] Id. ¶ 11.

DETAINING AND SEARCHING PEOPLE ON THE PREMISES TO BE SEARCHED

OUTLINE

This outline is for guidance in preparing for the execution of a valid search warrant. Officers executing a search warrant should be aware of the following guidelines for detaining and searching people found on the premises upon entry of the premises.

I. Officers executing a search warrant may conduct a protective sweep of the premises to be searched.

II. Officers executing a search warrant may detain occupants of the premises during the search.

A. Officers may detain the residents of the premises to be searched.

B. Officers may detain non-residents of the premises to be searched only under limited circumstances, such as the following:

1. The officers have a reasonable belief the non-resident has a connection to the premises.
2. The officers have a reasonable belief the non-resident is connected to the criminal activity under investigation.
3. The officers are aware of circumstances that exist at the time of their entry into the premises to conduct the search that establish a reasonable belief that the non-resident may be a threat to the safety of the officers, such as the following actions by the non-resident.
    a. Attempting to flee;
    b. Making sudden movements as if to reach for a weapon;
    c. Making threats;
    d. Resisting detention or the search;
    e. Committing (or about to commit) a crime;
    f. Appearing to be under the influence of alcohol or drugs.

III. Officers executing a search warrant may search a person detained during the search, under certain circumstances.

A. Officers may "pat down" a person detained during the execution of a search warrant if the officers have a reasonable suspicion that person poses a risk to the safety of the officers.

B. Officers may conduct a full search of a person detained during the execution of a search warrant if the officers have probable cause to arrest that person.

DETAINING AND SEARCHING PEOPLE ON THE PREMISES TO BE SEARCHED

SUMMARY

Officers executing a search warrant may detain people found on the premises during the search.

If officers executing a search warrant find people in or near the premises, the officers may detain those people, under certain circumstances. For example, officers executing a search warrant may detain a resident of the premises during the search.[1] Detention of a resident of the premises to be searched is reasonable under the Fourth Amendment's prohibition against unreasonable searches and seizures because a search warrant provides an objective justification to detain the resident during the search.[2] Moreover, such a detention is justified by the law enforcement interests in "(1) preventing flight in the event that incriminating evidence is found; (2) minimizing the risk to law enforcement officers; and (3) facilitating the search.[3]

However, these justifications do not extend to a non-resident who is not connected to the premises in some way or suspected to be involved with criminal activity.[4] Therefore, officers cannot detain a non-resident merely because that person is present at the place to be searched.[5] There must be additional facts that would make detaining a non-resident reasonable under the circumstances.[6] In other words, officers must have a reasonable basis to believe that a non-resident has some type of connection to the premises or to criminal activity.[7] This requirement is often referred to as a "presence plus" requirement.[8] Examples of what may satisfy the "presence plus" requirement include the fact that a non-resident was found five feet away from a drug-laden table inside the apartment being searched, or the fact that a non-resident was inside a home with money and drugs out in the open.[9] In addition, the "presence plus" requirement may be satisfied if the officers have information that the non-resident is a suspect in a crime.[10]

If officers executing a search warrant do not have any articulable reason to believe a non-resident found in the premises is connected to either the premises or criminal activity, the officers must diligently investigate whether the non-resident has such connections before they may detain the non-resident during the search.[11] Such an investigation may simply involve ascertaining the identity of the non-resident, his relationship, if any, to the resident of the premises, and his purpose for being in the premises.[12]

When officers find a person on the premises to be searched, they may detain that person temporarily, but only for as long as necessary to investigate the person's connection to the

premises.[13] In so doing, officers may take a few minutes to secure the premises before beginning the inquiry regarding the person detained.[14]

In addition to investigating the identity and background of the non-resident, officers executing a search warrant may obtain reasonable suspicion to justify detaining the non-resident by the circumstances existing at the time the officers enter the premises. Circumstances which may justify detaining a non-resident include (1) attempts by the non-resident to flee the premises, (2) furtive gestures or sudden movements by the non-resident toward a weapon, (3) threats by the non-resident against the officers or others in the premises, (4) behavior by the non-resident indicating a resistance to the search or to being detained, (5) facts indicating the non-resident is committing or is about to commit a crime, and (6) facts indicating the non-resident is under the influence of alcohol or drugs.[15] The more of these circumstances that exist, the more likely a detention of a non-resident during the execution of a search warrant will be deemed reasonable.

If the officers fail to establish any facts to support a reasonable belief that the non-resident is connected to the premises or to the criminal activity under investigation, or a reasonable basis for fearing the non-resident, the officers may not detain the non-resident during the search, but must release the non-resident.[16]

Officers executing a search warrant may search persons detained during the search, under certain circumstances.

If reasonable suspicion under the "presence plus" rule is established, officers may also search the residents and non-residents who have been detained, if circumstances warrant. The determination of whether circumstances warrant a search of the non-resident depends on whether the search is reasonable under the circumstances. That determination depends on the degree of the intrusion involved in the search. For example, officers may conduct a "pat down" type search under Terry v. Ohio[17] if they have a reasonable suspicion that the person poses a risk to the safety of the officers executing the search warrant.[18] A more extensive search may be conducted incident to a lawful arrest.[19] As with any search conducted without a warrant, a search of a non-resident detained during the execution of a search warrant must be reasonable.

DETAINING AND SEARCHING PEOPLE ON THE PREMISES TO BE SEARCHED

ENDNOTES

[1] State v. Madsen, 2000-NMCA-050, ¶¶ 14-15, 129 N.M. 251, 5 P.3d 573 (officers may detain resident of premises to be searched pursuant to a warrant even if the officers find the resident outside the premises - on front steps of house, or on pay phone outside of motel room - when they arrive to execute the warrant) (citing Michigan v. Summers, 452 U.S. 692 (1981)).

[2] Id.

[3] State v. Graves, 1994-NMCA-151, ¶ 11, 119 N.M. 89, 888 P.2d 971 (citing Summers).

[4] Id. ¶¶ 17, 20.

[5] Id. This is true even if the warrant includes language authorizing the search of all persons present at the time of the search. *See* State v. Light, 2013-NMCA-075, ¶¶ 27-28, 306 P.3d 534. Police must have particularized information with respect to each person present before detaining and searching each person. Thus, police may not rely on the general language of the warrant, but must have reasonable suspicion to justify detaining each person individually. Id.

[6] Id.

[7] Id.; *see also* Madsen, 2000-NMCA-050, ¶ 16.

[8] Graves, 1994-NMCA-151, ¶ 14; State v. Martinez, 1996-NMCA-109, ¶ 34, 122 N.M. 476, 937 P.2d 31.

[9] Graves, 1994-NMCA-151, ¶¶ 15-16 (citing cases).

[10] Id. ¶ 15 (citing State v. Lovato, 1991-NMCA-083, 112 N.M. 517, 817 P.2d 251).

[11] Id. ¶¶ 18-19.

[12] Id.

[13] State v. Winton, 2010-NMCA-020, ¶¶ 15-17, 148 N.M. 75, 229 P.3d 1247.

[14] Id. ¶ 18.

[15] Graves, 1994-NMCA-151, ¶¶ 18-19.

[16] Id.

[17] 392 U.S. 1 (1968).

[18] Ybarra v. Illinois, 444 U.S. 85 (1979); State v. Lovato, 1991-NMCA-083, ¶ 34, 112 N.M. 517, 817 P.2d 251.

[19] State v. Tywayne H., 1997-NMCA-015, ¶ 19, 123 N.M. 42, 953 P.2d 251.

SEIZURE OF ITEMS FOUND IN PLAIN VIEW

OUTLINE

This outline is for guidance in preparing for the execution of a valid search warrant. Officers executing a search warrant should be aware of the following guidelines for the seizure of property found during the execution of a search warrant which is not listed in the warrant, but is in the plain view of the officers.

I. Before seizing items in plain view, an officer must lawfully be in a position to discover the items.

A. The officer must be executing a valid search warrant.

1. The warrant must be valid.
2. The items found and seized must be located in the premises named in the warrant.

B. The officer must be conducting a search authorized by the warrant.

1. The officer may search only in the places authorized by the search warrant.
2. The officer may search only for items named in the search warrant.
3. The officer may not seize items found while searching in places not authorized by the warrant, even if the items are in plain view.

II. The incriminating nature of the items seized must be immediately apparent to the officer.

A. The incriminating nature of the items found in plain view may be unrelated to the purpose of the search.

B. The officer must have a reasonable belief that the items found in plain view are probably related to criminal activity.

SEIZURE OF ITEMS FOUND IN PLAIN VIEW

SUMMARY

Ordinarily, police officers executing a valid search warrant may seize only items specifically named in the search warrant. An exception to that rule is found in the "plain view doctrine." The doctrine creates an exception to the warrant requirement when property is found in "plain view" because "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity."[1]

There are two requirements that must be met before a seizure of items not listed in the warrant is reasonable under the plain view doctrine.[2] First, the officer seizing the evidence must lawfully be in a position to discover the evidence. Second, it must be immediately apparent that the items seized "may be evidence of a crime, contraband, or otherwise subject to seizure."[3]

If the officer is conducting a search of the defendant's house pursuant to a search warrant, the search warrant must be valid. Likewise, the officer must discover the evidence while conducting the search authorized by the warrant.[4] The plain view exception does not apply if the officer seizes items he finds while conducting a search not authorized by the warrant.[5] For example, if the officer is authorized by the warrant to search for a stolen piano and finds drugs in a shoe box in a closet, he may not seize the drugs. In that situation, the officer's search in the closet, and the box, is not authorized by the warrant because the officer could not believe that a piano would be found in the box in the closet. If the search warrant authorizes the officer to search for small items that could fit into a shoe box, the officer is authorized to search a shoe box in a closet and, therefore, may seize evidence he finds inside the shoe box.[6]

But the officer may seize the evidence only if the incriminating character of the evidence is "immediately apparent" to the officer.[7] The incriminating nature of the evidence "need not relate to the crime under investigation."[8] Rather, the evidence may be seized if it relates to "some criminal activity of which the officer is aware."[9] For example, an officer searching for stolen property may seize illegal drugs found in plain view. In addition, the officer need not be absolutely certain of the incriminating nature of the evidence. It is sufficient if there is a "probability that incriminating evidence is involved."[10] Thus, it is enough if the officer reasonably believes, based on his knowledge and experience, that the item is cocaine, for

example. The officer need not test the item to determine for certain it is cocaine before seizing it.

SEIZURE OF ITEMS FOUND IN PLAIN VIEW

ENDNOTES

[1] State v. Williams, 1994-NMSC-050, ¶ 11, 117 N.M. 551, 874 P.2d 12 (quoting Payton v. New York, 445 U.S. 573, 587 (1980)).

[2] These requirements also apply to the seizure of items found in plain view during a valid warrantless search.

[3] Williams, 1994-NMSC-050, ¶¶ 11, 13-14. In Texas v. Brown, 460 U.S. 730, 737 (1983), the Court included a third requirement - that the discovery of the seized items must have been inadvertent. The Court later discarded that requirement, as our Supreme Court recognized in Williams, 1994-NMSC-050, ¶ 12. *See also* State v. Steinzig, 1999-NMCA-107, ¶ 29, 127 N.M. 752, 987 P.2d 409.

[4] State v. Arredondo, 1997-NMCA-081, ¶¶ 21-22, 123 N.M. 628, 944 P.2d 276 (discovery of marijuana under driver's seat during valid search for weapons in automobile fell within plain view exception, but discovery of cocaine in small hole in dashboard did not fall within plain view exception).

[5] Similarly, the plain view doctrine does not apply if the officer conducting a warrantless search is not authorized to be in the place where the evidence is viewed, and if the search exceeds the scope of a valid warrantless search. *See* State v. Howl, 2016-NMCA-084, ¶ 18, 381 P.3d 684.

[6] *See* State v. Dobbs, 1983-NMCA-033, ¶¶ 10-13, 100 N.M. 60, 665 P.2d 1151 (seizure of vibrator found under bed was reasonable where officer's search under defendant's bed was within the scope of the warrant because he could logically have expected to find ski mask or sock there), *overruled on other grounds by* State v. Tollardo, 2012-NMSC-008, 275 P.3d 110; State v. Calloway, 1990-NMCA-110, ¶ 17, 111 N.M. 47, 801 P.2d 117 (seizure of briefcase during the warrantless search of a house after a fire, which was justified by exigent circumstances, was reasonable because the briefcase could have contained chemicals used to start the fire); State v. Lara, 1990-NMCA-075 ¶ 23, 110

N.M. 507, 797 P.2d 296 (plain view exception applied to blood stains observed during a protective sweep of the defendant's home, where officers were investigating a battery).

[7] Williams, 1994-NMSC-050, ¶ 11.

[8] State v. Miles, 1989-NMCA-028, ¶ 11, 108 N.M. 556, 775 P.2d 758.

[9] Id.

[10] Williams, 1994-NMSC-050, ¶ 15.

WARRANTLESS SEARCHES AND SEIZURES

INTRODUCTION

Article II, § 10 of the New Mexico Constitution, and the Fourth Amendment to the United States Constitution, protect people from unreasonable searches and seizures. Thus, the general rule is that a warrant must be obtained prior to conducting a search or making an arrest.[1] However, New Mexico recognizes several exceptions to that general rule. Those exceptions include searches and seizures conducted with consent, such as a consensual encounter with police and a consensual search of one's home or vehicle.

New Mexico also recognizes exceptions to the warrant requirement that apply even when consent has not been granted. First, New Mexico recognizes exceptions for stops of individuals or vehicles, such as an investigatory stop based on reasonable suspicion, a border stop or roadblock, and community caretaking encounters. Second, New Mexico recognizes exceptions to the warrant requirement for searches of individuals, vehicles and places. Those exceptions include (1) a pat down justified by reasonable suspicion the individual is armed and dangerous, (2) a search incident to an arrest, (3) an inventory search, (4) a protective search justified by exigent circumstances, (5) a search of a home that is justified by both probable cause to believe evidence of a crime will be found and exigent circumstances justifying an immediate search, (6) a search of the home of probationer or parolee based on reasonable suspicion that evidence of a condition of probation or parole will be found, and (6) a search of a home under the emergency assistance doctrine. Finally, New Mexico also recognizes two exceptions to the warrant requirement for arrests: (1) an arrest for a misdemeanor committed in the officer's presence and (2) an arrest for a felony when the officer has probable cause to believe a crime has been or is being committed and exigent circumstances exist to justify an immediate arrest.

Unless one of these exceptions applies, a search or seizure conducted without a warrant will be deemed illegal and any evidence obtained as a result of the search or seizure will be suppressed.

However, prosecutors should be aware of three possible defenses against the suppression of evidence obtained as a result of an illegal search or seizure.[2] First, evidence obtained independently from the illegal search is admissible.[3] This rule is often referred to as the

independent source exception. It applies in situations in which an illegal search or seizure occurred, but the discovery or seizure of the evidence did not depend on the illegal police actions.[4] Second, evidence that is obtained as a result of an illegal search or seizure but that would have inevitably been obtained through a legal search is also admissible.[5] This rule is referred to as the inevitable discovery exception.[6]

Finally, an illegal search may not require suppression of the evidence if the defendant seeking suppression does not have standing to object to the illegal search. Standing requires that a person moving to suppress evidence must have an adversarial interest in the outcome.[7] Given that interest, the determination of whether a person has standing hinges on whether that person had a reasonable expectation of privacy in the place entered.[8] To establish standing, a defendant must demonstrate both that he had an actual, subjective expectation of privacy and that his expectation of privacy is one that society is prepared to recognize as reasonable.[9] It is important for prosecutors to remember that the State is required to challenge the defendant's standing to seek exclusion of evidence obtained as a result of a search or seizure, and that the failure to do so results in waiver of the defendant's lack of standing.[10]

[1] The warrant requirement applies only "if there has been a search or seizure." State v. Van Cleave, 2001-NMSC-031, ¶ 11, 131 N.M. 82, 33 P.3d 633. "A search is an intrusion on a person's "reasonable expectation of privacy.'" Id. (quoting Terry v. Ohio, 392 U.S. 1, 9 (1968)). In Van Cleave, the New Mexico Supreme Court held that a dog sniff in which the agents placed the dog downwind from the vehicle near the open trunk, but did not allow the dog to touch or enter the vehicle, was not a search. A dog sniff is a search only if the dog "intrudes on the private space of the suspect." Id. ¶ 15.

[2] Police officers should not be concerned with these defenses because they are at issue only after a search or seizure has been declared invalid. Therefore, a thorough discussion of these defenses is beyond the scope of this manual. They are mentioned here, with reference citations, only to assist prosecutors in preparing to defend against a motion to suppress.

[3] State v. Corneau, 1989-NMCA-040, ¶ 37, 109 N.M. 81, 781 P.2d 1159 (citing Murray v. United States, 487 U.S. 533, 539 (1988)).

[4] Id.; State v. Wagoner, 2001-NMCA-014, ¶ 21, 130 N.M. 274, 24 P.3d 306. The independent source exception cannot apply when illegally obtained information is included in an application for a search warrant, even if the remaining information, excluding the tainted information, was sufficient to establish probable cause for the warrant. If a warrant is obtained by the use of illegally obtained information, the warrant is tainted and any evidence obtained during the execution of the warrant must be suppressed. Wagoner, 2001-NMCA-014, ¶¶ 21, 32, 36, 41.

[5] Corneau, 1989-NMCA-040, ¶ 37 (citing Nix v. Williams, 467 U.S. 431, 447 (1984)); Wagoner, 2001-NMCA-014, ¶ 15.

[6] *See* State v. Romero, 2001-NMCA-046, ¶ 10, 130 N.M. 579, 28 P.3d 1120. "In order for the inevitable discovery doctrine to apply, the lawful means by which the evidence could have been attained must be wholly independent of the illegal actions." Id. ¶ 10. In contrast to the independent source exception, which normally applies to situations where

evidence is obtained during the execution of a warrant that was obtained by the use of tainted information, the inevitable discovery exception normally applies when evidence is obtained illegally without a warrant, but would have been obtained by some other legal means. At this point, the only legal means our courts have recognized as falling under the inevitable discovery exception is an inventory search. For an explanation of an inventory search, refer to "Searching a Person" and "Searching a Vehicle" in this manual.

[7] Baker v. Carr, 369 U.S. 186 (1962).

[8] State v. Leyba, 1997-NMCA-023, ¶ 9, 123 N.M. 159, 935 P.2d 1171.

[9] Id. The following cases have discussed the requirements for standing: State v. Clark, 1986-NMCA-095, ¶ 11, 105 N.M. 10, 727 P.2d 949 (the fact that person rents rather than owns the property does not affect his legitimate expectation of privacy); State v. Hensel, 1987-NMCA-059, ¶ 9, 106 N.M. 8, 738 P.2d 125 (mere presence on the property is not enough to confer standing without permissive use), *overruled on other grounds by* State v. Rivera, 2008-NMSC-056, ¶ 22, 144 N.M. 836; Leyba, 1997-NMCA-023, ¶¶ 16-17 (a house guest on the premises with the owner's permission who has a possessory interest in an item seized there has standing); State v. Wright, 1995-NMCA-016, ¶¶ 13-15, 119 N.M. 559, 893 P.2d 455 (a house guest who has been given permission to use a private part of the residence has standing to challenge the warrantless entry of that part of the residence); State v. Waggoner, 1981-NMCA-125, ¶¶ 15-16, 97 N.M. 73, 636 P.2d 892 (a passenger in a vehicle may not have standing to challenge the search of the vehicle or its contents); State v. Creech, 1991-NMCA-012, ¶ 7, 111 N.M. 490, 806 P.2d 1080 (a passenger has standing to challenge the validity of the initial stop of the vehicle); State v. Van Dang, 2005-NMSC-033, ¶ 12, 138 N.M. 408, 120 P.3d 830 (driver who lacks authority or permission to possess the car does not have standing to challenge the search of the car); State v. Ryan, 2006-NMCA-044, ¶ 21, 139 N.M. 354, 132 P.3d 1040 (park ranger does not have standing to challenge search of a bedroom in a "bunkhouse" to which he did not have exclusive access or use); State v. Crocco, 2014-NMSC-016, ¶¶ 22-23, 327 P.3d 1068 (a person without authority or permission to occupy a dwelling does

not have standing to challenge the search or seizure of his or her belongings found during a search of the dwelling).

[10] State v. Guebara, 1995-NMCA-031, ¶ 9, 119 N.M. 662, 894 P.2d 1018.

CONSENT TO STOP AND SEARCH

OUTLINE

I. Consensual encounters.

A. A consensual encounter is not a seizure under the Fourth Amendment as long as a reasonable person would feel free to leave.

B. Whether a reasonable person would feel free to leave depends on:

1. The conduct of police in initiating the encounter,
2. The attributes of the individual citizen, and
3. The physical surroundings of the encounter.

II. Consensual searches.

A. Person giving consent must have authority to consent.

1. Ownership of the premises is not determinative.
2. Authority to consent is determined by the circumstances of the person's connection to the property, such as:
   a. The person's access to the property,
   b. The person's control over the property,
   c. The person's use of the property.
3. A person who has joint access, control or use of the property with others has the authority to consent to a search.
4. A person's authority to consent is limited to the areas of the property that person has access to, control over or use of.
5. Apparent authority to give consent is not sufficient; *officer should determine whether the person has authority to give consent before entering the premises.*

B. Consent to search must be voluntary.

1. Consent must be freely and intelligently given.
2. There must be no duress or coercion.
3. Consent must be unequivocal and specific.
4. The State must have clear and convincing evidence of the voluntary consent.

C. Validity of the consent depends on the totality of the circumstances.

1. Knowledge of a right to refuse may show a valid consent but is not required.
2. Miranda warnings are not required for a valid consent to search.
3. The fact that a defendant is being taken into custody does not negate consent.
4. An assertion that a search warrant will be obtained anyway negates consent.

D. Consent to search following an illegal detention may not be valid.

1. The consent must be sufficiently attenuated based on intervening factors.
2. Validity depends on the purpose and flagrancy of official misconduct.

E. Consensual search is limited to the scope of the consent given.

1. A consensual search may not be extended beyond the limits of the actual consent.
2. Objective reasonableness is the standard for measuring the scope of consent.
3. Consent may be invalid if it is given after officer asks questions that are unrelated to the reason for the stop and are not supported by reasonable suspicion.

CONSENT TO STOP AND SEARCH

SUMMARY

I. Consensual Encounters.

A police officer may approach a person on the street or in another public place and ask that person questions and request identification without the encounter involving a seizure under the Fourth Amendment.[1] The key is whether the officer imposes any restriction on the person's freedom to leave.[2] The restraint on a person's freedom of movement may be affected either by physical force or by a show of authority.[3]

The factors that determine whether a reasonable person would feel free to leave are 1) the conduct of the police, 2) the attributes of the individual citizen, and 3) the physical surroundings of the encounter.[4] If an officer simply approaches a person and asks questions in a non-threatening or non-coercive manner, there is no seizure. The officer may also request identification without the encounter becoming a seizure under the Fourth Amendment. Circumstances that might constitute a seizure would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. [5]

Restraint of a person's freedom of movement encompasses more than a physical touching or physical restraint of the person. For example, a person's freedom of movement is restrained by using a police car to block the road in front of the person's parked vehicle. As to a show of authority, our courts have found that officers yelling and ordering a suspect to stop is a sufficient show of authority to render a police encounter non-consensual.[6] A show of authority need not be so dramatic, however. For example, four officers displaying badges as they approached a parked vehicle was a sufficient show of authority to constitute a seizure. Similarly, a request that the driver of a parked car open the car door is a sufficient show of authority to make a reasonable person feel he is not free to leave and, therefore, constitute a seizure. [7]

II. Consensual searches.

Consent is one of the recognized exceptions to the constitutional prohibition against warrantless searches.[8] If there is a valid consent, probable cause is not required.[9] However, consent to search a particular place must be given by a person "who is clothed with common

authority or possesses some other sufficient relationship concerning the premises in question."[10] In other words, the person giving consent must actually have the authority to do so.[11] Whether a person has authority to consent to a search depends on the person's access to the premises, control over the premises, and use of the premises.[12] Thus, whether a person owns the property is not determinative of his authority to consent to a search. Rather, a person's authority to consent to a search is determined by whether that person has a legitimate expectation of privacy that society is prepared to recognize as reasonable.[13]

For example, an owner of a rented apartment does not have authority to consent to a search unless the person renting the apartment has abandoned it,[14] or the owner has common authority over the apartment.[15] Similarly, a parent who owns the family home does not have authority to consent to a search of an adult-child's room unless the parent has access to the room and shares use of the room with the son.[16] However, when two or more people have access to the premises and have joint use of the premises, such as a husband and wife, each of those people may consent to a search independently from the other.[17] Such authority extends to items of personal property that are within the joint possession of the occupants.[18] The extent of a person's authority to grant consent is limited to those areas of the premises to which the person has access and control. Thus, if a person has access to and control over a common area, such as the kitchen, but does not have access to a roommate's bedroom, that person may consent to a search of the common area but not the bedroom.

If the consent was not valid because of a lack of authority to consent, then all of the evidence found during the search will be excluded. Therefore, it is extremely important for an officer seeking consent to determine that the person giving consent actually has the authority to do so. It is not sufficient for the officer to rely on the appearance of authority to consent.[19] For example, an officer may not rely on the fact that the person giving consent opened the door for the officer and allowed the officer to enter the premises without objection.[20] Before entering, the officer must determine the circumstances of that person's relationship to the premises.[21] In other words, unless the officer already has information that the person opening the door and granting entry owns or resides at the premises, the officer must determine the nature of the person's presence in the premises. If the person is merely a temporary guest, the officer cannot rely on that person's consent to enter and search. The officer must obtain consent to enter and search from a person having authority to give such consent.

A consent to search must be voluntary; it must be freely and intelligently given; it must not be the product of duress or coercion, actual or implied; and it must be proved by clear and positive evidence with the burden of proof on the State.[22] In order for consent to be considered voluntary, it must be unequivocal and specific.[23] Moreover, the validity of the consent is determined based on the totality of the circumstances.[24] Actual consent must be clearly shown to overcome the presumption against waiver of constitutional rights.[25]

Proof of knowledge of a right to refuse is not required for an effective consent to search, but it can be used to establish the existence of a valid consent.[26] Miranda warnings are not a prerequisite to obtaining a valid consent to search.[27] The fact that a defendant is being taken into custody at the time he gives a consent to search does not negate the validity of the consent.[28] Consent obtained based on a police officer's statement that he will obtain a search warrant anyway will not justify a search without a warrant, because it amounts to no more than acquiescence to a claim of lawful authority.[29] If, on the other hand, an officer comments that he "feels" or "believes" he has enough evidence to secure a search warrant, such a comment does not rise to the level of coercion or duress that would invalidate consent.[30] In addition, even an unequivocal assertion that the officer could get a warrant may not invalidate a consent as long as there is probable cause to support a warrant; if a warrant is obtainable, the defendant's privacy rights under the Fourth Amendment are not violated.[31]

Where there is an illegal stop or detention, there must be intervening factors to establish that a subsequent consent to search is sufficiently attenuated from the tainted encounter.[32] The validity of a consent to search following an illegal detention also depends on the purpose and flagrancy of official misconduct.[33]

A consent to search is limited to the scope of the consent given.[34] When police have stated that a search is for a particular purpose and the defendant has consented, the search may not be expanded to a general exploratory search.[35] The standard for measuring the scope of a consent to search is one of "objective reasonableness": what a typical reasonable person would have understood from the discussion between the police officer and the defendant.[36]

A consent to search may also be invalid if it is given in connection with questions that are unrelated to the reason for the stop. For example, when a person is stopped for littering and suspicion of larceny, his consent to search for guns, alcohol or illegal drugs is tainted because the request for consent exceeds the purpose of the initial stop.[37] As a result, an officer may not

request consent to search for items unrelated to the purpose for stopping the person.[38] However, a request for consent to search may be permissible and lead to a valid consent to search if—based on specific, articulable facts—the officer's suspicions broaden to include such matters during an investigatory stop.[39]

CONSENT TO STOP AND SEARCH

ENDNOTES

[1] State v. Walters, 1997-NMCA-013, ¶ 18, 123 N.M. 88, 934 P.2d 282; State v. Scott, 2006-NMCA-003, ¶ 18, 138 N.M. 751, 126 P.3d 567.

[2] State v. Jason L., 2000-NMSC-018, ¶ 15, 129 N.M. 119, 2 P.3d 856.

[3] Id. (citing State v. Lopez, 1989-NMCA-030, ¶ 3, 109 N.M. 169, 783 P.2d 479).

[4] Id.

[5] Lopez, 1989-NMCA-030, ¶ 10.

[6] State v. Garcia, 2009-NMSC-046, ¶ 41, 147 N.M. 134, 217 P.3d 1032.

[7] Lopez, 1989-NMCA-030, ¶ 11.

[8] State v. Flores, 2008-NMCA-074, ¶ 12, 144 N.M. 217, 185 P.3d 1067 (quoting State v. Mann, 1985-NMCA-107, ¶ 21, 103 N.M. 660, 712 P.2d 6). Consent to search is an issue only when law enforcement officers have conducted a search. Officers do not need consent to employ a method of investigation that is not a search, such as a dog sniff in which the dog does not intrude on the suspect's reasonable expectation of privacy. *See* State v. Van Cleave, 2001-NMSC-031, ¶ 13, 131 N.M. 82, 33 P.3d 633.

[9] State v. Bidegain, 1975-NMSC-060, ¶ 9, 88 N.M. 466, 541 P.2d 971.

[10] State v. Wright, 1995-NMCA-016, ¶ 16, 119 N.M. 559, 893 P.2d 455.

[11] Id. ¶ 19 (holding that, under Article II, Section 10 of the State Constitution, apparent authority to consent to search is not sufficient).

[12] State v. Cline, 1998-NMCA-154, ¶ 7, 126 N.M. 77, 966 P.2d 785 (quoting United States v. Matlock, 415 U.S. 164, 171 n. 7 (1974)).

[13] State v. Clark, 1986-NMCA-095, ¶ 10, 105 N.M. 10, 727 P.2d 949.

[14] Id. ¶¶ 12-14.

[15] State v. Monteloeone, 2005-NMCA-129, ¶ 12, 138 N.M. 544, 123 P.3d 777. Common authority over the apartment requires more than the right to occasionally enter; the landlord must have an equal right to enter and occupy the apartment. Id. ¶ 13.

[16] State v. Diaz, 1996-NMCA-104, ¶¶ 9, 15-16, 122 N.M. 384, 925 P.2d 4.

[17] *See* State v. Madrid, 1978-NMCA-003, ¶¶ 6-11, 91 N.M. 375, 574 P.2d 594; State v. Walker, 1998-NMCA-117, ¶¶ 13-14, 125 N.M. 603, 964 P.2d 164; Cline, 1998-NMCA-154, ¶ 18.

[18] Cline, 1998-NMCA-154, ¶¶ 18-19 (the defendant's husband had authority to consent to search the defendant's personal pouch found in their joint bedroom).

[19] Wright, 1995-NMCA-016, ¶ 16 (apparent authority to consent is not sufficient under Article II, Section 10 of the New Mexico Constitution); *see also* State v. Celusniak, 2004-NMCA-070, ¶ 20, 135 N.M. 728, 93 P.3d 10.

[20] *See* Wright, 1995-NMCA-016, ¶ 17.

[21] Id. ¶ 20.

[22] State v. Aull, 1967-NMSC-233, ¶ 22, 78 N.M. 607, 435 P.2d 437; State v. Chapman, 1999-NMCA-106, ¶¶ 19-25, 127 N.M. 721, 986 P.2d 1122.

[23] State v. Flores, 1996-NMCA-059, ¶ 20, 122 N.M. 84, 920 P.2d 1038; State v. Davis, 2013-NMSC-028, ¶ 14, 304 P.3d 10.

[24] State v. Pallor, 1996-NMCA-083, ¶ 16, 122 N.M. 232, 923 P.2d 599.

[25] Davis, 2013-NMSC-028, ¶ 14.

[26] State v. Valencia Olaya, 1987-NMCA-040, ¶ 25, 105 N.M. 690, 736 P.2d 495; State v. Flores, 2008-NMCA-074, ¶ 16, 144 N.M. 217, 185 P.3d 1067 (officer conducting a "knock and talk," in which officer approaches an individual and asks for consent to search, need not advise the individual of the right to refuse the request for consent to search); State v. Carlos A., 2012-NMCA-069,¶ 16, 284 P.3d 384 (officer requesting consent to search vehicle need not inform driver of the right to refuse, but the driver's knowledge of the right is a factor in determining voluntariness of consent).

[27] Mann, 1985-NMCA-107, ¶ 23.

[28] State v. Blakely, 1993-NMCA-053, ¶ 13, 115 N.M. 466, 853 P.2d 168.

[29] State v. Lewis, 1969-NMCA-041, ¶ 16, 80 N.M. 274, 454 P.2d 360.

[30] State v. Shaulis-Powell, 1999-NMCA-090, ¶ 11, 127 N.M. 667, 986 P.2d 463.

[31] Shaulis-Powell, 1999-NMCA-090, ¶ 12.

[32] State v. Bedolla, 1991-NMCA-002, ¶ 23, 111 N.M. 448, 806 P.2d 588; State v. Jutte, 1998-NMCA-150, ¶¶ 22-23, 126 N.M. 244, 968 P.2d 334; State v. Warsaw, 1998-NMCA-044, ¶ 23, 125 N.M. 8, 956 P.2d 139.

[33] State v. Hernandez, 1997-NMCA-006, ¶ 31, 122 N.M. 809, 932 P.2d 499.

[34] Flores, 1996-NMCA-059, ¶ 22.

[35] Id. ¶ 23.

[36] Id.

[37] State v. Taylor, 1999-NMCA-022, ¶¶ 17-29, 126 N.M. 569, 973 P.2d 246; *see also* City of Albuquerque v. Haywood, 1998-NMCA-029, ¶¶ 15-18, 124 N.M. 661, 954 P.2d 93.

[38] State v. Figuroa, 2010-NMCA-048, ¶¶ 23-25, 148 N.M. 811, 242 P.3d 378; State v. Duran, 2005-NMSC-034, ¶ 23, 138 N.M. 414, 120 P.3d 836.

[39] Chapman, 1999-NMCA-106, ¶¶ 13-18; Duran, 2005-NMSC-034, ¶ 23.

STOPPING A PERSON OR VEHICLE

OUTLINE

I. Community Caretaking Encounters.

A. A community caretaking encounter is not a seizure subject to the requirements of the Fourth Amendment.

B. To qualify as a community caretaking encounter, the encounter must be based on articulable safety concerns.

1. Articulable facts establishing the safety concerns must be based on the officer's observations and must be objectively identifiable.
2. The actions of the officer initiating the encounter must be reasonable under the circumstances.

C. An officer engaged in a community caretaking encounter may conduct further investigation based on reasonable suspicion of wrongdoing established by the officer's observations during the community caretaking encounter.

II. Investigatory stops.

A. An investigatory stop is a non-consensual encounter initiated by a police officer for the purpose of investigating possible criminal activity.

B. A valid investigatory stop requires reasonable suspicion.

1. Officer must have an articulable suspicion that criminal activity is afoot.
2. Suspicion must be based on officer's observation and experience.
3. A hunch is not enough.
4. An anonymous tip, alone, is not enough; officer must corroborate some information in the tip.
5. Length and scope of the encounter must be related to the original suspicion, or purpose for the stop.

C. Pretextual stops are prohibited under the New Mexico Constitution.

1. A pretextual stop is a traffic stop supported by reasonable suspicion or probable cause that a traffic violation has occurred,
2. But is actually made for an investigative reason that is unrelated to the traffic violation.

D. The scope of an investigatory stop may be expanded beyond the initial reason for the stop if the officer observes articulable facts that raise a reasonable suspicion of additional criminal activity.

III. Border stops and other roadblocks.

A. Border stops. Evidence seized during a border stop is admissible in a state court only if the stop and the seizure were valid under the New Mexico Constitution.

1. Valid border stop at an interior fixed checkpoint.
   a. Motorists must stop at border checkpoints; reasonable suspicion and probable cause are not required.
   b. Routine questioning is allowed to inquire about citizenship and immigration status.
   c. Prolonging or expanding the stop to inquire beyond citizenship and immigration status requires reasonable suspicion of criminal activity to the same degree as an investigatory stop.
2. Valid border stop at the international border or its equivalent.
   a. Motorists must stop; reasonable suspicion and probable cause are not required.
   b. Routine questioning is allowed and may include questions regarding:
      - citizenship,
      - trip origin and destination,
      - vehicle ownership, license & registration.
   c. Referral to a secondary checkpoint is routine and does not require reasonable suspicion or probable cause.
   d. Routine searches are allowed, without reasonable suspicion or probable cause, and can include:
      - patdowns,
      - frisks,
      - luggage searches, and
      - automobile searches.

B. Roadblocks.

1. A roadblock is a seizure.
   a. A roadblock does not require reasonable suspicion or probable cause; a roadblock need only be reasonable.
   b. The reasonableness of a roadblock is determined by balancing the following:
      - the gravity of the public concern served by the roadblock,
      - the degree to which the roadblock advances the public concern,
      - the severity of the interference with individual liberty, security and privacy resulting from the roadblock

c. Facts evaluated in determining the reasonableness of a roadblock:
   - role of supervisory personnel,
   - restrictions on the discretion of field officers,
   - safety of motorists and field officers,
   - location of the roadblock,
   - indicia of official nature of the roadblock,
   - length and nature of detention, and
   - advance publicity.

2. Roadblocks found to be reasonable:
   a. Sobriety and DWI checkpoints, and
   b. Roadblocks conducted to detect violations of licensing, registration and insurance laws.

STOPPING A PERSON OR VEHICLE

SUMMARY

I. Community caretaking encounters.

Not every encounter between a police officer and an individual is a seizure subject to Fourth Amendment scrutiny. For example, if a police officer stops to assist a person in distress, or to determine whether a person needs assistance, the stop is not a seizure under the Fourth Amendment.[1] Rather, such a stop is considered a "community caretaking encounter."[2] "The community caretaker exception recognizes that warrants, probable cause, and reasonable suspicion are not required when police are engaged in activities that are unrelated to crime-solving."[3]

New Mexico courts recognize "three distinct doctrines under the community caretaker exception": (1) the emergency aid doctrine, (2) the inventory doctrine, and (3) the community caretaking or public servant doctrine.[4] Of these three doctrines, only the third - the community caretaking doctrine - applies to a warrantless stop of a vehicle.[5] The emergency aid doctrine applies to searches of places, primarily homes, and the inventory doctrine applies when a vehicle is impounded and searched.[6] Thus, only the community caretaking doctrine is addressed in this section. The other two are addressed in subsequent sections on searching places and searching vehicles.[7]

To qualify as a community caretaking encounter under the public servant doctrine, a stop must be based on an officer's specific articulable safety concerns.[8] "This is an 'objective test to determine whether a vehicle stop is based on a reasonable concern for public safety.'"[9] Thus, whether the officer made the stop based on articulable safety concerns does not depend on the subjective beliefs of the officer.[10] Rather, the articulable safety concerns must be objectively identifiable because "it is the evidence known to the officer that counts, not the officer's view of the governing law."[11] The objective nature of the test ensures that the stop is not made for the purpose of investigating possible criminal activity or obtaining evidence. For example, an officer who observes passengers riding in the back of a pick-up truck with their feet dangling from the tailgate may stop the truck out of concern for the safety of the passengers.[12] Similarly, an officer's observation of a motorcycle weaving within its lane of traffic in an unusual and

dangerous manner may support the officer's stop of the motorcycle based on the officer's concern for the driver's safety.[13]

Once an officer has initiated a community caretaking encounter, the officer may ask the person stopped questions related to the purpose for the stop, and may ask for identification.[14]

In addition, during a caretaking encounter an officer may make observations that lead to reasonable suspicion of criminal activity and to further investigation of that suspicion.[15] Evidence discovered in plain view by an officer engaged in a community caretaking encounter is not subject to exclusion simply because the stop was made without a warrant, reasonable suspicion or probable cause. But evidence discovered after the officer's concern for safety has been dispelled is excludable, unless the officer's observations raised a reasonable suspicion of criminal activity to justify expansion of the encounter into an investigatory detention. For example, if during a community caretaking encounter the officer smells a strong odor of alcohol and observes indicators that the driver is impaired, such as slurred speech or bloodshot watery eyes, the officer may expand the stop to investigate DWI.[16]

In cases involving a community caretaking encounter, as in all cases involving police-citizen contact, the police action must be reasonable. In a community caretaking encounter, the reasonableness of the police action is determined by balancing the public interest furthered by the police conduct against the degree of intrusion upon the privacy of a citizen.

II. Investigatory Stops.

An approach by an officer in a non-coercive manner during which the person is free to leave is a consensual encounter that does not implicate the Fourth Amendment. At the other extreme is a full-scale arrest, which must be supported by probable cause. In between these two extremes are confrontations amounting to seizures that must be justified by something less than probable cause but more than intuition or an inarticulate hunch.[17] This type of intermediate encounter was defined in Terry v. Ohio, 392 U.S. 1 (1968), and is referred to as an investigatory stop.[18]

Requirements for a valid investigatory stop.

"An investigatory stop occurs when an officer briefly detains and investigates a person based on reasonable suspicion of criminal activity.[19] Reasonable suspicion of criminal activity is "[a] particularized suspicion, based on all the circumstances that a *particular individual*, the one detained, is breaking or has broken the law."[20] Reasonable suspicion of criminal activity

must exist at the inception of the stop and cannot be based on observations made during the stop.[21] In deciding whether to make an investigatory stop, "[o]fficers are "entitled to draw upon their experience and training and make inferences and deductions about the information available to them, but reasonable suspicion cannot be based on unsupported intuition or inarticulate hunches."[22] For example, suspicion of criminal activity based merely on the defendant's association with a suspected drug dealer is "the type of conjecture and hunch" that is "insufficient to constitute reasonable suspicion."[23] Rather, the suspicion must be individualized and particularized, which means the officer must be able to articulate facts that would lead a reasonable person to believe that the person being stopped is engaged or has been engaged in criminal activity.[24]

When an officer makes a lawful investigatory stop, the officer may conduct an investigation of the circumstances that caused the stop.[25] Such an investigation includes asking for identification, and if the stop is of a vehicle, asking to see the driver's license, vehicle registration and proof of insurance, as well as performing a wants and warrants check.[26] An officer making an investigatory stop is not required to inform the suspect that he or she has the right not to answer the officer's questions.[27]

However, the officer's investigation must be reasonably related to the purpose for the stop.[28] For example, if an officer stops a car because he could not see a license plate or temporary tag on the back of the car, he can briefly detain the driver for the purpose of verifying or quelling his suspicion that the driver was operating a motor vehicle without the proper vehicle registration. Once that determination is made, the officer has no reason for continuing the detention. Even if the officer asks the driver if he has a gun in the car and the driver responds affirmatively,[29] the officer still may not detain the driver or conduct a frisk for weapons, because the acknowledgment of having a gun in the car does not give rise to reasonable suspicion of unlawful possession.[30]

Indeed, under the New Mexico Constitution,[31] asking the question about having a gun in the car is an impermissible expansion of the stop, unless the officer has reasonable suspicion to believe the individual has engaged in criminal activity with a gun.[32]

Pretextual stops are prohibited under the New Mexico Constitution.

A pretextual stop is "a detention supportable by reasonable suspicion or probable cause to believe that a traffic offense has occurred, but is executed as a pretense to pursue a 'hunch,' a

different more serious investigative agenda for which there is no reasonable suspicion or probable cause."[33] For example, the New Mexico Court of Appeals held that a pretextual stop occurred when an officer, who was investigating information about drug activity at a particular address, followed an individual leaving the house and made a traffic stop after observing a traffic violation.[34] The stop was pretextual because the officer made the stop with the intention of determining whether the individual was connected to the suspected drug activity, and only used the traffic violation as an excuse for stopping the individual in order to continue the drug investigation.[35]

Although pretextual stops are deemed reasonable under the Fourth Amendment,[36] they are considered unreasonable under Article II, Section 10 of the state constitution.[37] When a defendant seeks to suppress evidence obtained during a traffic stop, which he or she claims was pretextual, the trial court must examine the circumstances surrounding the stop to determine whether the stop was pretextual. In so doing, the court may consider several facts that may indicate whether the officer had a motive other than the traffic violation for making the stop.[38] If the evidence indicates such a motive, the State may rebut the suggestion of pretext by presenting evidence that the officer would have made the traffic stop absent the motive unrelated to the traffic violation.[39] A pretextual stop "violates the New Mexico Constitution, and the evidentiary fruits of the stop are inadmissible."[40]

The prohibition of pretextual stops applies only to traffic stops. Thus, a vehicle stop made for the purpose of executing an arrest warrant is not subject to the rule against pretextual stops, even if the officer suspects the defendant of other criminal activity.[41] Likewise, the rule against pretextual stops does not invalidate a traffic stop by an officer who has a motive for the stop unrelated to the traffic violation, if the unrelated motive is supported by reasonable suspicion or probable cause.[42] For example, an officer involved in the execution of a search warrant on a home, who observes a vehicle driving away from the home just prior to, or during, the execution of the warrant, may follow the vehicle and stop it based on a reasonable suspicion that the driver is involved in the drug activity on which the search warrant is based.[43]

Expanding an investigatory stop.

The scope of an investigatory stop is limited to the reason for the stop.[44] Therefore, "all questions asked during the investigation of a traffic stop [must] be reasonably related to the initial reason for the stop. Unrelated questions are permissible when supported by independent

reasonable suspicion, for reasons of officer safety, or if the interaction has developed into a consensual encounter."[45]

Thus, an officer may expand his or her investigation beyond the purpose for the investigatory stop if, during the stop, the officer obtains additional information to raise a suspicion that other criminal activity is afoot.[46] For example, if an officer stops a vehicle for a traffic violation and then observes things that raise a suspicion that the driver is intoxicated, the officer may investigate that suspicion. In such a situation, the officer's expanded investigation is limited to the expanded suspicion.[47] Each expansion of the investigation must be based on particular, articulable facts that reasonably raise a suspicion of criminal activity.

An anonymous tip alone will not provide reasonable suspicion for an investigatory stop.[48] Officers must obtain corroboration of the anonymous tip and conduct sufficient follow-up investigation to create reasonable suspicion for an investigatory stop. The additional information must be something more than just innocent information available to the general public.[49] New Mexico courts have ruled that if innocent details contained in the anonymous tip are sufficiently corroborated by subsequent investigation to establish the tip's reliability, there may be sufficient reasonable suspicion for an investigatory stop.[50] Fox example, if the anonymous tip provides details that the person will be leaving his house at a certain time and then will be making stops at several addresses to deliver drugs, and the police corroborate that activity by watching the person's activities, that corroboration will be a factor that supports reasonable suspicion to make an investigatory stop. The same is true for information obtained from a confidential informant; the informant must provide information not generally available to the public that can be corroborated by the officers.[51] In addition, there must be information available to the officers about the informant that indicates the reliability of the informant.[52]

An expanded investigatory stop may become a de facto arrest.[53] At the point the stop becomes an arrest, it must be justified by probable cause, rather than the reasonable suspicion required for the investigatory stop.[54]

"There is no bright-line test for evaluating when an investigatory detention becomes invasive enough to become a de facto arrest."[55] Instead, New Mexico courts consider several factors, including "(1) the government's justification for the detention, (2) the character of the intrusion on the individual, (3) the diligence of the police in conducting the investigation, and (4) the length of the detention."[56] In so doing, the courts focus on the time between the initial

investigatory stop and the discovery of contraband or other evidence.[57] Cases in which an investigatory detention did not become a de facto arrest include (1) a ten-minute detention during which the defendant was questioned outside his vehicle and officers performed a search, (2) a thirty to forty-five minute detention while officers waited for a canine unit, (3) a stop in which suspects were ordered to get out of the vehicle at gunpoint and handcuffed prior to questioning, and (4) detentions in which suspects were handcuffed upon exiting their vehicles, where officers had reasonable safety concerns.[58] Courts have also found that giving the defendant Miranda warnings prior to questioning does not transform a valid investigatory stop into a de facto arrest.[59] As for the time factor, detentions lasting as long as forty minutes have been found reasonable, but detentions lasting more than an hour, during which the officers had completed their initial investigation, were found to be de facto arrests.[60]

III. Border Stops and Other Roadblocks.

Border Stops

Evidence seized during a border patrol stop by a state or local police officer or a federal Border Patrol agent is admissible in a state court[61] only if the stop and the seizure complied with the requirements of the New Mexico Constitution.[62] The requirements for a valid border patrol stop depend on whether the stop occurs at an interior fixed checkpoint, or at the international border or its functional equivalent.[63]

Under both the federal and state constitutions, a vehicle may be stopped at a fixed checkpoint for the purpose of checking the citizenship status of the occupants of the vehicle.[64] New Mexico requires more than the Fourth Amendment requires, however, when an officer or agent prolongs or expands a stop at an interior fixed checkpoint to inquire beyond citizenship and immigration status.[65] Under the state constitution, an officer or agent who prolongs or expands the initial checkpoint stop to inquire beyond citizenship and immigration status must have individualized reasonable suspicion of criminal activity.[66] In addition, the scope of the expanded stop must be limited to investigating the particular suspicion.[67]

On the other hand, New Mexico does not depart from federal precedent with respect to the requirements for a valid stop at the international border or its equivalent. The New Mexico Supreme Court has declined to interpret Article II, Section 10 of the state constitution as requiring individualized suspicion of criminal activity for prolonging detentions at an international border checkpoint.[68] In so doing, the Court adopted the distinction applied by

federal courts between the "border search doctrine" and the "interior fixed-checkpoint doctrine."[69] That distinction is based on the diminished expectation of privacy of persons who "present themselves at the border for entry into the United States,"[70] and the government's substantial interest in "preventing the entry of unwanted persons and effects."[71]

Thus, during a stop at the international border, or its functional equivalent,[72] officers and agents "'may conduct routine searches of persons and effects crossing the border even in the absence of individualized suspicion.'"[73] Referral to a secondary checkpoint is considered routine, and also does not require individualized suspicion. "Routine searches" during a stop at the international border "include 'patdowns, frisks, luggage searches, and automobile searches.'"[74]

Roadblocks

Although a roadblock is a seizure, it does not require reasonable suspicion or probable cause with respect to a particular motorist; rather, a roadblock must be reasonable.[75] The reasonableness of a roadblock provides a constitutionally adequate substitute for the reasonable suspicion that would otherwise be required to justify detention of vehicles and questioning of their occupants.[76] The reasonableness of a roadblock is determined by a balancing test, whereby the court balances the gravity of the governmental interest or public concern served by the roadblock, the degree to which it advances these concerns and the severity of the interference with individual liberty, security, and privacy resulting from the roadblock.[77]

The factors for determining the reasonableness of a roadblock are: (1) the role of supervisory personnel in conducting the roadblock, (2) the restrictions imposed on the discretion of field officers conducting the roadblock, (3) the precautions taken to ensure the safety of the motorists and field officers, (4) the reasonableness of the location of the roadblock, (5) the indicia of the official nature of the roadblock, (6) the length and nature of the detention of motorists passing through the roadblock, and (7) the extent to which the roadblock was publicized in advance.[78] Roadblocks conducted by police as part of sobriety checkpoints,[79] and roadblocks conducted to detect violations of licensing, registration, and insurance laws have been found to be reasonable.[80]

STOPPING A PERSON OR VEHICLE

ENDNOTES

[1] *See* State v. Walters, 1997-NMCA-013, ¶ 10, 123 N.M. 88, 934 P.3d 282.

[2] Id.

[3] State v. Ryon, 2005-NMSC-005, ¶ 24, 137 N.M. 174, 108 P.3d 1032.

[4] Id.

[5] Id. ¶ 26.

[6] Id.

[7] *See* infra., pp. 106-107 (inventory search of a vehicle) and pp. 125-126 (emergency assistance doctrine in searching a place).

[8] State v. Munoz, 1998-NMCA-140, ¶ 8, 125 N.M. 765, 965 P.2d 349; State v. Sheehan, 2015-NMCA-021, ¶ 12, 344 P.3d 1064.

[9] Sheehan, 2015-NMCA-021, ¶ 12 (quoting Ryon, 2005-NMSC-005, ¶ 30).

[10] Id.; Munoz, 1998-NMCA-140, ¶ 9.

[11] Munoz, 1998-NMCA-140, ¶ 9 (citing State v. Martinez, 1997-NMCA-048, ¶ 15, 123 N.M. 405, 940 P.2d 1200).

[12] State v. Reynolds, 1993-NMCA-162, ¶¶ 2, 7-8, 117 N.M. 23, 868 P.2d 668, *reversed on other grounds*, 1995-NMSC-008, 119 N.M. 383, 890 P.2d 1315.

[13] Apodaca v. State Tax and Revenue Dept., 1994-NMCA-120, ¶¶ 5-6, 118 N.M. 624, 884 P.2d 515.

[14] Reynolds, 1995-NMSC-008, ¶ 12.

[15] Sheehan, 2015-NMCA-021, ¶¶ 12, 14.

[16] Walters, 1997-NMCA013, ¶ 18.

[17] State v. Cohen, 1985-NMSC-111, ¶¶ 13-20, 103 N.M. 558, 711 P.2d 3.

[18] State v. Alderete, 2011-NMCA-055, ¶ 15, 149 N.M. 799, 255 P.3d 377.

[19] State v. Ochoa, 2008-NMSC-023, ¶ 14, 143 N.M. 749, 182 P.3d 130.

[20] State v. Jason L., 2000-NMSC-018, ¶ 20, 129 N.M. 119, 2 P.3d 856.

[21] Id.

[22] Alderete, 2011-NMCA-055, ¶ 16.

[23] Id.

[24] Ochoa, 2008-NMSC-023, ¶ 19 (quoting State v. Vandenberg, 2003-NMSC-030, ¶ 21, 134 N.M. 566, 81 P.3d 19).

[25] State v. Williamson, 2000-NMCA-068, ¶ 8, 129 N.M. 387, 9 P.3d 70.

[26] State v. Taylor, 1999-NMCA-022, ¶ 14, 126 N.M. 569, 973 P.2d 246.

[27] State v. Javier M., 2001-NMSC-030, ¶ 19, 131 N.M. 1, 33 P.3d 1. A different rule applies when the person stopped is a juvenile. In Javier M., the Court interpreted NMSA 1978, § 32A-2-14 (1993) as providing greater protection to juveniles than adults during an investigatory stop. While full Miranda warnings are not required, an officer questioning a juvenile during an investigatory stop must advise the juvenile of his or her constitutional right to remain silent. Javier M., 2001-NMSC-030, ¶¶ 44, 47. The advice of rights is not required if (1) the juvenile volunteers a statement without being questioned, (2) the officer is asking an "administrative" question (i.e., identity, age), or (3) the officer is asking a "general on the scene question" that is not directed at any particular suspect, or is directed at a juvenile who is not suspected of engaging in criminal activity. Id. ¶ 40.

[28] Williamson, 2000-NMCA-068, ¶ 8.

[29] An officer may ask such a question only if it is related to the reason for the stop. Taylor, 1999-NMCA-022, ¶ 19. For example, an officer who stops a car for littering may not ask the driver if he has guns or alcohol in the car. Id.

[30] City of Albuquerque v. Haywood, 1998-NMCA-029, ¶ 17, 124 N.M. 661, 954 P.2d 93, *overruled in part on other grounds by* State v. Leyva, 2011-NMSC-009, 149 N.M. 435, 250 P.3d 861.

[31] New Mexico does not follow federal precedent under the Fourth Amendment on this issue. In State v. Leyva, 2011-NMSC-009, ¶ 21, 149 N.M. 435, 250 P.3d 861, our Supreme Court recognized that, under United States Supreme Court precedent interpreting the Fourth Amendment, an officer making a valid investigatory stop may ask questions unrelated to the reason for the stop as long as the questioning does not measurably extend the length of the stop. But our Court rejected that rule under Article II, Section 10 of the state constitution. Under the New Mexico Constitution, "all questions asked during the stop [must] be reasonably related to the reason for the stop or otherwise supported by reasonable suspicion." Id. ¶ 55 (citing State v. Duran, 2005-NMSC-034, ¶ 13, 138 N.M. 414, 120 P.3d 836). Prosecutors need to be aware of the theory under which a defendant is challenging an investigatory stop. If the defendant raises only a Fourth Amendment challenge, then federal precedent applies. If the defendant raises a challenge under Article II, Section 10 of the state constitution, then Duran and Leyva apply in determining whether an officer's questions that were unrelated to the purpose for the stop require exclusion of evidence obtained during the stop.

[32] *See* State v. Portillo, 2011-NMCA-074, ¶ 23, 150 N.M. 187, 258 P.3d 466.

[33] State v. Ochoa, 2009-NMCA-002, ¶ 25, 146 N.M. 32, 206 P.3d 143.

[34] Id. ¶¶ 43-45.

[35] Id. ¶ 46.

[36] Whren v. United States, 517 U.S. 806, 813 (1996).

[37] Ochoa, 2009-NMCA-002, ¶ 26.

[38] Id. ¶ 41. Those facts include: (1) whether the officer was in an unmarked car or was not in uniform, (2) whether enforcing traffic violations is one of the officer's typical duties, (3) whether the officer had a hunch that other criminal activity was occurring, or had occurred, (4) the manner of the stop, including how far and for how long the officer followed the vehicle before making the stop, how many officers were present for the stop, and the demeanor and statements of the officer during the stop, (5) the relevant

characteristics of the defendant, and (6) whether the reason articulated for the stop is necessary for traffic safety. Id.

[39] Id. ¶ 40.

[40] Id. ¶ 42.

[41] State v. Peterson, 2014-NMCA-008, ¶¶ 7-8, 315 P.3d 354.

[42] Alderte, 2011-NMCA-055, ¶¶ 15-18.

[43] Id. ¶ 20.

[44] State v. Olson, 2012-NMSC-035, ¶ 13, 285 P.3d 1066.

[45] Leyva, 2011-NMSC-009, ¶ 55 (citing Duran, 2005-NMSC-034, ¶ 35).

[46] Williamson, 2000-NMCA-068, ¶ 8.

[47] Id.

[48] State v. Prince, 2004-NMCA-127, ¶¶ 12-14, 136 N.M. 521, 101 P.3d 332; Ochoa, 2008-NMSC-023, ¶ 20.

[49] State v. Bedolla, 1991-NMCA-002, ¶¶ 13-15, 111 N.M. 448, 806 P.2d 588.

[50] State v. Flores, 1996-NMCA-059, ¶ 8, 122 N.M. 84, 920 P.2d 1038 (citing Alabama v. White, 496 U.S. 325, 332 (1990)).

[51] State v. Skippings, 2014-NMCA-117, ¶ 12, 336 P.3d 128.

[52] Id. ¶ 11.

[53] State v. Werner, 1994-NMSC-025, ¶ 13, 117 N.M. 315, 871 P.2d 971; State v. Wilson, 2007-NMCA-111, ¶ 18, 142 N.M. 737, 169 P.3d 1184.

[54] Skippings, 2014-NMCA-117, ¶ 14.

[55] Id.

[56] Id. (quoting State v. Robbs, 2006-NMCA-061, ¶ 21, 139 N.M. 569, 136 P.3d 570).

[57] Id. ¶ 15.

[58] Id. ¶ 19-20 (citing cases).

[59] Id.

[60] Id.

[61] To be admissible in a federal court, evidence seized during a border patrol stop need only comply with the Fourth Amendment, which allows expansion of such stops beyond routine questioning based on suspicious circumstances, which is a lower standard than reasonable suspicion. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 566-67 (1976); United States v. Massie, 65 F.3d 843, 848 (10th Cir. 1995) (citing United States v. Rascon-Ortiz, 994 F.2d 749, 752 (10th Cir. 1993)). Reasonable suspicion is not required under the Fourth Amendment until the officer or agent decides to prolong the detention beyond routine questioning. State v. Porras-Fuerte, 1994-NMCA-141, ¶ 14, 119 N.M. 180, 889 P.2d 215; *accord* State v. Affsprung, 1993-NMCA-056, ¶ 10, 115 N.M. 546, 854 P.2d 873 (citing Cohen, 1985-NMSC-111, ¶¶ 13-14). In addition, "routine questioning" is broader under the Fourth Amendment, which allows questions about vehicle ownership, destination, cargo and travel plans, in addition to citizenship. Martinez-Fuerte, 428 U.S. at 566-67; Massie, 65 F.3d at 848.

[62] *See* State v. Cardenas-Alvarez, 2001-NMSC-017, ¶¶ 18, 20, 130 N.M. 386, 25 P.3d 225.

[63] State v. Sanchez, 2015-NMSC-018, ¶¶ 14-19, 350 P.3d 1169.

[64] *See* State v. Estrada, 1991-NMCA-026, ¶ 5, 111 N.M. 798, 810 P.2d 026; Cardenas-Alvarez, 2001-NMSC-017, ¶ 16 (citing Estrada as foundation for interpreting the state constitution as requiring reasonable suspicion to justify prolonging or expanding the initial checkpoint stop).

[65] Cardenas-Alvarez, 2001-NMSC-017, ¶ 16; Sanchez, 2015-NMSC-018, ¶ 25.

[66] Id.

[67] *See* State v. Robbs, 2006-NMCA-061, ¶ 23, 139 N.M. 569, 136 P.3d 570 ("the scope of the search and seizure must be justified by and limited to the circumstances that created reasonable suspicion for the stop"). (*See* the section of this manual entitled "Stopping a Person or Vehicle.")

[68] Sanchez, 2015-NMSC-018, ¶ 9.

[69] Id. ¶¶ 15-18.

[70] Id. ¶ 28.

[71] Id. ¶ 13 (quoting United States v. Flores-Montano, 541 U.S. 149, 152 (2004)).

[72] "Searches at the functional equivalents of borders are 'those searches that, although not conducted at the actual physical border, take place after a border crossing at the first practicable detention point.'" Sanchez, 2015-NMSC-018, ¶ 15 (quoting United States v. Garcia, 672 F.2d 1349, 1365 (11th Cir.1982)).

[73] Sanchez, 2015-NMSC-018, ¶ 14 (quoting United States v. Ezeiruaku, 936 F.2d 136, 140 (3d Cir.1991)).

[74] Sanchez, 2015-NMSC-018, ¶ 14 (quoting United States v. Whitted, 541 F.3d 480, 485 (3d Cir.2008)).

[75] State v. Bates, 1995-NMCA-080, ¶ 9, 120 N.M. 457, 902 P.2d 1060.

[76] State v. Bolton, 1990-NMCA-107, ¶ 8, 111 N.M. 28, 801 P.2d 98.

[77] State v. Madalena, 1995-NMCA-122, ¶ 12, 121 N.M. 63, 908 P.2d 756.

[78] City of Las Cruces v. Betancourt, 1987-NMCA-039, ¶¶ 14-21, 105 N.M. 655, 735 P.2d 1161.

[79] Bates, 1995-NMCA-080.

[80] Bolton, 1990-NMCA-107.

SEARCHING A PERSON

OUTLINE

I. Pat downs.

A. During an investigatory stop.

1. Officers may frisk or pat down a person stopped to ensure personal safety.

    a. Officer must reasonably believe the individual may be armed and dangerous.
    b. Officer must have articulable facts of potential danger, OR
    c. The type of crime the individual is suspected of committing must be inherently dangerous.

2. The scope of the pat down must be related to officer safety.

    a. Officer may pat down outer clothing to feel for weapons.
    b. Officer may reach into pockets after feeling a weapon, OR
    c. Officer may reach into pockets to remove an object he reasonably believes may be a weapon.
        - the object may not be soft
        - the object does not have to have shape of gun or other weapon
        - the object's size and density must suggest it is a weapon
        - simply not knowing, or being unable to identify the object is not sufficient to reach into the pocket.

B. During protective custody.

1. Officer may pat down a person taken into protective custody.
2. Pat down must be limited to securing officer safety.

C. What may be seized during a pat down.

1. Weapons found during pat down may be seized.
2. Items that are immediately identifiable as contraband may be seized.
    a. Identification of item as contraband must occur without manipulation of the item during the pat down.
    b. Other factors are considered in determining the reasonableness of the seizure:
        - the suspect's behavior and demeanor (nervousness)
        - circumstances of the stop (place, time of day, etc.)
3. Items not immediately identifiable as a weapon or contraband may not be seized without consent.

a. Officer must complete the pat down without removing the item
b. Officer may then ask for consent to see the item, without directing the person to reveal the item.
c. A request to empty one's pockets may be viewed as a directive, thereby invalidating the consent.

II. Search of a person incident to arrest.

A. Officer must have probable cause to arrest.

B. Search must occur contemporaneously with the arrest.

C. Scope of the search incident to arrest is limited to the area in the immediate control of the person arrested.

III. Inventory search of a person.

A. Person searched must be lawfully arrested or detained.

B. Search must be conducted pursuant to established regulations.

1. State must establish the existence of standard inventory search procedures.
2. State must establish that the standard procedures were followed.

C. Search must be reasonable.

1. State must establish a valid purpose for the standard inventory search procedures.
   a. To protect the arrestee's property,
   b. To protect police against claims of lost or stolen property, or
   c. To protect the police or others against danger.
2. The subjective purpose of the police officer conducting the search is irrelevant if a proper objective purpose exists.

SEARCHING A PERSON

SUMMARY

I. Pat downs.

During an Investigatory Stop

An officer coming in contact with a citizen may frisk or pat down that person for weapons to ensure personal safety only when circumstances give the officer justification for believing the individual may be armed and dangerous.[1] The test for justification of the search is whether a reasonably prudent officer in the circumstances would be warranted in the belief that his or her safety or that of others was in danger.[2] A pat down conducted to determine whether the suspect possesses drugs or other evidence is not valid.[3] Nor is a pat down based on the general concern for officer safety inherent in any encounter between an officer and an unknown individual.[4]

New Mexico courts have stated that the officer must have articulable facts of potential danger in order to conduct a pat down.[5] Those facts may include a description of the behavior and appearance of the individual.[6] Such description should include "specific behaviors and changes in [the d]efendant's demeanor and attitude that explain why [the officer] believed that [the d]efendant might be armed and dangerous," such as the failure to make eye contact, shaking hands, increasing nervousness during the encounter, and an aggressive demeanor when addressing the officer.[7] Also, an officer will be justified in conducting a weapons pat down when the officer has reasonable suspicion that the person has committed or is committing an "'inherently dangerous crime.'"[8] The types of inherently dangerous crimes invoking an officer's privilege to frisk include burglary, robbery, rape, assault with weapons and dealing in large narcotics transactions.[9] They do not include possession of small amounts of marijuana.[10]

A pat down permits an officer to pat down the outer clothing of the person to feel for weapons.[11] A protective search of this kind may be found unreasonable when it extends beyond ensuring that the person is not armed.[12] In conducting a pat down, the officer may not place his hands in the person's pockets or under the outer surface of the person's clothing until the officer feels weapons, and then the officer may only reach for and remove the weapon.[13]

During Protective Custody

When a police officer takes a person into protective custody and intends to transport the person in his police vehicle, the officer can pat down the person for weapons, even if he is not suspected of committing an inherently dangerous crime. A protective search cannot extend beyond what is reasonably necessary to determine if the person may be armed or possess a dangerous weapon.

For example, police officers or public service officers are authorized by statute to make a protective search of an intoxicated person who is taken into protective custody, prior to transporting him to a residence, health care facility, or jail.[14] Also, when an officer is going to transport a juvenile who has violated curfew, the officer may pat down the juvenile for weapons.[15]

What May Be Seized During A Pat Down

Clearly, if the officer feels an item that he reasonably suspects is a weapon, he can remove that item. However, a pat down search for weapons may not be expanded into a search for evidence of a crime absent probable cause.[16]

If the officer remains uncertain whether the object is a weapon, he may be entitled to remove it, if the officer can articulate a reason for believing the object could be a weapon.[17] The officer may not, however, reach into a pocket if the object is soft.[18] If the object is hard, then the question is whether its size or density is such that it might be a weapon. The officer does not necessarily have to discern the outline of a gun or other weapon, especially if the suspect is wearing heavy clothing.[19] Our courts have ruled that several coins wrapped in tissue paper were not of such a size or density to provide a reasonable basis for the officer to intrude into the suspect's pockets.[20]

New Mexico courts have provided some guidelines for determining whether seizure of items other than weapons is justified during a pat down. For example, an officer may remove an object observed in plain view during the pat down, if it is apparent to the officer, based on the officer's training and experience, that the object is contraband or evidence of a crime.[21] If the officer feels objects other than weapons that are not immediately identifiable, he cannot seize those items during the pat down. On the other hand, if the officer feels an object that he can

immediately identify as contraband without any manipulation of the item, and the circumstances surrounding the pat down would support the officer's reasons, then the seizure may be justified.[22]

In determining whether such a seizure is justified, the court will look at the officer's ability to state specific justifications for seizing the item, as well as the surrounding circumstances that might support the officer's reasons for identifying the item as contraband. As an example, the officer states that he felt a vial in the person's pocket that, without any manipulation of the vial, he immediately recognized as the type of vial that is commonly used to hold drugs. In addition, the person is unusually nervous under the circumstances of a roadside stop for not wearing his seatbelt, and his nervousness increases when the officer asks whether he has any needles in his pockets so that he won't be pricked during a pat down for weapons. Under those facts, the court will likely recognize that the officer had probable cause to seize the vial.[23] On the other hand, if the officer and the detainee were standing in a drugstore, and the detainee showed no signs of nervousness, the surrounding circumstances would likely not justify seizure of the vial.

If the officer feels items that are not clearly identifiable as contraband, then he must complete the pat down without seizing the items. However, after the pat down is completed, the officer may then try to obtain consent from the individual to allow him to seize or see items, or he may try to develop probable cause to seize the items through further questioning. The officer must be careful not to ask to see the items in such a manner that the individual might interpret the request as a directive. For example, if the officer asks the person to please empty his pockets, that may be viewed as a directive, rather than a request, particularly in a situation in which the person is not free to leave.[24]

II. Search of a person incident to arrest.

A search incident to arrest is an exception to the general search warrant requirement.[25] This exception is based on the "possible danger that a person who is arrested might be hiding a weapon or that evidence of a crime might be destroyed or concealed."[26] Therefore, to conduct a valid search incident to arrest, an officer must have probable cause to arrest.[27] The arrest must be lawful; a search incident to an invalid arrest is also invalid.[28] In addition, the search must occur contemporaneously with the formal arrest.[29] That the search occurs before or after formal arrest is made may not matter as long as the search is contemporaneous with the arrest.[30]

For example, if an officer conducting an investigatory stop of a suspect conducts a pat down and discovers sufficient information to establish probable cause to arrest the suspect, the officer may complete the pat down before arresting the suspect. In so doing, the officer may seize objects found on the suspect, such as a key holder in the suspect's pocket, even though the objects are not obviously weapons. The search and seizure of such items may be justified as a search incident to arrest as long as the officer had probable cause to arrest the suspect before finding the objects and did in fact arrest the suspect based on that probable cause.[31]

The scope of a valid search incident to arrest is limited by the purpose for the exception: to remove weapons and evidence from the immediate control of the suspect. Therefore, a search of an arrested person is broader than a pat down conducted during an investigatory stop. In searching an arrested person, the officer may go beyond a mere pat down and reach into pockets, or order the suspect to empty his pockets, and may seize any objects found on the suspect.[32]

On the other hand, a search that is more invasive than a pat down, such as an underclothing search, "is not presumed to be reasonable simple because it occurs incident to an arrest."[33] Such a search "requires, at a minimum, particularized reasonable suspicion that the arrestee is concealing a weapon or evidence that is susceptible to destruction before arriving at the police station."[34] But even when an officer has reasonable suspicion to believe the arrestee is concealing a weapon or contraband, the officer's actions in conducting the underclothing search must be reasonable. Courts assess the reasonableness of an underclothing search by considering (1) the scope of the search, (2) the manner in which it is conducted, (3) the justification for initiating the search, and (4) the place in which it is conducted.[35] In so doing, courts should not consider whether the officer used the least intrusive means of conducting the search, as long as the other factors establish the reasonableness of the search.[36]

For example, in Williams, an officer stopped the defendant for a traffic violation and, as he approached the defendant's vehicle, observed the defendant fumbling around with something inside the car. After running a background check on the defendant, the officer discovered that the defendant had an outstanding arrest warrant. When the officer ordered the defendant to get out of the car, he noticed that the zipper and belt on the defendant's pants were undone. Suspecting that the defendant had hidden either a weapon or contraband inside his pants, the officer placed the defendant between police cars on the side of the road, in a manner that shielded the defendant from the road, then reached into the defendant's pants and retrieved a

plastic bag containing illegal drugs.[37] Applying the four factors, our Supreme Court found the search reasonable because it was justified by reasonable suspicion and the "officers took adequate steps to minimize the invasion of [the d]efendant's privacy."[38]

III. Inventory search of a person.

A person who has been lawfully arrested is subject to an inventory search during booking.[39] Such a search includes the authority to open and search containers found on the person or in the person's clothing at the time of arrest or during booking.[40] Items found in the arrestee's vicinity, but not in the arrestee's possession, at the time of arrest may not be seized or searched under the inventory search exception.[41]

"Inventory searches 'are a well-defined exception to the warrant requirement of the Fourth Amendment.'"[42] However, like all warrantless searches, inventory searches are presumed to be unreasonable.[43] As a result, the State bears the burden of establishing the validity of an inventory search.[44] Probable cause to believe evidence of a crime will be found is not required to justify an inventory search.[45] Rather, an inventory search is valid if it meets the following three requirements: (1) the person to be searched must be in the custody or control of the police; (2) the inventory search must be conducted pursuant to established police regulations; and, (3) the search must be reasonable under the circumstances.[46]

A person who has been lawfully arrested is in the custody and control of the police. Therefore, to meet the first requirement of a valid inventory search, the State must establish that the defendant was lawfully arrested. Similarly, a search of a person taken into protective custody, but not arrested, meets the first requirement of a valid inventory search.[47]

The second requirement of a valid inventory search – that the search be conducted pursuant to established police regulations – is met by establishing that the agency responsible for detaining the arrestee (either the police department or the jail) has established procedures for searching persons arrested and booked into jail and that those procedures were followed.[48] Prosecutors relying on the inventory search exception in defending against a motion to suppress should be careful to establish the existence of regulations, the details of the regulations, and that those regulations were actually followed.[49] The regulations or standard procedures do not need to be written as long as the procedures are well established and consistently followed.[50]

Finally, to be valid, an inventory search must be reasonable. "An inventory search is reasonable if it is made to protect the arrestee's property, to protect police against claims of lost

or stolen property, or to protect police from potential danger."[51] However, the fact that the reasonableness of the inventory search is based on the purpose for the search does not mean the reasonableness is determined by the police officer's subjective understanding of the purpose for the search.[52] Rather, the purpose for the established procedures of an inventory search must be to protect the arrestee's property, to protect the police against claims of lost or stolen property, or to protect police from danger. Thus, the State must establish, not only the existence of the inventory search procedures and the use of those procedures in the case at hand, but also the purpose of those procedures.[53] If those facts are established, the officer's subjective suspicion that contraband will be found will not render an inventory search unreasonable.[54]

SEARCHING A PERSON

ENDNOTES

[1] Terry v. Ohio, 392 U.S. 1, 27 (1968); *See also* In re Josue T., 1999-NMCA-115, ¶ 23, 128 N.M. 56, 989 P.2d 431. Importantly, New Mexico courts require objective facts indicating that the suspect is both armed and dangerous, not either armed or dangerous. State v. Vandenberg, 2003-NMSC-030, ¶ 22, 134 N.M. 566, 81 P.3d 19. Thus the presence of a rifle and a pocket knife is not sufficient to justify a pat down without additional facts that would make a reasonably prudent officer believe the suspect was dangerous (likely to use the weapons during the stop). State v. Pierce, 2003-NMCA-117, ¶ 13, 134 N.M. 388, 77 P.3d 292.

[2] Vandenberg, 2003-NMSC-030, ¶ 23.

[3] Pierce, 2003-NMCA-117, ¶ 14.

[4] State v. Boblick, 2004-NMCA-078, ¶ 13, 135 N.M. 754, 93 P.3d 775.

[5] State v. Haddenham, 1990-NMCA-048, ¶ 23, 110 N.M. 149, 793 P.2d 279.

[6] State v. Chapman, 1999-NMCA-106, ¶ 15, 127 N.M. 721, 986 P.2d 1122; State v. Madsen, 2000-NMCA-050, ¶ 21, 129 N.M. 251, 5 P.3d 573.

[7] Chapman, ¶¶ 2, 15. A suspect's response to the officer's initial approach may also justify a pat down, such as when the suspect ignores the officer's demands to stop, refuses to show his hands, and keeps one hand hidden in his shirt. Madsen, ¶ 21.

[8] Vandenberg, 2003-NMSC-030, ¶ 22; State v. Barragan, 2001-NMCA-086, ¶ 12, 131 N.M. 281, 34 P.3d 1157, *overruled on other grounds by* State v. Tollardo, 2012-NMSC-008, 275 P.3d 110; State v. Arredando, 1997-NMCA-081, ¶ 16, 123 N.M. 628, 944 P.2d 276, *overruled on other grounds by* State v. Steinzig, 1999-NMCA-107, ¶ 29, 127 N.M. 752, 987 P.2d 409.

[9] State v. Cobbs, 1985-NMCA-105, ¶ 35, 103 N.M. 623, 711 P.2d 900.

[10] State v. Eskridge, 1997-NMCA-106, ¶ 26, 124 N.M. 227.

[11] State v. Paul T., 1999-NMSC-037, ¶ 17, 128 N.M. 360, 993 P.2d 74.

[12] State v. Ingram, 1998-NMCA-177, ¶ 7, 126 N.M. 426, 970 P.2d 1151.

[13] Id. ¶ 7; Terry, 392 U.S. at 29-30. Our Supreme Court has held that an "underclothing search" during a search incident to arrest requires reasonable suspicion that the arrestee is concealing a weapon or contraband. State v. Williams, 2011-NMSC-026, ¶ 14, 149 N.M. 729, 255 P.3d 307. Assuming the same standard applies when an officer reaches under clothing or into pockets during a pat down, the reasonable suspicion standard is supplied by the requirement that the officer reasonably believe that the item felt during the pat down is a weapon.

[14] NMSA 1978, § 43-2-19 (1973); State v. Blakely, 1993-NMCA-053, ¶ 9, 115 N.M. 466, 853 P.2d 168.

[15] Paul T., 1999-NMSC-037, ¶ 16.

[16] State v. Flores, 1996-NMCA-059, ¶ 17, 122 N.M. 84, 920 P.2d 1038.

[17] State v. Almanzar, 2012-NMCA-111, ¶ 14, 288 P.3d 238, *rev'd on other grounds*, 2014-NMSC-001, 316 P.3d 183; Barragan, 2001-NMCA-086, ¶ 15.

[18] Paul T., 1999-NMSC-037, ¶ 19.

[19] Id.

[20] Id.

[21] State v. Ochoa, 2004-NMSC-023, ¶ 13, 135 N.M. 781, 93 P.3d 1286.

[22] State v. Johnson, 2010-NMCA-045, ¶ 24, 148 N.M. 237, 233 P.3d 371.

[23] *See* Chapman, 1999-NMCA-106, ¶¶ 2-3.

[24] Ingram, 1998-NMCA-177, ¶ 8.

[25] Arredondo, 1997-NMCA-081, ¶ 27.

[26] Paul T., 1999-NMSC-037, ¶ 11.

[27] Probable cause to arrest is based on facts known to the officer that would cause a person of reasonable caution to believe that the suspect has committed or is committing a crime. *See* State v. Williams, 1994-NMSC-050, ¶ 16, 117 N.M. 551, 874 P.2d 12 (defining

"probable cause" in context of search), *overruled on other grounds by* Tollardo, 2012-NMSC-008; State v. Madsen 2000-NMCA-050, ¶ 22 (discussing probable cause to arrest).

[28] State v. Gurrola, 1995-NMCA-138, ¶ 10, 121 N.M. 34, 908 P.2d 264.

[29] In re Doe, 1976-NMCA-011, ¶ 9, 89 N.M. 83, 547 P.2d 566. In addition, the search must be "confined to the area within the defendant's immediate control." Arredondo, 1997-NMCA-081, ¶ 27, *citing* State v. Martinez, 1997-NMCA-048, ¶ 6, 940 P.2d 1200. For a discussion of the application of this rule to a search of a vehicle incident to the occupant's arrest, see infra., pp. 106-109.

[30] *See* In re Doe, 1976-NMCA-011, ¶ 9.

[31] Id.

[32] State v. Martinez, 1997-NMCA-048, ¶ 6, 123 N.M. 405, 940 P.2d 1200 (quoting Chimel v. California, 395 U.S. 752, 763 (1969)).

[33] Williams, 2011-NMSC-026, ¶ 10.

[34] Id. ¶ 14.

[35] Id. ¶ 11 (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

[36] Id. ¶ 15.

[37] Id. ¶¶ 3-5.

[38] Id. ¶ 19.

[39] State v. Gutierrez, 2011-NMSC-024, ¶ 31, 150 N.M. 232, 258 P.3d 1024 (quoting United States v. Edwards, 415 U.S. 800, 803-06 (1974)); *see also* State v. Shaw, 1993-NMCA-016, ¶ 17, 115 N.M. 174, 848 P.2d 1101; State v. Johnson, 1996-NMCA-117, ¶ 15, 122 N.M. 713, 930 P.2d 1165.

[40] Johnson, 1996-NMCA-117, ¶¶ 15, 19 (Life Savers candy container); Shaw, 1993-NMCA-016, ¶ 16 (cigarette package); State v. Boswell, 1991-NMSC-004, ¶ 13, 111 N.M. 240, 804

P.2d 1059 (wallet given to police at time of arrest, but left at the scene of the arrest, could be retrieved and opened later during booking at the police station).

[41] State v. Davis, 2016-NMCA-073, ¶¶ 10-11, 387 P.3d 274, *cert. granted*, 2016-NMCERT-07.

[42] Shaw, 1993-NMCA-016, ¶ 5 (quoting Colorado v. Bertine, 479 U.S. 367, 371 (1987)).

[43] Id.

[44] Id.; State v. Romero, 2001-NMCA-046, ¶ 15, 130 N.M. 579, 28 P.3d 1120.

[45] Boswell, 1991-NMSC-004, ¶ 11.

[46] In re Jeff M., 1999-NMCA-045, ¶ 14, 127 N.M. 87, 977 P.2d 352; State v. Davis, 2016-NMCA-073, ¶ 9, 387 P.3d 274, *cert. granted*, 2016-NMCERT-07.

[47] Johnson, 1996-NMCA-117, ¶ 17.

[48] *See* In re Jeff M., 1999-NMCA-045, ¶¶ 19, 23 (second requirement met by testimony of officer that the inventory search of the vehicle was conducted pursuant to standard operating procedures; but remanding on issue of reasonableness of opening folded newspaper because trial court failed to determine whether the paper was opened pursuant to established procedure).

[49] *See* Davis, 2016-NMCA-073, ¶ 14.

[50] Id. ¶ 15.

[51] Johnson, 1996-NMCA-117, ¶ 15; *see also* State v. Ruffino, 1980-NMSC-072, ¶ 5, 94 N.M. 500, 612 P.2d 1311.

[52] In re Jeff M., 1999-NMCA-045, ¶ 21.

[53] Id.

[54] Id.

SEARCHING A VEHICLE

OUTLINE

I. Search of a vehicle incident to arrest.

A. Requirements of a valid search.

1. The arrest of the driver or another occupant must be lawful.
2. The arrest must be contemporaneous with the search.

B. The scope of a search of a vehicle incident to an arrest is limited by the purpose of ensuring officer safety.

1. Search is limited to a protective sweep of the area of the vehicle immediately accessible to the driver or other occupants.
2. Search is limited to a search for weapons.
   a. Areas of vehicle which could not hold a weapon may not be searched.
   b. Areas of the vehicle not accessible to driver or occupants may not be searched.
3. Evidence found in plain view during a valid search incident to arrest may be seized.

II. Inventory search of an impounded vehicle.

A. Requirements of a valid inventory search.

1. Vehicle must be in the lawful custody of the police (lawfulness is established by a nexus between the arrest of the driver or owner and the reason for impounding the vehicle).
   a. State must establish the existence of established police procedures requiring the impounding under the circumstances, OR
   b. State must establish the vehicle was used in the commission of a crime, and therefore is itself evidence of a crime.
2. The inventory search must be conducted pursuant to established police procedures.
   a. State must establish the existence of the police procedures, AND
   b. State must establish that the procedures were followed.
3. The inventory search must be reasonable.
   a. Search is reasonable if conducted pursuant to police procedures and the procedures exist for one of the following reasons:
      - to protect the vehicle and the property inside the vehicle from loss or theft
      - to protect the police against claims of loss or theft

b. The scope of the search must be consistent with the purposes of the procedures.
- Opening unlocked containers is reasonable.
- Opening locked or sealed containers may not be reasonable, and should be avoided.
- The search of the contents of a container is limited to the purposes of the inventory search.

B. What may be seized during an inventory search.

1. Contraband.
2. Items immediately identifiable as evidence of a crime.
3. All other items require a warrant.

III. <u>Search of a vehicle based on probable cause plus exigent circumstances</u>.

A. Absent a recognized exception to the warrant requirement, a warrantless search of a vehicle requires probable cause to believe evidence of a crime will be found, PLUS exigent circumstances that justify immediate action.

B. Recognized exigent circumstances.

1. Danger of the imminent escape of a suspect.
2. Danger to the safety of police officers or others.
   a. Officer must have an articulable suspicion the driver or occupant of the vehicle is armed and dangerous, which can be based on:
      - Reasonable suspicion the suspect is or was involved in an inherently dangerous crime, OR
      - The circumstances of the stop, including the time of day, location, and suspect's actions and demeanor.
3. Danger of destruction of evidence.
   a. There must be a possibility evidence will be destroyed if police wait for a warrant.
   b. Validity of the search depends on the circumstances at the time, such as the following:
      - The time it would take to get a warrant,
      - The time of day, and the location of the vehicle,
      - The danger to police while a warrant is obtained,
      - Whether the suspect is aware of the police investigation, and
      - The destructibility of the evidence

C. The scope of a valid search of a vehicle under exigent circumstances.

1. A search based on danger to officer safety is limited to the area of the vehicle accessible to the driver or occupants that might contain a weapon, and is limited to a search for weapons.

2. A search based on the danger that evidence could be destroyed.
    a. May extend beyond the area accessible to the driver and occupants,
    b. May extend only into areas believed to contain contraband or other evidence
    c. May include the opening and searching of containers capable of holding contraband or other evidence
    d. May be based on the circumstances surrounding the search that justify immediate action.
        - Because of location, time of day, or other factors, it would be dangerous to officer safety to guard the vehicle while a warrant is obtained
        - Officer has reason to believe the vehicle will be moved or the evidence will be removed from the vehicle before a warrant can be obtained

IV. <u>Search of a vehicle during a border patrol stop</u>.

A. Federal Border Patrol agents may search a vehicle based solely on probable cause; exigent circumstances are not required.

B. New Mexico police conducting a border stop are subject to state law limitations on warrantless searches.

1. Police may search with consent, or
2. Police must have probable cause to search, plus exigent circumstances.

V. <u>Seizing contraband or other evidence in plain view during a warrantless search of a vehicle</u>.

A. Requirements of plain view exception.

1. The warrantless search must be a valid search because officer must lawfully be in the place where the items are observed.
2. It must be immediately apparent (officer must have probable cause to believe) that the items are evidence of a crime or contraband.

B. Items in plain view that are often lawfully possessed cannot be seized unless the context in which they are observed establishes probable cause to believe they are evidence or contraband.

1. Circumstances of the encounter that may help establish probable cause include:
    - The reason for the encounter,
    - The location of the encounter,

- The officer's prior knowledge of the defendant, and
- The defendant's demeanor or furtive actions.

2. Furtive actions, alone, cannot establish probable cause to believe that items that are often lawfully possessed are evidence of a crime or contraband.

SEARCHING A VEHICLE

SUMMARY

I. Search of a vehicle incident to arrest.

The exception to the warrant requirement for a search incident to arrest applies to the search of a vehicle when the driver or other occupant of the vehicle is lawfully arrested.[1] This exception is based on the need to protect the safety of the arresting officer from the possibility that the person arrested is concealing a weapon.[2] The requirements for a valid search of a vehicle incident to arrest are the same as those for a valid search of a person incident to arrest: the arrest must be lawful and must occur contemporaneously with the search.[3]

The search incident to arrest is limited to a protective sweep of the area of the vehicle immediately accessible to the occupants of the vehicle.[4] A more extensive search would exceed the purpose of the search, which is to prevent the arrestee from gaining access to a weapon. Thus, a search of an area inside a small hole in the dashboard, discovered during a protective sweep of the front seat, would be unreasonable. In such a case, the person arrested would not have immediate access to the area inside the small hole after being arrested and could not be expected to retrieve a weapon from the area.[5] Similarly, a driver who has exited, locked, and walked away from his vehicle could not be expected to easily retrieve a weapon from the vehicle during his encounter with police.[6] On the other hand, an arrestee who has been handcuffed could gain, or attempt to gain, access to a weapon in the vehicle.[7] In addition, the presence of passengers or others in the vicinity of the arrest adds to the concern for officer safety that justifies a vehicle search incident to arrest.[8]

II. Inventory search of an impounded vehicle.

A warrantless inventory search of a vehicle is not a Fourth Amendment violation if each of the requirements for a valid inventory search are met. The requirements for a valid inventory search of a vehicle are the same as the requirements discussed above for an inventory search of a person.[9] Those requirements are (1) the object of the search, in this case the vehicle, must be in the custody or control of the police, (2) the inventory search must be conducted pursuant to established police regulations, and (3) the search must be reasonable under the circumstances.[10] However, the application of those requirements differ slightly with respect to an inventory search of a vehicle.

Our Supreme Court has stated that there must be a "nexus between the arrest and the reason for the impounding."[11] The "nexus" requirement is simply a means of establishing the lawful police custody of the object of the search. [12] In the context of an inventory search of an arrestee, the nexus is automatic because the impoundment and the arrest are the same event. When a person is arrested, he and all of the possessions he is carrying at the time are impounded, and therefore are in the lawful custody of the police.

However, in the context of an inventory search of a vehicle, a nexus between the arrest of the driver of the vehicle and the need for impounding the vehicle demonstrates the lawfulness of the police custody of the vehicle and its contents.[13] For example, the fact that the arrest resulted in the vehicle being left on the road and creating a traffic hazard is a sufficient nexus between the arrest and the impoundment to establish the lawfulness of the police custody of the vehicle.[14] Similarly, the need to remove a vehicle illegally parked, or simply abandoned in a parking lot after the arrest of the owner, establishes the lawfulness of the police custody.[15]

Typically, the State meets the requirement of lawful police custody of a vehicle by establishing the existence of standard police procedures that require an arresting officer to impound a car rather than leave it abandoned on the side of the road.[16] However, such a justification for taking custody and control of a vehicle does not apply if another person, such as a passenger, moves the vehicle for the driver who was arrested.[17] In addition, this justification applies only if the State establishes that standard police procedures require impounding the vehicle. If police custody of the vehicle was not taken pursuant to standard procedures that require impounding the vehicle, then the State must establish some other nexus between the arrest and the reason for impounding the vehicle.[18] Such a nexus exists when the vehicle impounded and searched was used in the commission of the crime for which the defendant was arrested.[19]

However, that nexus justifies only the impounding of the vehicle. The inventory search must comply with the second requirement of a valid inventory search, which is that the search must be conducted pursuant to established police regulations. For all inventory searches, the State must establish both the existence of the procedures and the compliance with the procedures.[20] This requires testimony by a police officer regarding the details of the standard procedures and the details of the officer's actions, demonstrating compliance with the procedures.

The third requirement of a valid inventory search – that the search must be reasonable – also applies to an inventory search of a vehicle. The reasonableness of the search is established by the purpose of the standard procedures of an inventory search.[21] Recognized acceptable purposes for inventory search procedures are (1) to protect the defendant's property, and (2) to protect the police from claims of lost or stolen property.[22] Reasonableness also requires the scope of the search to be limited to the purposes for an inventory. Thus, if the police conduct the search in a manner that does not further the purposes of the inventory search, the search will be deemed unreasonable. For example, it would not be reasonable to dismantle the vehicle during an inventory search because items of value are not ordinarily kept in places that can be reached only by dismantling the vehicle.[23]

On the other hand, opening a container is reasonably within the scope of a proper inventory search. Therefore, police officers may open a container found inside the vehicle and search the contents of the container, as long as the standard procedures for an inventory search include opening containers to inventory the contents.[24] This includes a closed container, as well as an open container such, as a briefcase, a backpack, a box, or even a folded piece of paper.[25] However, the scope of the search of the contents of a container found during an inventory search of a vehicle is limited to the purposes of the inventory.[26] New Mexico courts have not determined whether opening a locked or sealed container would be within the scope of an inventory search. Because this issue has not been settled, the most prudent course of action for police would be to not open locked or sealed containers. [27]

Since the purposes of the inventory search are to protect the contents of the vehicle from loss or theft, as well as to avoid claims of loss and theft, seizure of items found during an inventory search is not automatic. Our Supreme Court has stated that items found during an inventory search should be left in the vehicle and a warrant should be obtained before the items are seized.[28] However, that rule has been eroded by the application of the plain view doctrine to inventory searches. Under the plain view doctrine, an officer conducting a valid inventory search of a vehicle may seize any items found during the search that are immediately identifiable as contraband or other evidence of a crime.[29]

However, if items found during an inventory search are not immediately identifiable as contraband or evidence of a crime, those items may be seized only after a warrant has been obtained. For example, if a shotgun is found during an inventory search of an impounded

vehicle, and the police have no reason to believe the shotgun is evidence of a crime at the time it is found, it should be left in the vehicle. If the police later obtain probable cause to believe the shotgun is evidence of a crime, they should then obtain a warrant before seizing the shotgun from the vehicle.[30]

III. <u>Search of a vehicle based on probable cause plus exigent circumstances</u>.

A warrantless search of a vehicle, other than a search incident to arrest or an inventory search, requires probable cause to believe contraband or other evidence of a crime will be found in the vehicle,[31] and exigent circumstances to justify conducting the search without a warrant.[32] Exigent circumstances that justify a warrantless search of a vehicle are circumstances which lead an officer to reasonably believe that swift action is necessary "to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence."[33] To establish the validity of a warrantless search of a vehicle, the State must establish that the officer who conducted the search reasonably determined exigent circumstances existed.[34] If a reasonable, well-trained officer would have found the existence of exigent circumstances to justify a warrantless search, the search is deemed valid.[35] The State does not need to establish the defendant was "in fact preparing to escape, destroy evidence, endanger life, or damage property."[36]

Of the three recognized exigent circumstances that justify a warrantless search – threat to the safety of officer or others, threat of destruction of evidence, and threat of the suspect's escape – the two that apply best to the warrantless search of a vehicle are the safety of officers and the public and the threat of the destruction of evidence.[37]

The exigent circumstance of the threat to officer safety will justify a warrantless search of a vehicle if the officer had an articulable suspicion that the driver or occupant was armed and dangerous.[38] Such a suspicion may be based on the fact that the driver or occupant is suspected of being involved in an inherently dangerous crime, such as aggravated assault.[39] It may also be based on the circumstances of the stop, such as the time of day, the driver's demeanor or behavior, and the driver's answers to questions related to the purpose of the stop.[40]

The related exigency of a threat to the safety of others may justify a more expansive search. For example, officers who have probable cause to believe the occupants of a vehicle possess a firearm on school property are justified in searching the vehicle for the firearm after arresting and securing the occupants.[41] Such a search need not end upon the discovery of a

firearm. The officer may search "every place inside [the vehicle] where a weapon and its explosive ammunition might be located."[42]

To justify a warrantless search under the exigent circumstance of the possibility of destruction of evidence, there must exist a real possibility that evidence will be destroyed if law enforcement officers cannot enter the vehicle before they obtain a search warrant.[43] The emergency circumstances creating the possibility of the destruction of evidence will vary from case to case. Therefore, the inherent necessities of the situation at the time must be scrutinized. Circumstances which have seemed relevant to courts include (1) the presence of on-lookers at the scene of the arrest who can see the contraband or evidence in plain view,[44] (2) the degree of urgency involved and the amount of time necessary to obtain a warrant,[45] (2) the time of day and the reasonable expectation of a tow truck arriving before the vehicle leaves,[46] (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought,[47] (4) information indicating the possessors of the contraband are aware that the police are on their trail, (5) the destructibility of the contraband[48], and (6) the knowledge that efforts to dispose of the contraband and to escape are characteristic behavior of persons engaged in the suspected crime.[49]

The scope of a warrantless search of a vehicle depends on the exigent circumstances that justify the search. In other words, the reason for searching will govern the scope of the search. If the reason for searching is to protect officer safety during an investigatory stop, for example, then the search must be limited to that reason.[50] Therefore, a protective search of a vehicle must be limited to a "sweep" of the seats and floors of the vehicle to check for weapons accessible to the driver or other occupants.[51] A protective search conducted under these circumstances is justified by exigent circumstances and, therefore, is valid.[52]

On the other hand, when the reason for the search involves the accessibility of the vehicle to a group of people, or the possibility of the destruction of evidence, the search may be extended beyond the area immediately accessible to the driver. In fact, the driver need not be present during the search. For example, when an officer has probable cause to believe contraband or other evidence will be found in a vehicle, and believes that the vehicle might be moved before a warrant could be obtained, the officer may search the vehicle.[53] Such a search may include a thorough search of all parts of the car reasonably believed to contain contraband or other

evidence, and may include opening containers found in the vehicle.[54] However, the validity of such a search will depend on the totality of the circumstances.[55]

IV. Search of a vehicle during a border patrol stop.

When federal standards apply, Border Patrol agents, engaged in policing of the national border with no state police officer involved, are permitted immediately to search once probable cause is established by dog alert or otherwise.[56] Such a search is lawful under the Fourth Amendment even if New Mexico's Constitution would have required exigent circumstances or a warrant. But the lawfulness of the seizure under federal law does not necessarily make the evidence admissible in a New Mexico court.[57] "[T]he New Mexico Constitution applies to evidence seized by federal agents at an interior fixed checkpoint when the State seeks to introduce the evidence in state court criminal proceedings."[58]

Thus, a New Mexico peace officer at an interior fixed border checkpoint is only authorized to conduct a search for contraband or illegal immigrants to the extent permitted for any other type of illegal conduct.[59] Under Article II, Section 10 of the New Mexico Constitution, "a warrantless search of an automobile and its contents requires a particularized showing of exigent circumstances" in addition to probable cause.[60] The exigent circumstances that may justify a border search are the same circumstances that may justify any other warrantless search of a vehicle: the situation must require swift action to prevent imminent danger or to forestall the imminent escape of a suspect or destruction of evidence.[61] A warrantless search is valid if an objective view of the facts demonstrates that the officer's view that exigent circumstances existed was reasonable, and "[i]f reasonable people might differ about whether exigent circumstances existed, we defer to the officer's good judgment."[62]

A different rule applies at an international border checkpoint. The New Mexico Supreme Court has declined to interpret Article II, Section 10 of the state constitution as requiring individualized suspicion of criminal activity for prolonging detentions at an international border checkpoint.[63] In so doing, the Court adopted the distinction applied by federal courts between the "border search doctrine" and the "interior fixed-checkpoint doctrine."[64] That distinction is based on the diminished expectation of privacy of persons who "present themselves at the border for entry into the United States,"[65] and the government's substantial interest in "preventing the entry of unwanted persons and effects."[66] At an international border checkpoint, officers have wide latitude in conducting searches of persons

and effects crossing the border, including referral to a secondary checkpoint where officers may conduct a pat down of the motorist, and search the vehicle and luggage without first developing individualized suspicion of illicit activity.[67]

V. Seizing contraband or other evidence in plain view during a warrantless search of a vehicle.

During any valid warrantless search of a vehicle, an officer who observes in plain view items that are immediately identifiable as contraband or evidence of a crime may seize those items. There are two requirements for a valid seizure under the plain view exception. First, the warrantless search must be a valid search - a search that meets the requirements for a consensual search, a search incident to arrest, or a search based on probable cause plus exigent circumstances. For example, if the officer finds items while searching beyond the scope of a valid search incident to arrest, those items may not be seized. Indeed, those items should not even be relied upon in seeking a warrant.[68]

The second requirement for seizure under the plain view exception is that it must be immediately apparent to the officer that the items are either evidence of a crime or contraband.[69] In other words, the officer must be aware of facts and circumstances that are sufficient to establish probable cause to believe that the items are evidence of a crime or contraband.[70]

When an officer views in plain view an item that "is often lawfully possessed," probable cause to believe that the item is, in this instance, evidence of a crime or contraband depends on the context in which the item is observed, such as (1) the circumstances of the encounter, (2) the officer's training and experience, and (3) the particular item observed.[71] Relevant circumstances of the encounter include (1) the reason for the encounter, (2) the location of the encounter, (3) the officer's prior knowledge of the defendant, and (4) the demeanor and conduct of the defendant, such as nervousness or making furtive movements.[72] Nervousness and furtive movements alone are not sufficient, but considered together with other circumstances, may be sufficient to establish probable cause to believe the items are evidence or contraband.[73]

SEARCHING A VEHICLE

ENDNOTES

[1] State v. Arredondo, 1997-NMCA-081, ¶ 27, 123 N.M. 628, 944 P.2d 276, *overruled on other grounds by* State v. Steinzig, 1999-NMCA-107, ¶ 29, 127 N.M. 752, 987 P.2d 409.

[2] State v. Boswell, 1989-NMCA-099, ¶ 5, 110 N.M. 190, 793 P.2d 1343, *rev'd on other grounds*, 1991-NMSC-004, 111 N.M. 240, 804 P.2d 1059 (1991).

[3] Arredondo, 1997-NMCA-081, ¶ 27; State v. Weidner, 2007-NMCA-063, ¶¶ 18, 20, 141 N.M. 582, 158 P.3d 1025.

[4] Arredondo, 1997-NMCA-081, ¶ 27.

[5] Id. ¶ 29.

[6] *See* State v. Pittman, 2006-NMCA-006, 139 N.M. 29, 127 P.3d 1116; *see also* State v. Rowell, 2008-NMSC-041, ¶ 25, 144 N.M. 371, 188 P.3d 95 (search of arrestee's car after arrestee was secured in the officer's patrol car held not a valid search incident to arrest).

[7] *See* State v. Guiterrez, 2004-NMCA-081, ¶ 11, 136 N.M. 18, 94 P.3d 18.

[8] *See* Id.

[9] *See* infra., pp. 96-97

[10] State v. Ruffino, 1980-NMSC-072, ¶ 5, 94 N.M. 500, 612 P.2d 1311 (1980).

[11] Id.

[12] Boswell, 1991-NMCA-004, ¶ 8.

[13] *See* State v. Williams, 1982-NMSC-041, ¶ 7, 97 N.M. 634, 642 P.2d 1093.

[14] Id. ¶ 6.

[15] Id.

[16] *See* Ruffino, 1980-NMSC-072, ¶ 3; Williams, 1982-NMSC-041, ¶ 4; In re Jeff M., 1999-NMCA-045, ¶ 3, 127 N.M. 87, 977 P.2d 352.

[17] *See* State v. Clark, 1976-NMCA-109, ¶ 6, 89 N.M. 695, 556 P.2d 851 (police may not conduct an inventory search of a vehicle after they have relinquished custody or control to another person).

[18] *See* Williams, 1982-NMSC-041, ¶ 9.

[19] Id.; *see also* Salazar v. State, 1971-NMCA-076, ¶ 7, 82 N.M. 630, 485 P.2d 741.

[20] In re Jeff M., 1999-NMCA-045, ¶¶ 19, 23 (second requirement met by testimony of officer that the inventory search of the vehicle was conducted pursuant to standard operating procedures; but remanding on issue of reasonableness of opening folded newspaper because trial court failed to determine whether the paper was opened pursuant to established procedure).

[21] Ruffino, 1980-NMSC-072, ¶ 5. A third purpose - to protect police from potential danger - applies more to an inventory search of an arrestee than to a search of an arrestee's vehicle.

[22] Id.

[23] *Cf.* State v. Ramzy, 1993-NMCA-140, ¶¶ 9-10, 116 N.M. 748, 867 P.2d 418 (Court declined to decide whether a dog sniff is reasonably within the scope of an inventory search because Court determined that the State failed to establish a dog sniff is part of the established procedure for an inventory search).

[24] *See* State v. Shaw, 1993-NMCA-016, ¶ 11, 115 N.M. 174, 848 P.2d 1101 (police may search closed containers, so long as inventory search is done under clearly established procedures); State v. Vigil, 1974-NMCA-065, ¶ 12, 86 N.M. 388, 524 P.2d 1004 (where vehicle is lawfully in police custody "an inventory of the contents of closed containers is also justified").

[25] *See* Jeff M., 1999-NMCA-045, ¶¶ 22-23 (remanding for trial court to determine whether the paper was opened according to established police procedure; if it was, search of folded paper in which marijuana was found was valid).

[26] Id. ¶ 16 (citing South Dakota v. Opperman, 428 U.S. 364, 380 (1976) (Powell, J., concurring), and United States v. Khoury, 901 F.2d 948, 957-60 (11th Cir. 1990)) (cursory inspection of spiral notebook during inventory search was proper, but detailed examination of matters written therein held beyond the scope of an inventory search).

[27] Federal caselaw suggests that opening a locked or sealed container would be proper as long as the established police procedures require the officer to open locked, as well as unlocked, containers. *See* Florida v. Wells, 495 U.S. 1, 4-5, 110 S. Ct. 1632, 1625, 109 L.Ed.2d 1 (1990) (holding that the opening of a locked container was not justified as inventory search because there was no policy or established procedure regarding opening closed containers, but not reaching the issue of whether opening a locked container is within the scope of an inventory search); United State v. Evans, 937 F.2d 1534, 1538 (10th Cir. 1991) (opening a locked container – carry-on luggage – to conduct an inventory search was proper because police department procedures require opening locked containers for the purpose of inventory). However, it is not clear whether New Mexico courts would follow the lead of federal courts. Therefore, opening locked containers should be avoided. If locked containers are opened, it is imperative that the police department procedures for inventory searches explicitly require doing so.

[28] *See* Ruffino, 1980-NMSC-072, ¶ 5.

[29] State v. Foreman, 1982-NMCA-001, ¶ 8, 97 N.M. 583, 642 P.2d 186.

[30] *See* Ruffino, 1980-NMSC-072, ¶ 5.

[31] Under the Fourth Amendment, only probable cause is necessary; exigent circumstances need not exist to justify a warrantless search of a vehicle. That rule is often referred to as the automobile exception to the warrant requirement. However, Article II, Section 10 of the state constitution requires both probable cause and exigent circumstances.

[32] State v. Leticia T., 2014-NMSC-020, ¶¶ 11-15, 329 P.3d 636; State v. Rowell, 2008-NMSC-041, ¶ 27, 144 N.M. 371, 188 P.3d 95; State v. Gomez, 1997-NMSC-006, ¶ 39, 122 N.M. 777, 932 P.2d 1; State v. Valdez, 1990-NMCA-14, ¶ 14, 111 N.M. 438, 806 P.2d 578.

[33] Gomez, 1997-NMSC-006, ¶ 39 (quoting State v. Copeland, 1986-NMCA-083, ¶ 14, 105 N.M. 27, 727 P.2d 1342).

[34] Gomez, 1997-NMSC-006, ¶ 40.

[35] Id.; *see also* Rowell, 2008-NMSC-042, ¶ 31 (Explaining that "where the circumstances make obtaining a warrant objectively unreasonable, an immediate warrantless search will be upheld."); Leticia T, 2014-NMSC-020, ¶ 22 ("[W]e should not let our preference for warrants result in overriding an officer's on-the-scene decision to act immediately where immediate action is one of the lawful options.").

[36] State v. Snyder, 1998-NMCA-166, ¶ 20, 126 N.M. 168, 967 P.2d 843.

[37] Because the other two recognized exigent circumstances justifying a warrantless search apply more logically to a warrantless search of a place, those circumstances are discussed in another section of this manual. *See* supra at pp. 126-129.

[38] State v. Garcia, 2005-NMSC-017, ¶ 30, 138 N.M. 1, 116 P.3d 72. Such a search is similar to a pat down of a person during an investigatory stop; both searches are limited to checking for weapons. *See* Arredondo, 1997-NMCA-081, ¶ 22.

[39] Id. ¶ 16.

[40] State v. Chapman, 1999-NMCA-106, ¶ 15, 127 N.M. 721, 986 P.2d 1122; State v. Madsen, 2000-NMCA-050, ¶ 21, 129 N.M. 251, 5 P.3d 573.

[41] Rowell, 2008-NMSC-041, ¶¶ 33-35; *see also* Leticia T., 2014-NMSC-020, ¶¶ 11-15 (officers who had probable cause to believe the occupants of a vehicle threatened others by pointing a gun at them from through a window of the vehicle were justified in searching the vehicle for the gun after detaining the occupants).

[42] Rowell, ¶ 35.

[43] Gomez, 1997-NMSC-006, ¶ 42 (citing State v. Ortega, 1994-NMSC-013, ¶ 7, 117 N.M. 160, 870 P.2d 122); *see also* State v. Wagoner, 1998-NMCA-124, ¶ 12, 126 N.M. 9, 966 P.2d 176 (applying requirement to warrantless search of a home).

[44] State v. Bomboy, 2008-NMSC-029, ¶ 13, 144 N.M. 151, 184 P.3d 1045.

[45] Copeland, 1986-NMCA-083, ¶ 15 (warrantless search of home was justified because it would have taken the officers two and one-half to three hours to get a warrant); Snyder, 1998-NMCA-166, ¶ 21 (nearest magistrate was 35 miles away from border checkpoint where defendant was stopped).

[46] Gomez, 1997-NMCA-006, ¶ 40.

[47] Id.

[48] Copeland, 1986-NMCA-083, ¶ 15 (metabolizing of alcohol in the defendant's blood); *but see* State v. Nance, 2011-NMC-048, ¶ 22, 149 N.M. 644, 253 P.3d 934 (dissipation of alcohol, alone, is not a sufficient exigency to justify a warrantless entry into a home).

[49] Wagoner, 1998-NMCA-124, ¶ 12 (quoting United States v. Rubin, 474 F.2d 262, 268 (3rd Cir. 1973)).

[50] *See* Arredondo, 1997-NMCA-081, ¶ 22.

[51] Id. ¶ 18.

[52] Id.

[53] *See* Gomez, 1997-NMSC-006, ¶ 41.

[54] Id. (search conducted late at night with party-goers milling about the scene); *see also* Rowell, 2008-NMSC-041, ¶ 35 (emphasizing the presence of on-lookers at the scene of the arrest as a factor establishing the exigency).

[55] Id. ¶ 42; Rowell, 2008-NMSC-041, ¶ 8.

[56] California v. Acevedo, 500 U.S. 565, 571 (1991); United States v. Klinginsmith, 25 F.3d 1507, 1510 (10th Cir.1994).

[57] *See* State v. Gallegos, 2003-NMCA-079, ¶ 21, 133 N.M. 838, 70 P.3d 1277.

[58] State v. Sanchez, 2015-NMSC-018, ¶ 10, 350 P.3d 1169 (citing State v. Cardenas-Alvarez, 2001-NMSC-017, ¶ 20, 130 N.M. 386, 25 P.3d 225).

[59] Id.

[60] Gomez, 1997-NMSC-006, ¶ 39.

[61]Gomez, 1997-NMSC-006, ¶ 40. *See* infra at pp. 109-111.

[62] Id.

[63] Sanchez, 2015-NMSC-018, ¶ 9.

[64] Id. ¶¶ 15-18.

[65] Id. ¶ 28.

[66] Id. ¶ 13 (quoting United States v. Flores-Montano, 541 U.S. 149, 152 (2004)).

[67] Sanchez, 2015-NMSC-018, ¶ 28.

[68] *See* State v. Wagoner, 2001-NMCA-014, ¶ 21, 130 N.M. 274, 24 P.3d 306.

[69] State v. Sanchez, 2015-NMCA-084, ¶ 13, 355 P.3d 795 (citing State v. Ochoa, 2004-NMSC-050, ¶ 9, 139 N.M. 81, 93 P.3d 1286)).

[70] Id. (citing State v. Williams, 1994-NMSC-050, ¶ 15, 117 N.M. 551, 874 P.2d 12).

[71] Id. ¶ 16.

[72] Id. ¶¶ 17-18.

[73] Id. ¶ 22.

SEARCHING A PLACE

OUTLINE

I. Search incident to arrest.

A. Officers may conduct a protective sweep of the premises when making an arrest.

1. Sweep must be conducted contemporaneously with a valid arrest.
2. Officer must have a reasonable belief other people are present on the premises and could pose a danger.
3. Sweep must be limited to the areas of the premises where a person might be found.

B. Officers may conduct a search of the area within the arrestee's immediate control.

1. The arrest must be lawful.
2. The search must occur at the time of the arrest.
3. The search must be limited to the area within the immediate control of the person arrested or another person on the premises at the time of the arrest.

C. Officers may seize evidence or contraband in plain view.

1. The items seized must actually be in plain view.
2. The incriminating nature of the items must be immediately apparent.
3. Officers must obtain a warrant to seize items not in plain view or not obviously evidence or contraband.
   a. When in doubt, get a warrant
   b. Warrant not required if exigent circumstances exist
      - danger of destruction of evidence
      - danger to officer safety while waiting for a warrant

II. Emergency assistance doctrine.

A. A genuine emergency may justify a warrantless entry and search of a home, IF:

1. Officers have reasonable grounds to believe an emergency is occurring that requires their assistance to protect life and property, AND
2. The entry is not primarily motivated by the officers' intent to arrest and seize evidence, AND
3. The officers have a reasonable basis, approximating probable cause, to believe the emergency is occurring in the place to be entered or searched.

B. Officers justified in entering a home or other place by the emergency assistance doctrine are limited by the justification for the entry and, therefore, may not take any action other than what is necessary to determine if someone needs their assistance, and to provide that assistance.

III. Probable cause plus exigent circumstances.

A. Officer must have probable cause to believe evidence of a crime will be found, AND

B. **Immediate search must be justified by exigent circumstances.**

1. Danger of the imminent escape of a suspect.
   a. Officer must have articulable suspicion the escape of the suspect is imminent.
      - An "imminent" escape is not necessarily one that is actually occurring.
      - An imminent escape could be a situation where the officer has reason to believe the suspect could try to escape.
   b. Facts indicating imminent escape:
      - Suspect has a means of escape.
      - Escape is likely due to the violent nature of the crime.
      - Suspect is aware of the investigation.
      - Suspect's actions indicate imminent escape.
      - Officer is engaged in "hot pursuit" of suspect.
2. Danger of destruction of evidence.
   a. There must be a possibility evidence will be destroyed if police wait for a warrant.
   b. Validity of the search depends on the circumstances at the time, such as the following:
      - The time it would take to get a warrant.
      - The time of day and the location of the premises.
      - The danger to police in guarding the vehicle while a warrant is obtained.
      - Whether the suspect is aware of the police investigation.
      - The destructibility of the evidence.
3. Danger to the safety of police officers or others.
   a. Unlimited search of premises is not justified.
   b. Entry into premises is justified.
   c. Once officer has entered, scope of search may expand.
      - Officer may obtain consent to search.
      - Officer may conduct a pat down of the suspect or others in the premises to ensure officer safety.
      - If suspect is arrested, then officer may conduct a search incident to arrest, including protective sweep of premises.

- Officer may seize contraband and evidence in plain view.

C. Scope of a valid search of a place under the exigent circumstances exception.

1. A search under the exigent circumstance of danger of imminent escape.
   a. Officer may enter the premises.
   b. Officer may search for suspect.
   c. Search must be limited to areas on premises where suspect could reasonably be found.
   d. Officer may seize contraband and evidence of a crime found in plain view.
2. A search under the exigent circumstance of danger of destruction of evidence.
   a. Officer may enter the premises.
   b. Officer may search for evidence.
   c. Officer may search for suspect.
   d. Search must be limited to areas on premises where suspect or destructible evidence might be found.
   e. Officer must end search when risk of destruction has ended.
      - Suspect and others apprehended so they cannot destroy evidence.
      - Evidence found and seized so it cannot be destroyed.
3. A search under exigent circumstance of danger to officers and others.
   a. Officer may enter the premises.
   b. Officer may pat down suspect and others inside premises.
   c. Officer may conduct search incident to arrest, if arrest is made.
   d. Officer may seize contraband and evidence of a crime found in plain view.

IV. <u>Searching students on school premises</u>.

A. A warrant is not required for a search by a school official.

1. School officials may search a student, or a student's locker or personal belongings without a warrant.
2. The school officials must have a reasonable suspicion, based on articulable facts, of the following:
   a. The student is violating, or has violated, the law, school rules or school policy, and
   b. The search would uncover evidence of the violation.
3. The search must occur on school grounds.
4. The search must occur during school hours or during a school activity.

B. A warrant is not required for a student search conducted on school premises by a school resource officer on behalf of a school official.

1. Definition of School Resource Officer:
    a. Full-time commissioned police officer,
    b. Assigned to a school as a resource officer,
    c. By the officer's police department.
    d. A resource officer may be armed and in uniform while working at the school.
    e. A resource officer may have multiple roles:
        - prevention of crime,
        - law enforcement,
        - assisting school officials in creating and sustaining a safe environment conducive to learning.
2. The School Resource Officer may search without a warrant IF:
    a. The officer has a reasonable suspicion, based on articulable facts, that the student is violating, or has violated a law, school rule or school policy.
    b. The officer is acting at the behest of a school official.
    c. The purpose of the search is to maintain a safe and proper. educational environment.
    d. The search is conducted on school premises, during school hours or school activities.
    e. A valid exception to the warrant requirement applies:
        - Probable cause plus exigent circumstances;
        - Search incident to an arrest;
        - Pat down during an investigatory stop.
3. A warrant is required IF:
    a. The resource officer is acting as a law enforcement officer investigating a criminal matter, or
    b. The resource officer is acting independently from the school officials.

C. A warrant is required for a student search conducted on school premises by a law enforcement officer.

1. Students have the same protections as adults against unreasonable searches and seizures by law enforcement officers.
2. To conduct a search of a student or student's personal property on school premises, a police officer must obtain a warrant based on probable cause UNLESS an exception applies, such as
    a. Consent,
    b. Probable cause plus exigent circumstances,
    c. Pat down during an investigatory stop, or
    d. Search incident to arrest.

D. The scope of a school search is limited.

1. The search must be reasonably related to the objectives of the search.
2. If the search includes the student and his locker or other personal property, each search must be separately justified by articulable facts indicating evidence of a violation will be found.
3. The search must not be overly intrusive in light of the student's age and sex.

V. <u>Searching the home of a person on probation or parole</u>.

A. A probation and parole officer may conduct a warrantless search of the home of a probationer or parolee.

1. The terms of probation or parole must include a condition that the probationer or parolee is subject to warrantless searches by a probation or parole officer.
2. The probation and parole officer must have reasonable suspicion to believe contraband or other evidence of a probation or parole violation will be found.

B. Police officers may participate in a search of the home of a probationer or parolee.

1. The police participation must be at the request of the probation or parole officer; the search may not be conducted at the behest or direction of the police.
2. The probation or parole officer must be acting in his or her capacity as the defendant's supervising guardian, not as an investigator of criminal activity.
3. The probation officer must have an independent probationary reason for the search.

SEARCHING A PLACE

SUMMARY

I. Search incident to arrest.

Protective Sweep

Officers making a lawful arrest may conduct a "protective sweep" of the premises where the arrest is made for the purpose of protecting the safety of the officers or others.[1] The protective sweep must be conducted contemporaneously with an arrest of a person on the premises. A protective sweep conducted before the officers decide to make an arrest is not a valid protective sweep.[2] In addition, the officers conducting a protective sweep must have "a reasonable belief based on specific and articulable facts" that people on the premises may pose a danger to the officer and others.[3] Such a belief can be based on circumstances that would lead a reasonable person to believe others could be present and pose a danger, such as observations of people entering the premises, sounds of people moving about other areas of the premises, and the violent nature of the crime.[4] On the other hand, the absence of information that persons other than the arrestee are present in the premises renders a protective sweep invalid.[5] In conducting a protective sweep, the officers are limited to a quick search of areas on the premises where a person could reasonably be found.[6] For example, an officer may look in a closet, but not in a shoe box found inside the closet.

Search of area within arrestee's immediate control

In addition to a protective sweep, when making a lawful arrest, officers may conduct a search of the area within the arrestee's immediate control.[7] Such a search must be made at the time of the arrest, which must be a lawful arrest. Like a search of a person or a vehicle incident to an arrest, this search is limited to the area immediately accessible to the arrestee, or others on the premises, at the time of the arrest.[8] Such a search might include looking through a desk, if the desk is located within an area to which the arrestee has access. However, such a search could only be a look through the desk for weapons, or destructible evidence and contraband. Such a search cannot be a detailed search of each item in the desk, such as papers, notebooks, or checkbooks.[9]

Moreover, a search incident to arrest cannot extend to other unoccupied rooms on the premises,[10] although it might extend to a closet in the room where the arrestee is located, if the

arrestee has immediate access to it.[11] A room other than the room where the arrestee is located may be searched if that room is occupied by a person who may pose a danger to the safety of the officers.

The practical issue regarding the scope of a search incident to an arrest is whether the arrestee or another person might be able to quickly reach the area in question to obtain access to a weapon or destructible evidence.[12] Thus, courts have upheld the search, incident to arrest, of a kitchen cabinet, under a bed pillow, and inside a shoulder bag.[13] Moreover, the fact that the arrestee is handcuffed does not eliminate the danger to the officer. Therefore, officers may conduct a search incident to arrest even after the person has been handcuffed.[14]

Seizure of items found during protective sweep or search incident to arrest

If officers conducting a valid protective sweep discover evidence of a crime in "plain view," the officers may immediately seize the evidence.[15] However, before items in plain view may be seized, the incriminating nature of the items must be immediately apparent.[16] In other words, the officer must be able to immediately identify the items as either contraband or evidence of a crime.[17]

Items which might be evidence in the case being investigated, but are not normally immediately identifiable as evidence or contraband should not be seized simply because they are in plain view. Instead of immediately seizing such items, police officers should seek a search warrant. The officers must include the items in the search warrant and may describe the protective sweep as the basis for probable cause to support the warrant.[18] If exigent circumstances exist, such as the danger that the items will be destroyed, or danger to the safety of officers and others on the premises while waiting for a warrant, then the items may be seized immediately. However, without such exigent circumstances, seizure of the items will not be valid.[19]

II. <u>Emergency assistance doctrine</u>.

Not every encounter between a police officer and an individual is a seizure subject to Fourth Amendment scrutiny. "The community caretaker exception recognizes that warrants, probable cause, and reasonable suspicion are not required when police are engaged in activities that are unrelated to crime-solving."[20] New Mexico courts recognize "three distinct doctrines under the community caretaker exception:" (1) the emergency aid doctrine, (2) the inventory doctrine, and (3) the community caretaking or public servant doctrine.[21] Of these three

doctrines, only the first - the emergency aid doctrine - applies to a warrantless entry and search of a place.[22] The community caretaking, or public servant doctrine, applies primarily to warrantless searches and seizures of automobiles, and the inventory doctrine applies when a vehicle is impounded and searched.[23] Thus, only the emergency aid doctrine is addressed in this section. The other two are addressed in sections on searching places and searching vehicles.[24]

Because "the privacy expectation is strongest in the home only a genuine emergency will justify entering and searching a home without a warrant and without consent or knowledge."[25] Thus, the emergency assistance doctrine may justify a warrantless entry into a place only if each of the following three requirements are met.

First, officers must "have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property."[26] Reasonable grounds are those that cause an officer to have a "strong sense" of emergency.[27] Ambiguous and speculative concerns about the welfare of others are not sufficient.[28] The emergency must be life threatening; officers must have a reasonable belief that the failure to act would result in loss of life or in serious harm.[29]

Second, officers must not be "primarily motivated by intent to arrest and seize evidence."[30] Officers may, however, become aware of an emergency that justifies entry into a home while they are investigating the homeowner or occupant for criminal activity.[31] When that occurs, immediate entry may be justified, if the third requirement is also met.[32]

The third requirement is that officers must have "some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched."[33]

The scope of an entry justified by the emergency assistance doctrine is limited to the emergency at hand. Thus, officers "may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance."[34]

III. <u>Probable cause plus exigent circumstances</u>.

A warrantless search of a place,[35] other than a protective sweep or search incident to arrest, must be justified by both probable cause and exigent circumstances.[36] The exigent circumstances that justify a warrantless search of a vehicle[37] may also justify a warrantless search of a place. Those circumstances are (1) the danger of the escape of the suspect, (2) the danger to the safety of the officers or others, and (3) the danger of the destruction of evidence or

other property.[38] One or more of those circumstances must exist before a warrantless search is justified.

To establish the validity of a warrantless search, the State must establish that the officer who conducted the search reasonably determined exigent circumstances existed.[39] If a reasonable, well-trained officer would have found the existence of exigent circumstances to justify a warrantless search, the search is deemed valid.[40] The State does not need to establish the defendant was "in fact preparing to escape, destroy evidence, endanger life, or damage property."[41]

The exigent circumstance of the danger that the suspect will escape justifies a warrantless search when the officer knows of specific and articulable facts that would suggest to a reasonable officer that escape is "imminent."[42] To reasonably believe escape is imminent, the officer does not need to know for a fact that the suspect is preparing or attempting to escape.[43] Instead, it is sufficient for the officer to have a reason to believe the suspect could be trying to escape or would try to escape if the officer waited for a warrant.[44] Facts that would lead a reasonable officer to believe escape is imminent include the following: (1) the suspect has a means of escape,[45] (2) the violent nature of the crime makes an attempt to escape likely,[46] (3) the suspect is aware of the investigation against him or her,[47] and (4) the suspect's actions suggest that escape is imminent.[48]

Often, the suspect's actions result in a chase or "hot pursuit" of the suspect into the premises.[49] This situation has been referred to as the "hot pursuit" exception to the warrant requirement. However, "hot pursuit" is not a separate exception. Rather, it is a description of a circumstance that leads to a reasonable belief that the suspect is attempting to escape.[50] Thus, "hot pursuit" describes the exigent circumstance of the danger that the suspect will escape.

To justify a warrantless search under the exigent circumstance of the possibility of destruction of evidence, there must exist a real possibility that evidence will be destroyed if law enforcement officers cannot enter and search the premises before they obtain a search warrant.[51] The emergency circumstances creating the possibility of the destruction of evidence will vary from case to case. Circumstances which have seemed relevant to courts include (1) the degree of urgency involved and the amount of time necessary to obtain a warrant,[52] (2) the time of day,[53] (3) the possibility of danger to police officers guarding the premises while a search warrant is sought,[54] (4) information indicating the suspects are aware that the police are on their trail, (5)

the destructibility of the contraband,[55] and (6) the knowledge that efforts to dispose of the contraband and to escape are characteristic behavior of persons engaged in the suspected crime.[56]

The exigent circumstance of danger to the safety of officers or others will not normally justify a warrantless search of a place. Even when officer safety is a concern, a warrantless search of a person's home, motel room, office or other private place is limited to a search incident to an arrest, which includes a protective sweep. However, a concern for the safety of officers or others may justify the initial warrantless entry into such a place. For example, if officers hear gunshots, have a reason to believe a particular person fired the gun, and see that person through a window in his house holding a gun, then the officers may enter the house without a warrant and seize the gun.[57] In such a case, the officers have knowledge of specific facts that demonstrate that immediate entry into the house is necessary for the safety of the officers and others.[58] The key to this exigent circumstance is the officer's knowledge of facts that demonstrate that immediate action is necessary.[59]

It is possible that an officer who does not have probable cause to make an arrest will be conducting an investigatory stop inside a home or other private place.[60] In such a situation, if the officer develops articulable concerns for his or her safety, the officer should pat down (frisk) the suspect and seek consent to conduct a protective sweep. If consent is denied, the officer should leave. On the other hand, if the officer has probable cause to believe the suspect has committed or is committing a felony, then the officer may arrest the suspect. Likewise, if the pat down of the suspect reveals contraband or other evidence of a crime, the officer may arrest the suspect. At that point, the officer may conduct a search incident to arrest, including a protective sweep. However, if consent to search is denied, and probable cause to arrest does not exist, the officer should leave the premises.

The scope of a warrantless search of a place depends on the exigent circumstance that justifies the search. In other words, the reason for searching will govern the scope of the search. The scope of a warrantless search of a place, such as a home, motel room, or office, under each of the exigent circumstances is limited to entry into the premises to eliminate the exigency. For example, the purpose for the exigent circumstance of danger that the suspect will escape is met when police officers enter the premises and prevent the suspect's escape. Thus, the scope of a warrantless search under that exigent circumstance is limited to entering the premises, searching for the suspect, and apprehending the suspect. The officers may not search areas on the premises

where the suspect cannot reasonably be expected to be found, and may not continue their search after finding the suspect. However, if officers find contraband or other evidence in plain view while searching for the suspect, they may seize it, or include it in an application for a search warrant.

Similarly, the purpose for allowing a warrantless search under the exigent circumstance of a danger of the destruction of evidence is met when officers enter the premises and either apprehend the suspect or others capable of destroying the evidence, or seize the evidence. Therefore, the scope of a warrantless search conducted under this exigent circumstance is limited to entering the premises, searching for the suspect and the evidence which could be destroyed, and seizing the suspect and the evidence. Again, any search beyond that, for example of areas where the suspect or contraband may not be found, or after the suspect or contraband have been seized, would exceed the scope of a valid search.

Finally, like the other exigent circumstances, the purpose for allowing a warrantless search when there is a danger to officers and others is met when the officers enter the premises and eliminate the danger. Thus, a search conducted under the exigent circumstance of danger to officers or others must be limited to the actions designed specifically to ensure safety, such as entry into the premises to apprehend a dangerous suspect, pat down of the suspect or others inside the premises, and search of the suspect and the premises for weapons if the suspect is arrested. The search incident to arrest may include a protective sweep of the premises for other people who might pose a danger, and a search of the area of the premises in the arrestee's immediate control. In addition, as with other searches, officers may seize items obviously contraband or evidence of a crime that are found in plain view after the lawful entry.

IV. Searching a student on school premises.

"School children do not shed their constitutional rights at the schoolhouse gate."[61] Therefore, the Fourth Amendment applies to searches of students in schools.[62] However, a student's Fourth Amendment right to be free from unreasonable searches and seizures is tempered by the school's interests in discipline and order.[63] As a result, the United States Supreme Court has "rejected the need for school authorities to obtain search warrants before searching students and also lessened the search and seizure standard for school authorities from probable cause to reasonable suspicion."[64] The Court has also allowed suspicionless searches of

students under very limited circumstances that establish a "safety concern that is substantial enough to override the individual's privacy interests."[65]

The reasonable suspicion standard for a warrantless search of a student applies in two circumstances. First, it applies to a search of a student, or a student's personal property or locker, conducted by a school official.[66] The school official must have a reasonable suspicion, based on articulable facts that the student is violating or has violated the law, a school rule, or school policy.[67] The facts must also support a reasonable suspicion that evidence of the suspected violation will be found during the search. In addition, the search must occur on school grounds, either during school hours or during a school activity.[68]

Second, the reasonable suspicion standard applies to some searches of a student, or a student's personal property or locker, conducted by a "school resource officer."[69] A school resource officer is a full-time commissioned police officer assigned to a school by the officer's police department. "A school resource officer serves multiple purposes, including the prevention of crime, law enforcement, and assisting the school administration in creating and sustaining a safe environment conducive to learning."[70] Whether the lower standard of reasonable suspicion applies to a particular search depends on which of those roles the officer is fulfilling by conducting the search. If the officer is searching at the request of school officials in order to further the school's goal of maintaining "a safe and proper educational environment," then the lower standard of reasonable suspicion applies.[71] In such a case, the officer could search if he has reasonable suspicion, based on articulable facts, that the student is violating or has violated a law, school rule, or school policy. On the other hand, if the officer is searching solely to obtain evidence of a crime, unrelated to the safety and welfare of other students, and the search is at the request of the school officials, the general warrant requirement applies.[72] In that case, the officer would have to obtain a warrant, based on probable cause, unless a recognized exception to the warrant requirement applies, such as an exigent circumstance.

The reasonable suspicion standard for a warrantless search of a student on school premises never applies to a search conducted by a police officer for the sole purpose of investigating a crime. In other words, a police officer searching for evidence of a crime must obtain a search warrant based on probable cause, unless the circumstances surrounding the search support a recognized exception to the warrant requirement. Exceptions that might apply

include consent, probable cause plus exigent circumstances, search incident to arrest, and pat down during an investigatory stop.

The validity of a school search depends not only on whether the search is justified under the appropriate standard (reasonable suspicion or probable cause), but also the scope of the search. To be valid, a school search must be limited in scope to the reason for the search.[73] In addition, the search must not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."[74] For example, if a school official asks a school resource officer to search a student's pocket because a bulge in the pocket suggests a weapon may be concealed, requesting the student to empty his pockets, or reaching into the pocket is permissible.[75] In such a case, the search of the pocket is reasonably related to the purpose of the search.[76] On the other hand, if the school resource officer reaches into the pocket and then searches the student's backpack, that search would exceed the purpose of the search.

V. Searching the home of a person on probation or parole.

When a person is convicted of a crime, the district court has statutory authority to place that person on supervised probation as part of his or her sentence.[77] In so doing, the court may "may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens."[78] One of those conditions is the condition that the probationer submit to a warrantless search upon the request of a probation officer.[79] A similar condition may be imposed on persons released from prison on parole.[80] Consequently, probationers and parolees have "'significantly diminished' expectations of privacy,"[81] and "more limited rights" concerning searches than a person not on probation or parole.[82] Moreover, the "'special needs' of a state's probation system, beyond normal law enforcement, justifie[s] an exception to the 'usual warrant and probable-cause requirements.'"[83]

However, because New Mexico's probation and parole regulations require reasonable suspicion to search the home of a probationer or parolee, neither a probationer's diminished expectation of privacy, nor the State's special needs, can justify a suspicionless search.[84] Rather, a search conducted by a probation or parole officer pursuant to a condition of probation or parole authorizing warrantless searches must be supported by reasonable suspicion to believe that contraband or other evidence of a probation or parole violation will be found.[85]

Cooperation between probation officers and police

Police officers may participate in a search of the home of a probationer or parolee, as long as the police participation is at the request of the probation or parole officer.[86] The probation or parole officer must "be acting as the [probationer's] 'supervising guardian,' and not as an agent of the police.[87] In determining whether police involvement rendered a search outside the scope of the "probationer exception to the warrant requirement," courts consider (1) who initiated the search - police or probation officer, (2) the purpose for the search, (3) the extent to which the police directly participated in the search, or directed the probation officer in his search, and (4) whether the search would have occurred but for the police involvement.[88] Ultimately, these factors must establish "an independent probationary reason" for the search.[89]

SEARCHING A PLACE

ENDNOTES

[1] State v. Jacobs, 2000-NMSC-026, ¶ 35, 129 N.M. 448, 10 P.3d 127 (citing Maryland v. Buie, 494 U.S. 325 (1990); State v. Eckard, 2012-NMCA-067, ¶ 14, 281 P.3d 1248 (protective sweep of residence may be justified when arrest occurs a short distance from the residence, if there is reason to believe others who pose a danger to the arresting officers are inside the residence).

[2] *See* State v. Valdez, 1990-NMCA-134, ¶ 11, 111 N.M. 438, 806 P.2d 578 (sweep conducted before the police decided to arrest the suspect, and while the suspect was allowed to roam about the house gathering weapons, was invalid; sweep did not protect officer safety); State v. Trudelle, 2007-NMCA-066, ¶ 22, 142 N.M. 18, 162 P.3d 173 (protective sweep invalid where suspect was not under arrest at the time of the search).

[3] Valdez, 1990-NMCA-134, ¶ 9; State v. Ramos, 2017-NMCA-041, ¶¶ 29, 32, 394 P.3d 968 (sweep conducted where domestic violence victim informed police that the suspect had left the home and driven away was invalid because it was not made pursuant to an arrest); Eckard, 2012-NMCA-067, ¶ 29 (during execution of an arrest warrant, officers did not have information that people other than the arrestees were present in the premises and, therefore, protective sweep was invalid).

[4] *See* Jacobs, 2000-NMSC-026, ¶ 38 (people seen entering the house but not seen leaving); State v. Lara, 1990-NMCA-075, ¶ 22, 110 N.M. 507, 797 P.2d 296 (fact that victims could not tell for certain whether others were in the house, combined with the violent nature of the crime, justified belief that others could be in the house and pose danger to arresting officers).

[5] State v. Sublet, 2011-NMCA-075, ¶ 31, 150 N.M. 378, 258 P.3d 1170 (during arrest following a undercover purchase of drugs in the home, officer's observation that one suspect was attempting to conceal evidence in a closet was not sufficient to justify a protective sweep, as the observation did not demonstrate either a safety concern, or a concern that evidence would be destroyed); State v. Zamora, 2005-NMCA-039, 137 N.M. 301, 110 P.3d 517

(during protective sweep of the bathroom, officer looked inside a medicine cabinet that had been left ajar, finding crack cocaine; search of medicine cabinet found beyond the scope of the protective sweep incident to arrest).

[6] Jacobs, 2000-NMSC-026, ¶ 35.

[7] State v. Martinez, 1997-NMCA-048, ¶ 6, 123 N.M. 405, 940 P.2d 1200 (quoting Chimel v. California, 395 U.S. 752, 762-63 (1969)).

[8] Martinez, 1997-NMCA-048, ¶ 6.

[9] Id.

[10] Id. ¶¶ 4, 12 (search of paper sack found in room other than room in which the defendant was arrested was not valid search incident to arrest).

[11] Id. ¶ 6 (quoting Chimel, 395 U.S. at 762-63).

[12] Id.

[13] Martinez, ¶ 7 (citing United States v. Lucas, 898 F.2d 606, 609-10 (8th Cir. 1990) (kitchen cabinet); United States v. Parra, 1 F.3d 1058, 1063 (10th Cir.1993) (under pillow); United States v. Nelson, 102 F.3d 1344, 1347 (4th Cir. 1996) (shoulder bag).

[14] Id. ¶ 7; State v. Gutierrez, 2004-NMCA-081, ¶ 11, 136 N.M. 18, 94 P.3d 18.

[15] Lara, 1990-NMCA-075, ¶ 23.

[16] Id.

[17] Id. (blood stains found in plain view during a protective sweep were obviously evidence of the crime of battery for which the defendant was arrested and, therefore, taking pictures of the blood stains was proper).

[18] However, it should be noted that if the officers are wrong about the necessity for a protective sweep, the search warrant will be invalidated, and absent objective evidence other than the officer's testimony that he intended to obtain a warrant, the evidence will not be admissible under either the inevitable discovery exception or the independent source doctrine. *See* State v. Wagoner, 1998-NMCA-124, ¶ 19, 126 N.M. 9.

[19] State v. Wagoner, 1998-NMCA-124, ¶ 19, 126 N.M. 9, 966 P.2d 176 (entry and search of trailer home held invalid because exigent circumstance of possible destruction of evidence did not exist; no reason to believe destruction could have occurred while one officer sought a warrant and other officer removed occupants and secured the trailer until warrant was obtained).

[20] State v. Ryon, 2005-NMSC-005, ¶ 24, 137 N.M. 174, 108 P.3d 1032.

[21] Id.

[22] *See* Id. ¶ 26.

[23] Id.

[24] *See* infra., pp. 77-78 (community caretaking stope of a vehicle or person) and pp. 106-109 (inventory search of a vehicle).

[25] Id.

[26] Id. ¶ 39.

[27] State v. Baca, 2007-NMCA-016, ¶ 20, 141 N.M. 65, 150 P.3d 1015.

[28] Id. ¶ 23 (the officer's vague and speculative concern that an individual may have suffered a drug overdose was insufficient where officer's concern was based only on the facts that the individual had not been seen for two days, was last seen in the presence of known drug users, and was not answering his door).

[29] State v. Cordova, 2016-NMCA-019, ¶¶ 11-13, 366 P.3d 270 (Fact that the defendant's truck was involved in a serious accident was insufficient to justify entry into his home where officers did not find the defendant in the truck at the scene and, therefore, did not know whether the defendant was in the truck at the time of the accident, and had no information that he was home or that he was injured).

[30] Ryon, ¶ 39.

[31] Id. ¶ 35 ("[W]e recognize that emergency situations can occur during a criminal investigation.").

[32] Id. ¶ 27 (disagreeing that, under State v. Nemeth, 2001-NMCA-029, ¶ 27, 130 N.M. 261, 23 P.3d 936, "officers may never respond to an emergency when they are investigating a crime or attempting to arrest a suspect," and recognizing, instead, that circumstances may develop during a criminal investigation that would justify the emergency assistance doctrine).

[33] Id. ¶ 39; *see also*, Cordova, 2016-NMCA-019, ¶ 13.

[34] Id.

[35] As discussed herein, pp. 129-131, conducting a search on school grounds involves particular circumstances requiring rules specific to those circumstances.

[36] *See* State v. Valdez, 1990-NMCA-134, ¶13, 111 N.M. 438, 806 P.2d 578.

[37] *See* supra., pp. 109-111.

[38] State v. Copeland, 1986-NMCA-083, ¶ 14, 105 N.M. 27, 727 P.2d 1342.

[39] Id. ¶ 40; State v. Allen, 2011-NMCA-019, ¶ 15, 149 N.M. 267, 247 P.3d 1152.

[40] Copeland, 1986-NMCA-083, ¶ 1.

[41] State v. Snyder, 1998-NMCA-166, ¶ 20, 126 N.M. 168, 967 P.2d 843.

[42] *See* State v. Chavez, 1982-NMCA-072, ¶ 16, 98 N.M. 61, 644 P.2d 1050.

[43] Id.

[44] Id.

[45] Id. ¶ 17.

[46] Id.; *See also* Lara, 1990-NMCA-075, ¶ 20.

[47] Id.

[48] *See* State v. Moore, 1979-NMCA-037, ¶ 16, 92 N.M. 663, 593 P.2d 760 (suspect entered his house to get identification and did not come back out); State v. Duffy, 1998-NMSC-014, ¶ 71, 126 N.M. 132, 967 P.2d 807 (suspect became upset upon seeing the officers in the trailer home, and moved toward the back of the trailer).

[49] *See* Moore, 1979-NMCA-037, ¶ 20.

[50] *See* Id. ¶¶ 14-15.

[51] State v. Gomez, 1997-NMSC-006, ¶ 42, 122 N.M. 777, 932 P.2d 1 (citing State v. Ortega, 1994-NMSC-013, ¶ 9, 117 N.M. 160, 870 P.2d 122.; *see also* Wagoner, 1998-NMCA-124, ¶ 12 (applying requirement to warrantless search of a home).

[52] Copeland, 1986-NMCA-083, ¶ 15 (warrantless search of home was justified because it would have taken the officers two and one-half to three hours to get a warrant); Snyder, 1998-NMCA-166, ¶ 21 (nearest magistrate was 35 miles away from border checkpoint where defendant was stopped).

[53] Gomez, 1997-NMCA-006, ¶ 40.

[54] Id.

[55] Copeland, 1986-NMCA-083, ¶ 15 (the metabolizing of the alcohol in the defendant's system is as much a means of destruction as flushing drugs down the toilet). *But see* Missouri v. McNeely, 569 U.S. 141 (2013) (the natural dissipation of alcohol from the bloodstream will not *always* constitute an exigency justifying warrantless taking of a blood sample, and will depend on all of the facts and circumstances of the particular case).

[56] Wagoner, 1998-NMCA-124, ¶ 12 (quoting United States v. Rubin, 474 F.2d 262, 268 (3rd Cir. 1973)).

[57] State v. Calvillo, 1990-NMCA-046, ¶ 10, 110 N.M. 114, 792 P.2d 1157.

[58] Id. ¶ 14.

[59] State v. Moore, 2008-NMCA-056, ¶ 14, 144 N.M. 14, 183 P.3d 158. Interestingly, New Mexico courts do not consider facts indicating the presence of a methamphetamine lab sufficient to justify immediate entry into a home. Id.; *see also* Trudelle, 2007-NMCA-066, ¶ 29. Rather, immediate entry requires additional facts, such as facts indicating the lab is a working lab, State v. Allen, 2011-NMCA-019, 149 N.M. 267, 247 P.3d 1152, or facts indicating the presence of a person inside the home; State v. Brown, 2010-NMCA-079, ¶ 18, 148 N.M. 888, 242 P.3d 455.

[60] Entry into the premises may be consensual, or may be justified by probable cause and exigent circumstances.

[61] State v. Tywane H., 1997-NMCA-015, ¶ 7, 123 N.M. 42, 933 P.2d 251(citing Vernonia Sch. Dist. 47J v. Action, 515 U.S. 646 (1995) and Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).

[62] Id.

[63] Tywayne H., 1997- NMCA-015, ¶ 8.

[64]Id. (citing New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985)).

[65] State v. Gage R., 2010-NMCA-104, ¶ 13, 149 N.M. 14, 243 P.3d 453 (citing Vernonia, 515 U.S. at 653, and Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 829, 837 (2002)). Suspicionless school searches of students include random drug tests for athletes and students who participate in other competitive extracurricular activities.

[66] Tywayne H., 1997- NMCA-015, ¶ 8.

[67] Id.; *see also* Gage R., 2010-NMCA-104, ¶¶ 12, 20 (child's presence with other students who were smoking on school grounds was not sufficient to establish individualized suspicion that child was also smoking).

[68] State v. Crystal B., 2001-NMCA-010, ¶ 14, 130 N.M. 336, 24 P.3d 771. The lower standard of reasonableness under the circumstances to justify a school search applies "only in furtherance of the school's education-related goals; that is in a situation where the student is on school property or while the student is under control of the school." Id.

[69] In re Josue T., 1999-NMCA-115, ¶ 20, 128 N.M. 56, 989 P.2d 431.

[70] Id.

[71] Id.

[72] Id.

[73] Id. ¶ 27; *see also*, State v. Pablo R., 2006-NMCA-072, 139 N.M. 744, 139 P.3d 1198 (search of a backpack belonging to a student who was stopped for being out of class without a

pass was unreasonable because the backpack was not likely to contain evidence of the student's infraction).

[74] Id. (quoting T.L.O., 469 U.S. at 342).

[75] Id.

[76] Id.

[77] State v. Baca, 2004-NMCA-049, ¶ 17, 135 N.M. 490, 90 P.3d 509 (citing NMSA 1978, § 31-20-6(C) (1997)).

[78] Id. (quoting United States v. Knights, 534 U.S. 112, 119 (2001).

[79] Baca, 2004-NMCA-049, ¶ 18. Such conditions are valid as long as they are "reasonably related" to the probationer's rehabilitation." Id. (quoting § 31-20-6). "'To be reasonably related, the probation condition must be relevant to the offense for which probation was granted.'" Id. (quoting State v. Gardner, 1980-NMCA-122, ¶ 19, 95 N.M. 171, 619 P.2d 847).

[80] *See* State v. Benavidez, 2010-NMCA-035, ¶ 15, 148 N.M. 190, 231 P.3d 1132.

[81] Baca, 2004-NMCA-044, ¶ 27 (quoting Knights, 534 U.S. at 121)

[82] Id. ¶ 23 (quoting Gardner, 1980-NMCA-122, ¶ 14).

[83] Id. ¶ 31 (quoting Griffin, 483 U.S. at 873-74).

[84] Benavidez, 2010-NMCA-035, ¶ 20. In Samson v. California, 547 U.S. 843, 846 (2006), the Supreme Court upheld a California law allowing for suspicionless searches of parolees and their homes. In so doing, the Court concluded that "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." Id. at 850. Indeed, the Court found that a parolee who agreed to suspicionless searches of his home as a condition of completing his sentence on parole, "did not have an expectation of privacy that society would recognize as legitimate." Id. at 852. In Benevidez, our Court of Appeals construed Samson as setting "the constitutional floor for permissible parole and probation searches pursuant to a state's policy." 2010-NMCA-035, ¶ 17. In other words, a warrantless search of the home of a

probationer or parolee is constitutional as long as it complies with state regulations and policies. Because New Mexico regulations and policies require reasonable suspicion, a search of the home of a probationer or parolee requires reasonable suspicion.

[85] Baca, 2004-NMCA-049, ¶ 37-43.

[86] State v. Bolin, 2010-NMCA-066, ¶ 14, 148 N.M. 489, 238 P.3d 363 (quoting Gardner, 1980-NMCA-122, ¶ 25)

[87] Id. ¶ 15.

[88] *See* id. ¶¶ 16-19.

[89] Id. ¶ 20.

SEARCH AND SEIZURE OF ELECTRONIC DEVICES

OUTLINE

I. A search or seizue of an electronic device requires a warrant or a recognized excetion to the warrant requirement.

A. A search incident to arrest will generally not justify a warrantless search of a cell phone or other device.

B. To justify a warrantless search under probable cause and exigent circumstances, the exigency, such as destruction of evidence, must be such that preventative measures are not possible or practicable.

II. Electronic communications and records held by service providers.

A. Under the third-party doctrine, people do not have a Fourth Amendment protection against disclosure of information held by third-party providers, such as internet service providers and social media networks.

B. Federal statute provides some protection, including requirements for warrants or subpoenas under certain circumstances.

SEARCH AND SEIZURE OF ELECTRONIC DEVICES AND DATA

SUMMARY

Electronic Devices

More and more frequently, officers investigating criminal activity develop reason to believe that an electronic device, such as a cell phone, a computer, or a camera, contains data that is evidence of a crime. Thus, essentially, electronic devices are containers in which evidence may be found and courts tend to treat them as such. Thus, search and seizure of an electronic device is governed by the same constitutional principles as search and seizure of other types of containers: accessing data on an electronic device requires a warrant, unless a recognized exception applies.[1]

For example, the United States Supreme Court has held that, before searching the contents of a cellular phone, an officer must have either a warrant or a valid exception to the warrant requirement.[2] The warrant requirement is not limited to the extraction of data using forensic tools. An officer is searching a phone simply by pressing a button to look at the call log and, to do so, must have a warrant or a recognized exception.[3]

Warrants to search or seize electronic devices fall under the same rules for warrants of other types of property. The affidavit supporting the warrant must show probable cause "(1) that the items sought to be seized are evidence of a crime; and (2) that the criminal evidence sought is located at the place to be searched."[4]

The New Mexico Supreme Court has ruled that once "there is probable cause to search for a particular item," the office executing the warrant "can search every container and location within the permitted area where that item could be located."[5] It should be noted, however, that the facts included in the affidavit are critical to establishing the proper scope of the warrant and search. In Gurule, the affiant articulated her training and experience, which showed the variety of devices and media on which digital evidence could be found.[6]

In most circumstances, search incident to arrest is not justification to access the data contained on an electronic device. This is because searches incident to arrest are limited by the need to protect officer safety or to preserve evidence.[7] Therefore, in a search incident to arrest, an officer may "examine the physical aspects of a phone to ensure that it will not be used as a weapon - say, to determine whether there is a razor blade hidden between the phone and its

case."[8] The data on the device itself, however, does not pose a danger and, therefore, may not be accessed pursuant to a search incident to arrest.[9]

Regarding the need to preserve evidence, generalized concerns about remote wiping or encryption are not sufficient to justify a warrantless search of a cellular phone or other electronic device.[10] Instead, officers can mitigate these concerns by using measures such as "Faraday bags" to prevent the phone from communicating with the network.[11] On the other hand, if officers have specific concerns that an attempt to destroy evidence is in progress, then exigent circumstances could justify a warrantless search.[12]

Electronic Communications and Records held by Service Providers

In 1976, the United States Supreme Court decided a case that led to establishment of the the "third-party doctrine."[13] Under the third-party doctrine, people generally do not have a constitutionally-protected privacy interest in information or documents stored with a third party.[14]

Ten years later, Congress passed the Electronic Communications Privacy Act of 1986 (ECPA), which included the Stored Communications Act (SCA).[15] The statue created statutory privacy protections for certain electronic records held by "providers of electronic communications service," a catch-all term that generally includes cellular phone providers, internet service providers, and social media networks.[16] The details of the statute and its various requirements are beyond the scope of this manual. It should be noted, however, that protections provided by the statute include, in certain circumstances, warrant or subpoena requirements. Officers seeking access to date held by third-party providers should be familiar with those requirements.[17]

ECPA/SCA also authorizes law enforcement to issue preservation requests and requires service providers to preserve records and evidence pending the issuance of a court order or other process.[18] Service providers must preserve the records for 90 days following a request, and that period may be extended by an additional 90 days if law enforcement sends a renewed request.[19]

SEARCH AND SEIZURE OF ELECTRONIC DEVICES

ENDNOTES

[1] Therefore, the guidance contained elsewhere in this manual applies with equal force to the search and seizure of electronic devices.

[2] Riley v. California, __ U.S. __, 134 S.Ct. 2473, 2494.

[3] Id. 2494.

[4] State v. Gurule, 2013-NMSC-025, ¶¶ 13-14, 303 P.3d 838. (*See* Chapter One of this manual, "Search Warrant Affidavits").

[5] Id. ¶¶ 27-28.

[6] Id. ¶ 20.

[7] Riley, 134 S.Ct. at 2485.

[8] Id.

[9] Id.

[10] Id. 2486-87.

[11] Id.

[12] Id. 2487. New Mexico also recognizes the impracticalities of waiting for a warrant as an exigent circumstance that could justify a warrantless arrest based on probable cause. State v. Paananen, 2015-NMSC-031, ¶ 27, 357 P.3d 958. It should be noted, however, that our courts have not specifically addressed whether such a justification applies to warrantless searches.

[13] United States v. Miller, 425 U.S. 435 (1976).

[14] As of this writing, however, the United States Supreme Court is considering a challenge to the third-party doctrine. In Carpenter v. United States, No. 16-402, the petitioner argues that the doctrine does not apply to historical cell phone records "revealing the location and movements of a cell phone user over the course of 127 days." Instead, the petitioner argues that the Fourth Amendment requires that this information only be obtained

through a warrant. This case has the potential to alter the landscape regarding stored electronic records.

[15] 18 U.S.C. § 2701, *et seq*.

[16] Id.

[17] For example, the statute divides the information generally sought from third party providers into three categories and imposes different process requirements, such as a warrant or subpoena, on each category. The table below identifies the necessary process for different categories of records held in storage at a service provider.

Type of Information	Minimum Level of Process Necessary	Governing Law
Contents in storage less than 180 days	Warrant	§ 2703(a)
Contents in storage more than 180 days	Warrant, no notice necessary 2703(d) order, with prior notice to subscriber Subpoena, with prior notice to subscriber	§ 2703(a), (b)
Transactional data	2703(d) order	§ 2703(c)(1)
Subscriber information	Subpoena	§ 2703(c)(2)

[18] 18 U.S.C. § 2703(f).

[19] Id.

MAKING AN ARREST

OUTLINE

I. **Misdemeanor arrest: Crime committed in the officer's presence.**

A. An officer may make a warrantless arrest if the officer has probable cause to believe a misdemeanor offense is being committed in the officer's presence.

B. Probable cause must be based on the officer's observations.

C. The police-team concept allows an officer other than the officer who observes the offense to make the arrest.

D. The arrest must be made at the time of the offense or within a reasonable time after the offense.

II. Felony arrest: Probable cause plus exigent circumstances.

A. An officer must have probable cause to believe the suspect had committed or was committing a crime, AND

B. Exigent circumstances must exist to make it reasonable for the officer to not procure an arrest warrant.

1. Possibility of the suspect's escape while waiting for a warrant.
2. Threat to the safety of officers and others.

C. An officer may make an arrest when the officer observes the suspect committing a felony (exigency is presumed).

MAKING AN ARREST

SUMMARY

I. Misdemeanor arrest rule: Crime committed in the officer's presence.

A police officer may arrest a person for a misdemeanor offense if the officer has probable cause to believe an offense is being committed in the officer's presence.[1] Probable cause for a misdemeanor arrest exists if the facts known to the officer at the time would lead a person of reasonable caution to believe an offense is being committed.[2] The facts known to the officer must be facts obtained through the officer's observations. Such observations include facts perceived by the officer through his or her senses, including sight, smell and hearing.[3] To be sufficient to establish probable cause, the officer's observations must indicate that a misdemeanor offense is occurring in the officer's presence.

In addition, a misdemeanor arrest must be made at the time of the offense or within a reasonable time after the offense.[4] However, a delay in making the arrest may be justified by the officer's continued attempt to make the arrest and exigent circumstances.[5] Exigent circumstances justifying a delay in making the arrest include the time elapsed while in pursuit of the suspect, or the time spent requesting assistance in the investigation or arrest.[6] For example, the Court of Appeals has found a two to three hour delay in making an arrest reasonable "when the officer was called upon to investigate a multiple-vehicle accident in which nineteen people were injured."[7] However, the officer may not attend to matters other than the investigation and arrest during the delay. For example, when an officer fails to make an immediate arrest, goes about other business and then returns to make the arrest thirty to forty minutes later, that delay is unreasonable.[8] Thus, to be reasonable, the delay must be related to the arrest. Moreover, the length of the delay must be reasonably related to the reason for the delay. In other words, the length of the delay must not exceed a reasonable amount of time to accomplish the purpose for the delay.[9]

Police-team qualification

New Mexico courts recognize some exceptions or qualifications to the misdemeanor arrest rule. For example, New Mexico recognizes the "police team qualification," which allows an arrest by an officer who did not observe the offense being committed, but received information about the offense from another officer who did observe the offense.[10] The police

team qualification has three requirements. First, the misdemeanor offense must be committed in the presence of at least one police officer.[11] Second, the officer who observes the offense must communicate promptly to another officer information about the offense and the offender.[12] Third, the second officer must make an arrest within a reasonable time from receiving the information from the first officer.[13]

Our courts have recognized two circumstances under which the police-team qualification applies. The police-team qualification applies in situations in which an officer must seek assistance from another officer to prevent danger to the officer or flight of the suspect.[14] For example, when an officer is assaulted while attempting to stop a fight and the attacker flees into a crowd, a second officer who arrives to assist the first officer may arrest the suspect, even though the second officer did not observe the assault.[15] The police-team qualification also applies to situations in which two or more officers are working together on an investigation. In such a case, the arresting officer may rely on observations made by other officers to establish probable cause to believe the misdemeanor occurred in an officer's presence.[16]

DWI arrests.

"[T]he misdemeanor arrest rule does not apply to DWI investigations."[17] Because of the danger to the public created by driving while intoxicated, and because the Legislature has designated DWI as both a misdemeanor and a felony, DWI is treated as a felony for the purposes of determining the validity of a warrantless arrest.[18] Consequently, an officer need not observe the offense of DWI before making a warrantless arrest, as required by the misdemeanor arrest rule.[19] Rather, an officer may make the arrest based on probable cause and exigent circumstances.[20]

Certain domestic violence arrests.

Section 31-1-7(A) provides an exception to the misdemeanor arrest rule in some domestic violence investigations.[21] That statute provides that an officer may make a warrantless arrest "when the officer is at the scene of a domestic disturbance and has probable cause to believe that the person has committed an assault or a battery upon a household member."[22] Such an arrest does not require the officer to observe the crime being committed. Rather, an officer may make the arrest based on articulable facts establishing probable cause that the suspect has committed the offense.[23] Such an arrest does not require exigent circumstances in addition to probable cause. The only requirement aside from probable cause is that the officer is "at the scene" of the

offense at the time of the arrest.[24] That requirement does not demand the officer's presence at the time of the offense, or the officer's presence at the exact location of the offense.[25] Because the purpose of Section 31-1-7(A) is to enable an officer to ensure the victim's safety by allowing the officer to arrest an aggressor who is still at the scene of the attack, the statute simply requires that the officer "make the warrantless arrest reasonably close to the scene both spatially and temporally."[26]

Arrests for non-jailable minor offenses

Under the Fourth Amendment, an officer may make a warrantless arrest for a non-jailable minor offense based on probable cause, such as the officer's observation of the crime being committed.[27] Under Article II, Section 10 of the state constitution, however, an officer is required to issue a citation for a non-jailable minor offense, unless the officer can articulate legitimate reasons that justify the additional intrusion of an arrest.[28] Such reasons may include facts indicating that the suspect is a flight risk, or circumstances that make an arrest necessary in order to abate the proscribed conduct.[29]

II. Felony arrest: Probable cause plus exigent circumstances.

In New Mexico, a warrantless arrest for a felony generally requires probable cause plus exigent circumstances.[30] In other words, an officer making a warrantless arrest of a suspect for a felony offense must have probable cause to believe the suspect has committed or is committing the offense, and exigent circumstances must exist to justify the immediate arrest without a warrant.[31] Probable cause alone is not sufficient. Exigent circumstances that may justify a warrantless search include the possibility of the suspect's escape during the time it takes to obtain a warrant and the threat to the safety of police officers and others that could occur while a warrant is sought.[32] In addition, circumstances that "make it not reasonably practicable to get a warrant" also qualify as exigent circumstances that justify an immediate warrantless arrest.[33] For example, a warrantless arrest is justified when officers have probable cause to believe that the suspect, who has been detained by store security, has committed shoplifting. Under those circumstances, the alternatives to an immediate arrest - continued detention of the suspect or release of the suspect while a warrant is obtained - are not practicable and, therefore, an immediate warrantless arrest is justified.[34] Whatever the exigent circumstance claimed, it must be such that it was reasonable for the officer to decide not to seek an arrest warrant.[35]

The amount of time that elapses between the formation of probable cause and the actual arrest can be an indicator of the reasonableness of the decision to forego a warrant. For example, if the officer obtains probable cause to make the arrest and decides to forego the warrant, but does not make the arrest until the next day, the decision to forego the warrant will be deemed unreasonable.[36] After all, if the officer can wait a day, then the exigency must not have been very great. Stated differently, an officer may not create an exigency by unreasonably delaying his decision to seek a warrant. On the other hand, our courts recognize that an officer may have reasonable grounds to decide to continue his investigation rather than stop the investigation to seek a warrant.[37] Ultimately, the validity of a warrantless arrest is determined on a case by case basis by the reasonableness of the decision to forego a warrant and make an immediate arrest.[38]

When the arresting officer observes the suspect committing the felony offense, the officer may make the arrest immediately, without a warrant. In such a case, the exigency is presumed.[39] Although our courts have not had occasion to further explain this exception for felonies committed in the presence of an officer, it is highly likely that the courts will impose similar requirements as those imposed on warrantless misdemeanor arrests. Those requirements include probable cause based on the officer's observations, and prompt arrest after observation of the offense. The police-team qualification should also apply to allow an arrest based on information observed by another officer either assisting or collaborating with the arresting officer.[40]

MAKING AN ARREST

ENDNOTES

[1] State v. Hawkins, 1999-NMCA-126, ¶ 17, 128 N.M. 245, 991 P.2d 989; State v. Almanzar, 2014-NMSC-001, ¶ 13, 316 P.3d 183. Our Supreme Court has suggested that a misdemeanor arrest may also be based on probable cause and exigent circumstances when the offense was not committed in an officer's presence. *See* State v. Paananen, 2015-NMSC-031, ¶ 28, 357 P.3d 958.

[2] Id. (citing State v. Goss, 1991-NMCA-003, ¶ 17, 111 N.M. 530, 807 P.2d 228); *see also* State v. Sanchez, 2001-NMCA-109, ¶¶ 6, 11, 131 N.M. 355, 36 P.3d 446. In Sanchez, the Court held the officer had probable cause to arrest the defendant for DWI based on the officer's observations that the defendant smelled of alcohol, had bloodshot, watery eyes, and admitted to drinking two beers prior to driving. In so doing, the court explained, "An officer does not have to observe a suspect actually driving in an impaired manner if the officer, based upon all the facts and circumstances, has 'reasonable grounds to believe that Defendant had been driving while intoxicated'" Sanchez 2001-NMCA-109, ¶ 6, (quoting State v. Jones, 1998-NMCA-076, ¶ 10, 125 N.M. 556, 964 P.2d 117).

[3] State v. Salas, 1999-NMCA-099, ¶ 10, 127 N.M. 686, 986 P.2d 482.

[4] State v. Warren, 1985-NMCA-095, ¶ 26, 103 N.M. 472, 709 P.2d 194.

[5] Id. at ¶ 32.

[6] Id.

[7] Id. (citing State v. Calanche, 1978-NMCA-007, ¶ 21, 91 N.M. 390, 574 P.2d 1018).

[8] Id. at ¶ 33.

[9] Id. at ¶¶ 31-33.

[10] State v. Lyon, 1985-NMCA-082, ¶ 18, 103 N.M. 305, 706 P.2d 516.

[11] Warren, 1985-NMCA-095, ¶ 21.

[12] Id.

[13] Id.

[14] Id. at ¶¶ 22-23, (citing State v. Marquez, 1985-NMCA-080, ¶¶ 10-13, 103 N.M. 265, 705 P.2d 170).

[15] *See* Marquez, 1985-NMCA-080, ¶¶ 2-13.

[16] Warren, 1985-NMCA-095, ¶ 26.

[17] City of Santa Fe v. Martinez, 2010-NMSC-033, ¶ 16, 148 N.M. 708, 242 P.3d 275.

[18] Id. ¶¶ 13-15.

[19] Id. ¶ 16.

[20] Id.

[21] *See* NMSA 1978, § 31-1-7(A) (1995); Almanzar, 2014-NMSC-001, ¶ 13.

[22] NMSA 1978, § 31-1-7(A) (1995).

[23] Almanzar, 2014-NMSC-001, ¶ 16.

[24] Id.

[25] Id. ¶ 20.

[26] Id.

[27] Atwater v. City of Lago Vista, 532 U.S. 318, 363 (2001).

[28] State v. Rodarte, 2005-NMCA-141, ¶¶ 9, 15, 20, 138 N.M. 668, 125 P.3d 647.

[29] *See* Id. ¶ 8 (citing Atwater, 532 U.S. at 365 (O'Connor, J., dissenting)).

[30] Campos v. State, 1994-NMSC-012, ¶ 14, 117 N.M. 155, 870 P.2d 117. In Campos, the New Mexico Supreme Court rejected the federal rule that probable cause, without exigent circumstances, is sufficient for a valid warrantless felony arrest. The Court based its decision on the greater protection against unreasonable searches and seizures and the stronger preference for warrants provided by the New Mexico Constitution than provided by the Fourth Amendment.

[31] Id.

[32] Id. ¶ 12, (citing State v. Jones, 1981-NMSC-013, ¶¶ 3-5, 96 N.M. 14, 627 P.2d 409) (exigency created by the suspect's attempt to leave the area in a car while officers were verifying an anonymous tip); and State v. Garcia, 1983-NMCA-069, ¶¶ 26-27, 100 N.M. 120, 666 P.2d 1267 (exigency implied by the defendant's attempt to flee).

[33] Paananen, 2015-NMSC-031, ¶ 27.

[34] Id. ¶ 25.

[35] Campos, 1994-NMSC-012, ¶ 14; Paananen, 2015-NMSC-031, ¶ 27.

[36] Campos, 1994-NMSC-012, ¶¶ 16-17.

[37] Id. ¶ 16.

[38] Campos, 1994-NMSC-012, ¶ 14; Paananen, 2015-NMSC-031, ¶ 27.

[39] Campos, 1994-NMSC-012, ¶ 14.

[40] *See* supra., p. 153.