

# The law of search and seizure

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Based on a tip that drugs were being sold out of the Western Inn, Officers Jesse and James of the Narcotics Task Force set up surveillance at the hotel. Just after 11:30 p.m., the officers saw two shady characters—Bugs and Daffy—walking along the east side of the building toward the alley behind the hotel. When the two spotted the officers, they reversed course and walked across the street at the light. The officers knew these two characters and decided they should stop and question them. When Daffy saw the officers walking towards them, he dropped something on the ground. Officer Jesse stopped the two and Officer James picked up the object dropped by Daffy—which proved to be a twist of cocaine. Daffy was charged with possession of a controlled substance. He now moves to suppress the evidence, arguing that the stop was not supported by reasonable suspicion.



# Argue, plead, or dismiss?

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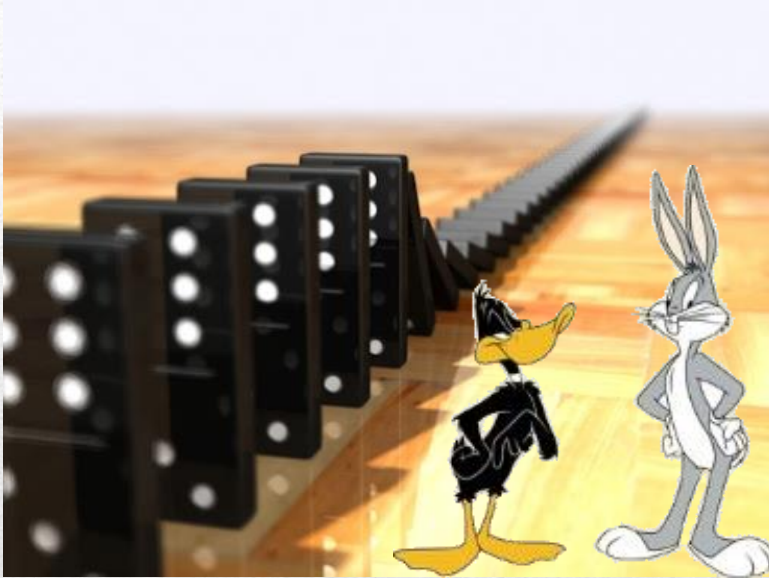
Officer responded to a Target store after receiving a call from a loss prevention officer reporting two suspicious men who were acting as if they were casing the store. The two men were stopped and questioned individually. The first man said that he came with his friend (Defendant) who drove a white pickup there. Other officers were sent to look for the pickup in the parking lot. Defendant, however, confirmed his friend's claim. Although the officers had no other evidence suggesting the two stole anything, they continued to detain Defendant for another five minutes. Ultimately, they said he was free to leave but he remained and continued to talk with the officers. Meanwhile, officers found the white pickup truck and saw in plain view marijuana and a pipe. Defendant was arrested and charged with possession of a controlled substance and paraphernalia. Defendant now moves to suppress the evidence, arguing that the stop was not supported by reasonable suspicion.



# Argue, plead, or dismiss?

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- As a threshold matter, exclusion is never appropriate unless “the evidence sought to be suppressed would not have come to light but for the government’s unconstitutional conduct.” United States v. Nava-Ramirez, 210 F.3d 1128, 1131 (10th Cir. 2000)
- *Nix v. Williams*, 467 U.S. 431, 444 (1984)

# But for causality

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Police received an anonymous tip that drugs were being sold at a house on Elm Street. Officer Nancy Thompson conducted afternoon surveillance at the home and observed some short term traffic consistent with drug transactions. She came back that evening to conduct more surveillance. When she arrived, she saw a man leave the house and walk down the street. Officer Thompson stopped the man, who identified himself as Freddy Krueger. Not surprisingly, a routine check with dispatch revealed an outstanding warrant. A search of Krueger's person uncovered cocaine. Krueger was arrested and charged with possession of a controlled substance. He has now moved to suppress the evidence, arguing that the stop was not supported by reasonable suspicion.



# Argue, plead, or dismiss?

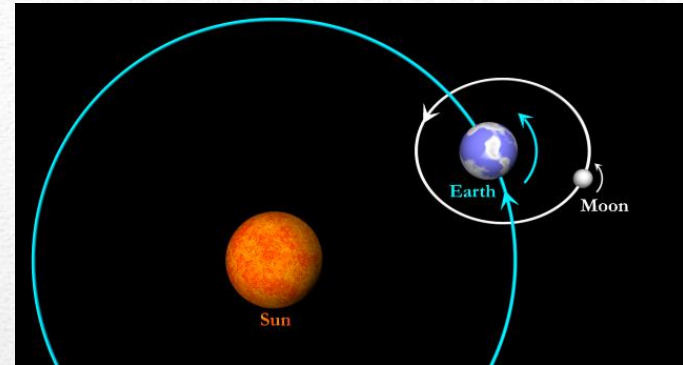
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“[N]ot . . . all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police.” Although the arrest came immediately after an unlawful detention, the arrest was sufficiently attenuated from the illegality because a warrant had previously been issued by a neutral magistrate authorizing the arrest and the officer “did not target [Defendant] in knowing or obvious disregard of constitutional limitations.” *State v. Strieff*, 2012 UT App 245, ¶ , 286 P.3d 317.

# Attenuation

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## Attenuation Factors:

1. Temporal proximity
2. Intervening circumstances
3. Purpose and flagrancy of police misconduct

Police received a tip that Ben Arnold was cooking meth in Unit 1776 of the Concord Storage Sheds. Officers Adams and Washington went to the storage shed and saw Arnold's horse in front and the shed door slightly ajar. K-9 Officer Jefferson brought in Franklin, a narcotics detection dog. Franklin was led past several storage sheds and alerted on Unit 1776. The officers knocked on the storage shed door and Arnold emerged, closing the door behind him.



The officers asked for permission to search the shed, but Arnold refused to give consent. Officers Adams and Washington entered anyway, saw the meth lab, and then shut the power off. Officer Adams left the scene and returned with a search warrant. Arnold was charged with operating a clandestine lab. He now moves to suppress the evidence, arguing that the officer's entry into the shed over his objection was unlawful.

# Argue, plead, or dismiss?

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“[T]he independent source doctrine admits challenged evidence if it was discovered through independent and lawful activity—if there is, in essence, an untainted version of the evidence.” *State v. Topanotes*, 2003 UT 30, ¶ 13, 76 P.3d 1159.

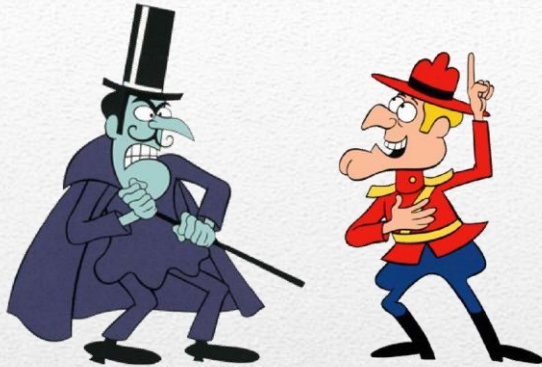
- The tainted evidence may not materially affect the probable cause showing in the warrant
- The tainted evidence may not have been the motivating factor for the officers to secure a warrant



# Independent source

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At 4:45 a.m., Officer Do-Right saw a woman leaning into an open passenger door talking to the driver of a parked car in an area known for drugs and prostitution. After the two ended their conversation, the driver—Snidely Whiplash—pulled away from the curb and turned left at an intersection without signaling. Officer Do-Right made a traffic stop and asked Snidely what he had been doing. Snidely said he had stopped to talk to the woman to see if she knew where he could find empty boxes for his sister, who was moving. A computer check revealed that Snidely's driver's license was suspended.

Officer Do-Right asked Snidely to step out of his car while he issued a citation. Before preparing the car for impound, Officer Do-Right frisked Snidely for weapons. During the frisk, a twist of cocaine fell from Snidely's sweatshirt. Snidely was arrested and charged with possession of a controlled substance. He has now moved to suppress the evidence, arguing that the frisk was not supported by reasonable suspicion.

# Argue, plead, or dismiss?

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The inevitable discovery doctrine “is similar to the independent source doctrine; it enables courts to look to the facts and circumstances surrounding the discovery of the tainted evidence and asks whether the police would have discovered the evidence despite the illegality. ‘If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received.’” *State v. Topanotes*, 2003 UT 30, ¶ 14, 76 P.3d 1159.

“For courts to confidently predict what would have occurred, but did not actually occur, there must be persuasive evidence of events or circumstances apart from those resulting in illegal police activity that would have inevitably led to discovery.” *Id.* at ¶ 16.

# Inevitable discovery

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Exclusion is also not warranted where it is *objectively reasonable* to rely on:

- A warrant
- Established law
- Court records
- Police records



# Good faith reliance

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Patrons of a local Mexican store reported to police that the store was selling prescription drugs without a license to do so. Based on that tip, undercover officers went to the store and purchased two drugs that were listed on the FDA's website as requiring a prescription. Based on that information, the officers secured a search warrant. During the search, the officers found the two described drugs and other prescription drugs, such as Valium. The store owner was charged with dispensing prescription drugs without a license. The store owner now moves to suppress the evidence on the ground that the two drugs listed on the FDA's website are not, in fact, prescription drugs. The store owner now moves to suppress the evidence, arguing that the facts supporting the search warrant did not establish probable cause to believe that the store was dispensing prescription drugs without the proper license.



# Argue, plead, or dismiss?

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## Suspicion required for searches:

- Evidence searches require probable cause.
  - *Search incident to arrest excepted*
  - *Inventory excepted*
- Safety searches require reasonable suspicion.

## Suspicion required for seizures:

- Arrests require probable cause.
- Brief investigatory stops require reasonable suspicion.
  - *Administrative safety checkpoints excepted*

# Fourth Amendment Principles

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- **Are warrants required to search for evidence?**
  - Dwellings?
    - YES
  - Automobiles?
    - NO
  - Person?
    - NO
- **Are warrants required to seize a person?**
  - Arrests in dwellings?
    - YES
  - Arrests in public?
    - NO
  - Investigatory stops?
    - NO

## **Fourth Amendment Principles**

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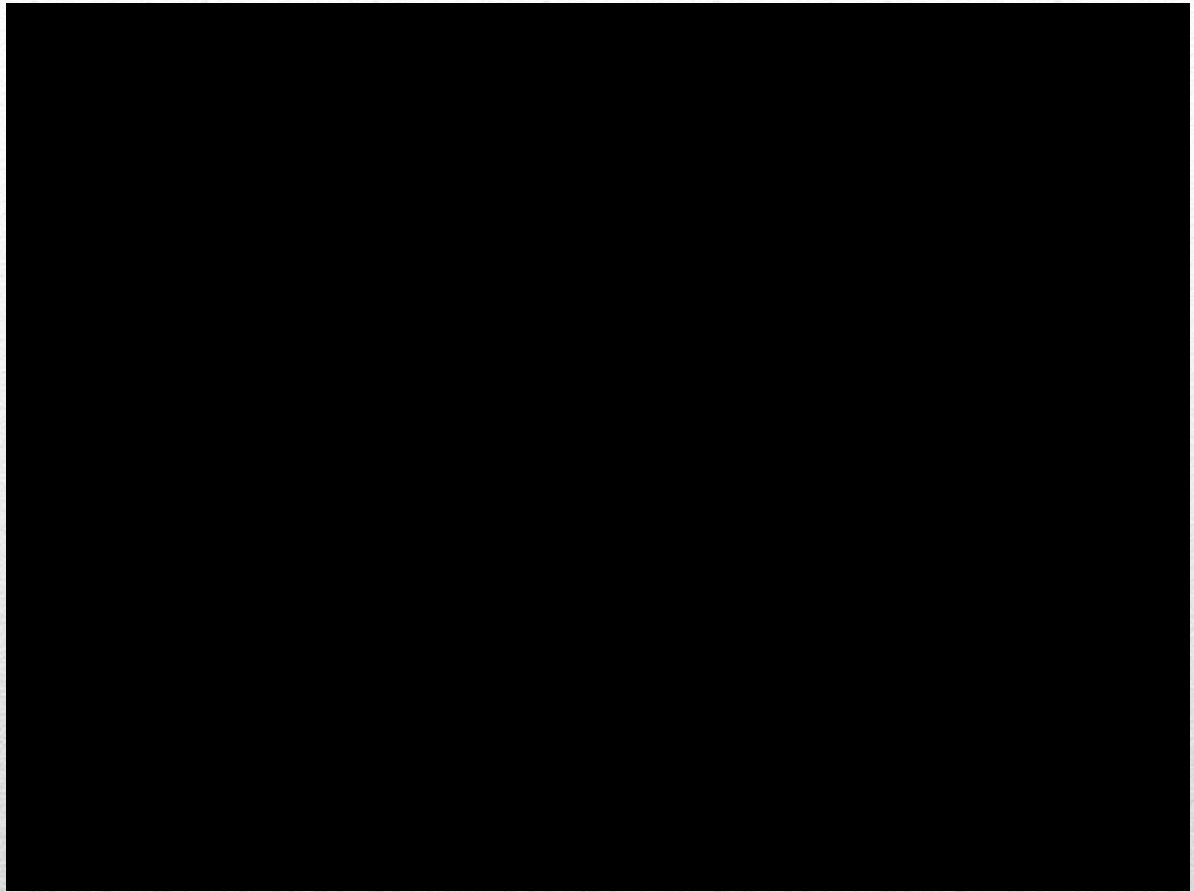
1. In addition to the authority provided by this article for making an arrest without a warrant, a police officer may stop a person in a public place located within the geographical area of such officer's employment when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.

\* \* \*

3. When upon stopping a person under circumstances prescribed in subdivision[ ] one . . . a police officer . . . reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

4. In cities with a population of one million or more, information that establishes the personal identity of an individual who has been stopped, questioned and/or frisked by a police officer or peace officer, such as the name, address or social security number of such person, shall not be recorded in a computerized or electronic database if that individual is released without further legal action; provided, however, that this subdivision shall not prohibit police officers or peace officers from including in a computerized or electronic database generic characteristics of an individual, such as race and gender, who has been stopped, questioned and/or frisked by a police officer or peace officer.

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# Stop-and-frisk

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After observing the car driven by Defendant cross the center line numerous times, Officer made a traffic stop. While speaking with Defendant, Officer noticed several signs of intoxication, including slurred speech, bloodshot eyes, and the odor of alcohol. After Defendant admitted to having a couple of beers at the bar, Officer asked him to step out of his car. When Defendant did so, he was unsteady on his feet. After Defendant failed a series of field sobriety tests, Officer arrested him. On the way to the station, Defendant said he would not take an Intoxilyzer test. The officer then went to a nearby hospital and required Defendant to submit to a blood draw over his objection. After results showed a BAC of .160, Defendant was charged with DUI.



Defendant moves to suppress the evidence, arguing that no exigency justified a warrantless blood draw.

# Argue, plead, or dismiss?

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- “The natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.” *Missouri v. McNeely*, 133 S.Ct. 1552, 1568 (2013)
- “[C]onsistent with general Fourth Amendment principles, ... exigency in this context must be determined case by case based on the totality of the circumstances.” *Id.* at 1556.
- In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.” *Id.* at 1561.



## Exigent circumstances and DUI

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## Relevant exigency factors

- Natural dissipation of alcohol in the blood
- Time it takes to take the accused to the hospital
- Time to investigate the scene
- Time it takes to prepare the warrant and find a magistrate
- Technological developments that enable police officers to secure warrants more quickly

The Court nevertheless acknowledged that “exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process.” *Id.* at 1563.

# Exigent circumstances and DUI

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Officer Taysom Hill deployed his drug dog Cougar around Defendant's car during a lawful stop. After Cougar alerted near the trunk area, Officer Hill searched the car and found the ingredients for manufacturing meth. Defendant was charged with possession of drug precursors for the manufacture of methamphetamine. Defendant now moves to suppress the evidence, arguing that the K-9 teams qualifications were lacking. Specifically, although Cougar successfully performed during regular refresher courses, the dog's certification expired. Also, Defendant challenged Cougar's reliability based on the fact that he had made a false positive alert on Defendant's car a week earlier and Officer Hill failed to keep field records.



# Argue, plead, or dismiss?

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“A defendant, however, must have an opportunity to challenge such evidence of a dog’s reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses.”  
*Id.*

“[E]vidence of a dog’s satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog’s alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs.” *Florida v. Harris*, 133 S.Ct. 1050, 1057 (2013).

## Dog searches and probable cause

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As in any other probable cause inquiry, “[t]he question is whether all the facts surrounding the dog’s alert , viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.” *Florida v. Harris*, 133 S.Ct. at 1058.

## **Dog searches and probable cause**

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