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You Have the Right to Be Free from Unwanted Bodily Intrusion--Unless of Course There Is a Court Order

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YOU HAVE THE RIGHT TO BE FREE FROM UNWANTED BODILY INTRUSION—UNLESS OF COURSE THERE IS A COURT ORDER

SUPREME COURT OF NEW YORK APPELLATE DIVISION, FOURTH DEPARTMENT

People v. Smith[1]
(decided March 16, 2012)

I. INTRODUCTION

In our modern society few rights are as fundamental to privacy and human dignity as the right to be free from unwanted bodily intrusion by the government.[2] This right is derived from the Fourth Amendment of the United States Constitution, which provides individuals with the right to be free from unreasonable searches and seizures by the government.[3] In identical language to that of the Fourth Amendment, Article 1 Section 12 of the New York State Constitution similarly affords individuals with protections against unreasonable search and seizures.[4] However, despite the mirrored language, the New York and federal interpretations of those rights are not identical. New York courts generally interpret search and seizure protections under the state constitution more generously than that of its federal counterparts, and in many ways expand the rights conferred on individuals by the federal courts.[5]

Neither federal nor state law places an absolute ban on searches and seizures, but rather each in effect prohibits those searches and seizures that are deemed unreasonable.[6] The issue then turns

[1] 940 N.Y.S.2d 373 (App. Div. 4th Dep't 2012).
[2] Schmerber v. California, 384 U.S. 757, 769-70 (1966).
[3] U.S. CONST. amend. IV.
[4] N.Y. CONST. art. 1, § 12.
[5] People v. Robinson, 767 N.E.2d 638, 642 (N.Y. 2001).
[6] U.S. CONST. amend. IV; N.Y. CONST. art. 1, § 12.

to what is reasonable? The most basic rule in this area is that all searches and seizures conducted absent a warrant, issued by a neutral magistrate and based on probable cause, are presumptively unreasonable.[7] But this general rule is only the starting point. Engrained in the extensive body of search and seizure law, at both federal and state levels, are numerous exceptions to the warrant requirement that may save an otherwise unlawful search or seizure from amounting to a constitutional violation.[8]

The next question is what happens if the government conducts an unreasonable search or seizure? Although neither the federal nor the state constitution provides a mechanism for enforcement, the judicially created exclusionary rule may, under conforming circumstances, allow for the suppression of unconstitutionally obtained evidence at trial.[9] The exclusionary rule was created as remedial measure available to an aggrieved party who suffered a constitutional violation, but more importantly, exists as a deterrent for unlawful police conduct.[10] As the creation of the exclusionary rule was intended to serve an extrinsic social policy, application of the rule is not automatic and may allow for the introduction of otherwise unconstitutionally obtained evidence where suppression would unreasonably frustrate the administration of justice.[11]

In the recent decision of *People v. Smith*, the New York Appellate Division held that tasing an uncooperative, but otherwise noncombative, suspect in order to obtain a DNA sample was an excessive use of force and therefore an unreasonable search and seizure under both the federal and state constitutions.[12] The court further held that because the search and seizure was constitutionally unreasonable, the evidence obtained as a direct result of the constitutional violation, namely the DNA sample, required suppression at trial.[13]

This case note will explore both federal and New York State search and seizure jurisprudence, as well as the application of the prophylactic exclusionary rule. Section I of this article lays out the factual and procedural background of the *Smith* case. Section II dis-

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

[8] *See infra* notes, 78-79, 235-36.

[9] Herring v. United States, 555 U.S. 135, 139 (2009).

[10] Mapp v. Ohio, 367 U.S. 643, 648, 651, 655-56, 659 (1961).

[11] United States v. Leon, 468 U.S. 897, 906-08 (1984).

[12] *Smith*, 940 N.Y.S.2d at 377-78.

[13] *Id.* at 379.

cusses the federal search and seizure protections afforded to all persons under the Fourth Amendment and addresses what constitutes a search and seizure, what is required for a reasonable search and seizure, the warrant requirement, and the categorical exceptions to the warrant requirement. Section III specifically addresses excessive force claims and when, under federal law, the use of force rises to the level of an unreasonable search or seizure. Section IV addresses the exclusionary rule, when it calls for the suppression of evidence, and the exceptions to the rule. Section V compares and contrasts New York search and seizure law, excessive force claims, and the exclusionary rule with federal precedent. Section VI discusses the *Smith* decision through the scope of both New York and federal law, and lastly, Section VII concludes this case note.

II. FACTUAL AND PROCEDURAL BACKGROUND OF *PEOPLE V. SMITH*

In July of 2006, four armed men robbed two separate homes in Niagara Falls, New York.[14] Roughly five months later, two armed men robbed a gas station also located in the same town.[15] Approximately two years after the gas station robbery, the defendant, Ryan Smith (hereinafter "Smith"), "was convicted of Assault in the third degree," a crime completely unrelated to the earlier robberies.[16] As a result of this conviction, a DNA sample was taken from Smith and entered into the Combined DNA Index System (hereinafter "CODIS").[17] Once Smith's DNA was in the CODIS system, "there was a 'hit' indicating that his DNA matched evidence collected in the 2006 home invasions and the gas station robbery."[18] Thereafter, in August of 2008, the People filed an order to show cause to compel Smith to submit to a DNA test in the form of a buccal swab.[19] While Smith received notice of the People's order to show cause, he failed to appear in court on the indicated return date.[20] On said return date, the court granted the People's request and issued the order compelling Smith "to provide a buccal swab 'to be taken by or at the direc-

[14] *Id.* at 375.
[15] *Id.*
[16] *Id.* at 375-76.
[17] *Smith*, 940 N.Y.S.2d at 375-76.
[18] *Id.* at 376.
[19] *Id.*
[20] *Id.*

tion of' " the Niagara Falls Police Department (hereinafter "NFPD").[21] Smith complied with the order and allowed the NFPD to obtain a sample, but by no fault of his own, "the DNA sample was sent to the incorrect lab and was 'compromised[,]' " requiring the People to obtain a second order.[22] Again, the People requested an order to compel Smith to submit to a buccal swab, only this time the request was made "by a letter to the court in September 2008."[23] At no time was Smith notified of the People's second application for a duplicate order, nor was he served with a copy of the second order issued by the court.[24] Shortly thereafter, the police approached Smith on the street, handcuffed him and took him to the police station where officers attempted to take the court ordered sample.[25] Smith was picked up by the police at 6:00 P.M.[26] At approximately 6:18 P.M. that same evening, after refusing to submit to the test, the police tased Smith's bare skin in order to force his compliance.[27]

Following a jury trial, Smith was convicted of five counts of first degree burglary and seven counts of first degree robbery.[28] Smith appealed the conviction on the grounds that the county court improperly denied his pretrial motion to suppress the DNA evidence and argued that "he lacked notice of the application seeking to compel him to provide a buccal swab and because the police used excessive force to obtain the swab."[29] The New York State Appellate Division found in favor of Smith with respect to both claims.[30]

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[21] *Id.*

[22] *Smith*, 940 N.Y.S.2d at 376.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 378.

[27] *Smith*, 940 N.Y.S.2d at 376, 378. When the police picked up Smith on the evening in question, he did not resist the police and voluntarily entered the police vehicle "even though the police did not tell him why he had to accompany them." *Id.* at 378. Once at the station, Smith was "placed in a secure room, where he was handcuffed, seated to the floor, and surrounded by three patrol officers and two detectives." *Id.* When the officers tried to take Smith's DNA sample, at no time did he "threaten, fight with, or physically resist . . . rather, he simply refused to open his mouth to allow the officers to obtain a buccal swab." *Id.*

[28] *Id.* at 375.

[29] *Smith*, 940 N.Y.S.2d at 375. Although not expressly provided for by statute, the New York Court of Appeals has recognized that a court may issue an order "to compel uncharged suspects to supply a DNA sample" if certain requirements are satisfied. *Id.* at 376. In the present case the court found that all necessary requirements were satisfied and Smith did not challenge this issue on Appeal. *Id.*

[30] *Id.* at 375.

Specifically, the court held that Smith's due process rights were violated when the second order was issued without adequate notice and an opportunity to be heard.[31] The court further held that Smith's Fourth Amendment rights were violated because of the excessive force used by the police to obtain the sample.[32] As a result, the court reversed the county court's judgment, granted Smith's motion to suppress the DNA evidence, and ordered a new trial.[33]

III. FOURTH AMENDMENT SEARCH AND SEIZURE PROTECTIONS

The Fourth Amendment affords individuals the right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures [which] shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."[34] This right seeks to protect "the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction."[35] Accordingly, these protections apply to searches and seizures by the government or individuals acting as a government agent, but does not protect against a search or seizure effected by a purely private party, no matter how arbitrary.[36]

In order to qualify for Fourth Amendment protections, the challenged government activity must constitute either a search or seizure within the meaning of the Constitution.[37] Absent a finding that either a search or a seizure was conducted the Fourth Amendment is inapplicable.[38]

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[31] *Id.* at 377. Although the court found that Smith's DNA evidence should have been suppressed on both due process and excessive force grounds, the scope of this article will be limited to the discussion of Smith's search and seizure rights and his excessive force claim. *Smith*, 940 N.Y.S.2d at 377.

[32] *Id.*

[33] *Id.* at 379.

[34] U.S. CONST. amend. IV.

[35] Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 602, 613-14 (1989). Fourth Amendment protections apply only to intrusions by Government actors, or those private parties who "act as an instrument or agent of the Government." *Id.*

[36] *Id.* at 614.

[37] Thomas K. Clancy, *What Is A "Search" Within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1, 1 (2006).

[38] *Id.*

A. Search and Seizure Defined

What is a "search" within the meaning of the Fourth Amendment? In its formative years, Fourth Amendment law was narrowly interpreted based upon the amendment's literal language, which was construed as principally protecting individuals' property interests.[39] During those early years, a search literally required a physical trespass into a constitutionally protected area, i.e., "persons, houses, papers, and effects."[40] It was not until 1967 with the case of *United States v. Katz*,[41] one of the most influential cases in Fourth Amendment jurisprudence, that this physical trespass standard was abandoned and was replaced with a definition based on protecting individuals' privacy, rather than property interests.[42] It was in *Katz* that the Court famously established "that the Fourth Amendment protects people [ ] not simply areas."[43] Interestingly, the groundbreaking impact of the *Katz* decision did not come from the majority opinion, but instead the concurring opinion by Justice Harlan.[44] In his concurring opinion, Justice Harlan coined the phrase "a reasonable expectation of privacy" which provided the basis of the Court's present definition of a search.[45] As the Court explained in *United States v. Jacobsen*,[46] "[a] 'search' occurs whenever an expectation of privacy that society is prepared to consider reasonable is infringed."[47]

In *Katz*, the Court formulated a two-part test to determine whether an individual possesses a reasonable expectation of privacy.[48] When applying this test, the first inquiry is whether "the individual manifested a subjective expectation of privacy in the object of the challenged search[.]"[49] The second being, "is society is willing to recognize that expectation as reasonable[.]"[50] Whether an invasion of

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[39] Michael Campbell, *Defining A Fourth Amendment Search: A Critique of the Supreme Court's Post-Katz Jurisprudence*, 61 WASH. L. REV. 191, 192 (1986).

[40] *Id.*

[41] 389 U.S. 347 (1967).

[42] Campbell, *supra* note 39, at 193.

[43] *Katz*, 389 U.S. at 353 (internal quotation marks omitted).

[44] *Id.* at 360-62.

[45] WILLIAM W. GREENHALGH, THE FOURTH AMENDMENT HANDBOOK 3 (3d ed. 2010).

[46] 466 U.S. 109 (1984).

[47] *Id.* at 113.

[48] California v. Ciraolo, 476 U.S. 207, 211 (1986).

[49] *Id.*

[50] *Id.* As such, purely subjective expectations of privacy are not recognized as deserving of Fourth Amendment protection. Oliver v. United States, 466 U.S. 170, 177 (1984).

a person's privacy is reasonable "must be appraised on the basis of facts as they existed at the time that the invasion occurred."[51]

What an individual "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected"; however, "[w]hat a person knowingly exposes to the public, even in his own home or office," will not.[52] Another relevant consideration is the manner in which the investigation was conducted. As seen in canine-sniff cases, discriminate but nonintrusive investigative methods, which reveal only evidence of criminality and arguably no other private information, are not considered searches under the Fourth Amendment.[53] In stark contrast, when it comes to obtaining samples, the Court has long recognized a forced intrusion into a person's body for the purpose of obtaining a blood sample, a urine sample, or a breath test constitutes a search under the Fourth Amendment as each of these intrusions raise serious concerns about a person's bodily integrity.[54]

Unlike the blanket definition of a "search" as applied to both persons and places, when considering whether a "seizure" occurred the standards are different for both persons and property. A " 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property."[55] Whereas a "seizure" of a person occurs if "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[56] Claiming "seizure" of a person requires a showing that an officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen."[57] It reasonably follows that any restraint exerted on a person for the purpose of conducting a search consequently constitutes a seizure.

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[51] *Jacobsen*, 466 U.S. at 115.

[52] *Katz*, 389 U.S. at 351.

[53] *Jacobsen*, 466 U.S. at 123.

[54] *Skinner*, 489 U.S. at 616-17.

[55] *Jacobsen*, 466 U.S. at 113.

[56] United States v. Mendenhall, 446 U.S. 544, 554 (1980). In order to ensure "that the scope of Fourth Amendment protection does not vary with the state of mind of the individual being approached" this test does not call for consideration of how an individual responded to the actions of police officers. Michigan v. Chesternut, 486 U.S. 567, 574 (1988).

[57] California v. Hodari, 499 U.S. 621, 625 (1991).

B. Satisfaction of the Fourth Amendment—What is Reasonable?

Once it is established that the government effectuated a search or seizure, the next inquiry is whether the search or seizure was reasonable under the meaning of the Fourth Amendment. As it flows naturally from the language of the Fourth Amendment, not all searches and seizures are barred, but rather, only those which are *unreasonable*.[58] To determine if a search or seizure was reasonable, courts must consider all of the surrounding circumstances, including the "nature of the search or seizure itself," and then balance the degree of the intrusion on the individual's constitutionally protected rights against the "promotion of legitimate governmental interests."[59]

As the Court stated in *Katz*, "the most basic constitutional rule in this area [ ] that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few well established and well delineated exceptions.' "[60] With respect to the issuance of warrants and warrantless arrests, searches, and seizures, the most basic requirement for Fourth Amendment satisfaction is the existence of probable cause.

> By the vey terms of the Fourth Amendment, probable cause is indispensible to the issuance of a valid warrant. That constitutional sine qua non applies to the search warrant and arrest warrant alike. The case law, moreover, has also established probable cause as the necessary predicate for both a reasonable warrantless search for evidence and a reasonable warrantless arrest.[61]

Although there is no mechanical test to apply to determine whether probable cause existed, the Court in *Brinegar v. United States*[62] articulated a widely accepted definition and stated as follows:

> In dealing with probable cause, however, as the very

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[58] *Skinner*, 489 U.S at 619.

[59] *Id.*

[60] Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) (quoting *Katz*, 389 U.S. at 357).

[61] GREENHALGH, *supra* note 45, at 13.

[62] 338 U.S. 160 (1949).

> name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . . "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." And this "means less than evidence which would justify condemnation" or conviction, as Marshall, C.J., said for the Court more than a century ago in *Locke v. United States*.[63] Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their (the officers') knowledge, and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.[64]

In the early years of Fourth Amendment jurisprudence, police were not required to obtain a warrant whenever feasible, but rather, it was generally accepted that police merely must "behave reasonably whenever they search[ed] and whenever they seize[ed], without calibrating too finely just what reasonable behavior involved."[65] It was not until the "coming of the Warren Court and its so-called 'Criminal Law Revolution' . . . [that the] Court determined [ ] the most effective way to maximize Fourth Amendment protection was, whenever possible, to interpose a 'neutral and detached magistrate' between 'the policeman and his quarry.' "[66] It was at this point that the warrant requirement became an integral part of Fourth Amendment law requiring police to obtain a warrant whenever feasible.[67] In order to encourage adherence to this warrant requirement, a lesser degree of probable cause was, and still is required to support a warrant as valid than any warrantless police activity.[68]

The warrant requirement provides individuals with two distinct protections. The first is to eliminate searches without probable

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[63] 11 U.S. 339 (1813).

[64] *Brinegar*, 338 U.S. at 175-77 (quoting *Locke*, 11 U.S. at 348) (citation omitted).

[65] GREENHALGH, *supra* note 45, at 14.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 15.

cause.[69] This interest is carried out by the issuance of a warrant because it requires a neutral judge or magistrate to make a "careful prior determination of necessity."[70] Second, where a judge or magistrate determines that a search or seizure is necessary, the purpose of the warrant is to then limit the scope of the search or seizure as much as possible in order to avoid general, unrestricted rummaging through an individual's property.[71] Discussing the importance of the warrant requirement, the Court in *Coolidge v. New Hampshire*[72] stated:

> [t]he warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow weighed against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakenly over-zealous, executive officers who are a part of any system of law enforcement. If it is to be a true guide to constitutional police action, rather than just a pious phrase, then [t]he exceptions cannot be enthroned into the rule.[73]

In *Schmerber v. California*,[74] the Court addressed the sensitive nature of search and seizure cases involving bodily intrusions and surgical procedures performed for the purpose of obtaining evidence of criminality.[75] In the context of these special cases, the ordinary Fourth Amendment requirements should be considered merely as threshold requirements.[76] In its decision, the Court provided three additional factors to balance when determining reasonableness: "the extent to which the procedure may threaten the safety or health of the individual. . . . [T]he extent of intrusion upon the individual's dignitary interest in personal privacy and bodily integrity. . . . [And] [w]eighed against these interests is the community's interest in fairly

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[69] *Coolidge*, 403 U.S. at 467.
[70] *Id.*
[71] *Id.*
[72] 403 U.S. 443 (1971).
[73] *Id.* at 481 (internal quotation marks omitted).
[74] 384 U.S. 757 (1966).
[75] *Id.* at 768-70.
[76] Winston v. Lee, 470 U.S. 753, 760-61 (1985).

and accurately determining guilt and innocence.[77]

C. Exceptions to the Warrant Requirement

It is a well accepted principle that the warrant requirement is not an absolute; the controversial question is under what circumstances is dispensing with this requirement justified? Dispensing with the warrant requirement, as previously stated, is at least in theory, "subject only to a few specifically established and well delineated exceptions."[78] These well recognized, or categorical exceptions include: search incident to a lawful arrest; exigent circumstances; the plain view doctrine; consent; the stop and frisk exception; the automobile exception; the suitcase/container exception; and the traffic stop exception.[79] Courts place the burden on those seeking to invoke an exception to the traditional warrant requirement to show that under the circumstances, the exigencies of the situation were imperative.[80] With each of these exceptions comes an extensive body of law; however, for the purposes of this case note, only those exceptions relevant to the facts of *Smith*, the case at hand, will be discussed.[81]

When considering whether there is an applicable exception to the warrant requirement justifying the particular search or seizure and thereby saving it from violating the Fourth Amendment, courts must ask "what is the predicate for the initial intrusion and [ ] what is the permitted scope of what may be done under the exception."[82]

1. Search Incident to Lawful Arrest

One recognized exception to the warrant requirement occurs where there is a search incident to lawful arrest, in which case the warrantless search "may generally extend to the area that is considered to be in the 'possession' or under the 'control' of the person arrested."[83] Once a lawful arrest is made, based on a showing of the requisite probable cause, it is reasonable for the arresting officer to

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[77] *Id.* at 760-62.

[78] *Katz*, 389 U.S. at 357.

[79] GREENHALGH, *supra* note 45, at 16-21.

[80] *Coolidge*, 403 U.S. at 455.

[81] While the opinion in *Smith* does not specifically address each potentially applicable exception, this case note will discuss each exception relevant to the facts of the case.

[82] GREENHALGH, *supra* note 45, at 16.

[83] *Coolidge*, 403 U.S. at 456.

subsequently search the arrestee, and further, to seize any weapons or evidence that may be in the arrestee's possession.[84] However, any search conducted incident to an arrest must be "substantially contemporaneous with the arrest and it is confined to the immediate vicinity of the arrest."[85]

2. Exigent or Emergency Circumstances

Another exception to the warrant requirement deals with searches and seizures incident to exigent or emergency circumstances. Exigent circumstances have been defined as "situations where 'real[,] immediate and serious consequences' will 'certainly occur' if a police officer postpones action to obtain a warrant."[86] This exception can be broken down into four sub-categories of exigencies: "hot pursuit of a fleeing felon[,]"[87] preventing the "imminent destruction of evidence,"[88] "the need to prevent a suspect's escape," and neutralizing "the risk of danger to the police or to other persons."[89] Under this exception, absent a finding of probable cause, one of these four sub-categories of exigent circumstances must exist for a warrantless search or seizure to be constitutional.[90] Of these four subcategories, preventing the destruction of evidence and protecting police/public welfare are relevant to the within discussion of *Smith*.

With respect to preservation of evidence, "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation."[91] The Court has recognized the need to preserve evidence of an individual's blood-alcohol content as a time sensitive issue, constituting an "emergency" circumstance under Fourth Amendment law.[92] However, unlike evidence of blood-alcohol content, the genetic character of DNA evi-

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[84] United States. v. Robinson, 414 U.S. 218, 226 (1973).

[85] *Coolidge*, 403 U.S. at 456. This area has become known as the *Chimel* perimeter and includes "the entire area within the reach, lunge, or grasp of the arrestee." GREENHALGH, *supra* note 45, at 16.

[86] United States v. Williams, 354 F.3d 497, 503 (6th Cir. 2003) (quoting Ewolski v. City of Brunswick, 287 F.3d 492, 501 (6th Cir. 2002).

[87] Vale v. Louisiana, 399 U.S. 30, 35 (1970).

[88] Welsh v. Wisconsin, 466 U.S. 740, 754 (1984).

[89] Minnesota v. Olsen, 495 U.S. 91, 100 (1990).

[90] *Id.*

[91] Roaden v. Kentucky, 413 U.S. 496, 505 (1973).

[92] *Schmerber*, 384 U.S. at 770-71 (1966).

dence is "not subject to change" and therefore by its very nature cannot fall within the exigent circumstances exception to the warrant requirement.[93]

As far as protecting the police and public welfare, the Court in *Warden v. Hayden*[94] emphasized that "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."[95] Accordingly, under this sub-category, justification for a warrantless search or seizure requires a showing, under the totality of the circumstances, that "law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and [that] the search's scope and manner were reasonable to meet the need."[96]

3. Consent

The consent exception is rooted in the principle that an individual may waive any of his constitutional rights, including those protected under the Fourth Amendment.[97] A search authorized by consent does not require probable cause, and therefore, law enforcement officers frequently seek consent to obtain evidence where there is some indicia of illegal activity, but where said activity does not rise to the level required to obtain a warrant.[98] When dealing with the issue of consent the key questions are: who gave the consent, specifically did the consenter have, or appear to have, the legal authority to consent, and how was the consent obtained.[99]

Under this exception, "a search authorized by consent is wholly valid . . . [provided] the consent was, in fact, freely and voluntarily given."[100] While this exception seems simple enough on its

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[93] Graves v. Beto, 301 F. Supp. 264, 265 (E.D. Tex. 1969).

[94] 387 U.S. 294 (1967).

[95] *Id.* at 298-99.

[96] United States v. Reyes-Bosque, 596 F.3d 1017, 1029 (9th Cir. 2010).

[97] GREENHALGH, *supra* note 45, at 20.

[98] Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). "[W]hen . . . the government relies on consent to justify a warrantless search, it bears the burden of proving by a preponderance of the evidence that the consent was voluntary." United States v. Snype, 441 F.3d 119, 131 (2d Cir. 2006).

[99] GREENHALGH, *supra* note 45, at 20.

[100] *Schneckloth*, 412 U.S. at 222. In addition to the requirement that consent be voluntary, "[t]he individual giving consent must also possess the authority to do so." United States v. Stabile, 633 F.3d 219, 230 (3d Cir. 2011). Both the individual under investigation or a third

face, difficulties arise in determining voluntariness.[101] As Justice Frankfurter colorfully put it: "[t]he notion of voluntariness is itself an amphibian."[102] Courts should look at the totality of the circumstances under which the consent was given to determine if it was in fact voluntarily.[103] Relevant considerations, none of which are dispositive as to the question of voluntariness include: the subjective state of mind of the consenter, whether the police questioning or practices were subtly coercive, and whether the consenter had knowledge of his right to refuse the search.[104] Additional considerations include: whether the consenter was in custody, in handcuffs, if there was force exerted, whether the individual had previously refused to consent, and whether the police gained the consent by telling the consenter that a warrant would be obtained.[105]

Once given, consent may be withdrawn at any time up and until the search is complete. "Withdrawal of consent need not be effectuated through particular 'magic words,' but an intent to withdraw consent must be made by [an] unequivocal act or statement."[106] Withdrawing consent requires "an act clearly inconsistent with the apparent consent to search, an unambiguous statement challenging the officer's authority to conduct the search, or some combination of both."[107] While a search is being carried out based on consent, police officers do not have the authority to order the consenter not to inter-

party with authority over the property at issue may validly consent to a search or seizure. United States v. Andrus, 483 F.3d 711, 716 (10th Cir. 2007). However, problems arise when a third party does not have actual authority over the subject property, but at the time of consent appears to the police to have the necessary authority. *Id.* Accordingly, the question of who has authority to consent is examined "subjectively through the eyes of the policeman at the time of the search or seizure." GREENHALGH, *supra* note 45, at 20. Therefore, where an officer subjectively believes that the consenter has authority to consent, this apparent authority may be sufficient to uphold the validity of the consent. *Andrus*, 483 F.3d at 716-17.

[101] *Schneckloth*, 412 U.S. at 224.

[102] Culombe v. Connecticut, 367 U.S. 568, 604-05 (1961).

[103] *Schneckloth*, 412 U.S. at 225-26.

[104] *Id.* at 229. Although the consenter's knowledge of his right to refuse a search is a relevant factor when determining whether or not consent was voluntary, there is no affirmative obligation on the part of law enforcement officers to advise an individual of his right to refuse prior to gaining consent. *Id.* at 231.

[105] United States v. Lavan, 10 F. Supp. 2d 377, 384 (S.D.N.Y. 1998).

[106] United States v. Gray, 369 F.3d 1024, 1026 (8th Cir. 2004).

[107] United States v. Sanders, 424 F.3d 768, 774 (8th Cir. 2005).

fere with the search.[108]

IV. EXCESSIVE FORCE

Individuals alleging excessive use of force by a government official have two available avenues for relief. The first, is to assert a civil claim under 42 U.S.C. § 1983[109] seeking damages under civil liability principles for the wrongdoing of the officer.[110] The second option, during the course of a criminal proceeding, is to seek suppression of the evidence unconstitutionally obtained as a direct result of the alleged excessive use of force.[111]

For many years, there was serious debate amongst the federal circuits over the source of excessive force protections and the standard to apply when analyzing such claims. It was not until 1989 with *Graham v. Connor*[112] that the Court resolved the debate over the source of excessive force protections. In *Graham*, the Court rejected the views of the majority of federal courts at that time, which were applying a generic substantive due process test based on the assumption "that there is a generic 'right' to be free from excessive force," but that the right was not grounded in any particular constitutional provision.[113] Instead, the Court firmly established that courts should analyze each excessive force claim with respect to the specific constitutionally protected right "allegedly infringed by the challenged application of force."[114] Accordingly, when examining an excessive force claim, courts must first determine which specific constitutionally protected right had allegedly been infringed and "the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than some generalized 'excessive force' standard."[115] Primarily, the constitutional rights of an individual against excessive use of force are found in the Fourth Amend-

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[108] *Id.* During the course of a consent search, courts have recognized such actions as a consenter locking the trunk to a vehicle during the course of the consented search as an act unequivocal and unambiguous enough to constitute a withdrawal of consent. Unites States v. Ibarra, 731 F. Supp. 1037, 1039 (D. Wyo. 1990).

[109] 42 U.S.C. § 1983 (2012).

[110] United States v. Arista-Herrera, No. 8:05CR301, 2006 WL 680891, at *4 (D. Neb. Feb. 21, 2006).

[111] *Id.*

[112] 490 U.S. 386 (1989).

[113] *Id.* at 393.

[114] *Id.* at 393-94.

[115] *Id.* at 394.

ment right against unreasonable search and seizure, the Eighth Amendment right against cruel and unusual punishment, and the Fifth and Fourteenth Amendment rights to due process of law.[116]

A. Classifying the Right

Excessive force claims are classified by reference to the legal status of the individual asserting the claim.[117] From arrest to conviction there are four stages: "(1) the initial investigatory stop and/or arrest; (2) an undefined period between 'arrest' and 'pretrial detention'; (3) another undefined period referred to as 'pretrial detention'; and (4) post-conviction incarceration."[118] While there is little debate that excessive force claims of a convicted prisoner should be analyzed under the Eighth Amendment, the classification of the remaining statuses are not always as clear.[119] Generally, courts should analyze claims of excessive force by pretrial detainees or arrestees under substantive due process principles of the Fifth and Fourteenth Amendments, while analyzing the claims of free citizens under the Fourth Amendment.[120]

The Court made clear in *Graham* "that *all* claims that law enforcement officers have used excessive force–deadly or not–in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment . . . rather than under a 'substantive due process approach.' "[121] The Court reasoned that "the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct", and therefore, should guide these claims.[122] Notably, the Court failed to draw a clear line as to when the course of an "arrest" ends and when it evolves into "pretrial detention."[123] This

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[116] *Id.* at 394-95.

[117] Brandon J. Demyan, *Aldini v. Johnson: The Fourth or Fourteenth Amendment—Which Applies to Excessive Force Suits Prior to Arraignment?*, 34 AM. J. TRIAL ADVOC. 433, 433 (2010).

[118] H.L. McCormick, *Excessive Force Claims under the Fourteenth Amendment*, 29 URB. LAW. 69, 69 (1997).

[119] Whitley v. Albers, 475 U.S. 312, 319 (1986).

[120] *Graham*, 490 U.S. at 395.

[121] *Id.*

[122] *Id.*

[123] H.L. McCormick, *supra* note 118, at 69.

> [T]he arrest, and the potential for Fourth Amendment violations, may end when the arrestee is handcuffed and placed in a police cruiser. If

gray area, concerning whether the Fourth or Fourteenth Amendment protections apply, continues to be a common source of disagreement among federal courts.

B. The Legal Standards

Once a court determines the legal status of the individual, thereby classifying the excessive force claim, it must then apply the corresponding constitutional standard, governing that specific right.[124]

1. Eighth Amendment

The Eight Amendment's Cruel and Unusual Punishment Clause "was designed to protect those convicted of crimes" while serving time as punishment.[125] Accordingly, the Eight Amendment standard is less protective than that of the Fourth and Fourteenth Amendments because it applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions."[126] For a sustainable Eighth Amendment claim, an inmate must show that the physical force used by the prison official inflicted unnecessary and wanton pain which requires "more than ordinary lack of due care for the prisoner's interests or safety."[127] Relevant considerations when analyzing Eighth Amendment excessive force claims are:

> [1] the need for the application of force, [2] the relationship between the need and the amount of force used, [3] the extent of the injury inflicted, . . . [4] the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts

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> that is so, then claims of excessive force while en route to the police station may require Fourteenth Amendment rather than Fourth Amendment analysis. The different analysis can lead to entirely different results depending on what the [claimant] can prove about the [ ] officer's state of mind and the objective reasonableness of the [officer's] acts.

Id. at 70.

[124] *Graham*, 490 U.S. at 394.

[125] Ingraham v. Wright, 430 U.S. 651, 664 (1977).

[126] *Id.* at 671 n.40.

[127] *Whitley*, 475 U.S. at 319.

made to temper the severity of a forceful response.[128]

Due to the special nature of internal prison security issues, great deference is given to prison administrators with respect to the "adoption and execution of policies and practices . . . needed to preserve internal order and discipline and to maintain institutional security."[129] It reasonably follows that application of the Eighth Amendment in excessive force claims requires some consideration of the subjective state of mind of the officer exerting the force.[130]

2. Fifth and Fourteenth Amendments

As previously mentioned, claims of pretrial detainees and arrestees are properly analyzed under the Fifth and Fourteenth Amendments' due process principles.[131] The assessment for Fifth and Fourteenth Amendment excessive force claims requires application of the four-factor test articulated by the Court in *Johnson v. Glick*.[132] Although *Johnson* was subsequently overturned by *Graham*, the four-factor test remains the standard used by courts when analyzing excessive force claims under the due process clauses. Said factors are as follows:

> [1] the need for the application of force, [2] the relationship between the need and the amount of force that was used, [3] the extent of the injury inflicted, and [4] whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[133]

Incarcerating an individual charged, but not yet convicted of a crime, is a permissible government practice used to ensure that person is present for trial if one should arise.[134] However, unlike convicted prisoners, pretrial detainees are innocent until proven guilty, and therefore "it is not sufficient that the conditions of confinement for pretrial detainees merely comport with contemporary standards of

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128 *Id.* at 321.
129 *Id.* at 321-22.
130 *Graham*, 490 U.S. at 398.
131 *Id.* at 395.
132 481 F.2d 1028 (2d Cir. 1973), *overruled by Graham*, 490 U.S. 386.
133 *Id.* at 1033.
134 Bell v. Wolfish, 441 U.S. 520, 531 (1979).

decency prescribed by the cruel and unusual punishment clause of the Eight Amendment."[135] While an individual held in pretrial detention has, as a prerequisite to his detention, undergone a judicial determination of probable cause justifying the restraint on his liberty, he may only be subjected to the restrictions and conditions of confinement to the extent that "those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution."[136]

Whether in a prison, custodial center, or some other form of a detention facility, "[o]nce the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention."[137] Incident to detention is the loss, in varying degrees, of the freedom of to make personal choices and privacy.[138] However, unless the government action taken against a pretrial detainee is construed as punishment, the deprivation of liberty incident to detention does not rise to the level of a due process violation.[139] The mere interference "with [a] detainee's understandable desire to live as comfortable as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment.' "[140]

3. Fourth Amendment

Excessive force claims by free citizens during the course of an arrest, investigatory stop, or other 'seizure' are analyzed under the Fourth Amendment objective reasonableness standard.[141] Determining whether the force used was reasonable, calls for a balancing of the intrusion on the individual's constitutionally protected Fourth Amendment interests' against "the countervailing governmental interests at stake."[142] There is no "precise definition or mechanical application" of the reasonableness test, and as a result, proper application requires consideration of all the surrounding facts and

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135 *Id.* (internal quotation marks omitted).
136 *Id.* at 535-37.
137 *Id.* at 537.
138 *Id.*
139 *Bell*, 441 U.S. at 535-37.
140 *Id.* at 537.
141 *Graham*, 490 U.S. at 395.
142 *Id.* at 396.

circumstances in every individual case.[143] Relevant considerations include: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[144]

When applying the objective reasonableness standard, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[145] This requires the court to consider the reasonableness of the use of force at the moment it was applied rather than in light of subsequent knowledge or information, which would clearly have rendered the use of force unnecessary.[146] In addition, "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments–in circumstances that are tense, uncertain, and rapidly evolving–about the amount of force that is necessary in a particular situation."[147] However, the question of reasonableness remains objective in that it asks "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard for their underlying intent or motivation."[148] In other words, force effectuated from an officer's bad intentions will not itself give rise to a Fourth Amendment violation, nor will an officer's use of force with good intentions save it from a constitutional violation.[149]

Courts have "long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[150] "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment."[151] When analyzing excessive force claims, courts must not lose sight

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[143] *Id.* "The question is not simply whether the force was necessary to accomplish a legitimate police objective; it is whether the force used was reasonable in light of *all* the relevant circumstances." Hammer v. Gross, 932 F.2d 842, 846 (9th Cir. 1991) (emphasis in original).

[144] *Graham*, 490 U.S. at 396. These three considerations later became known as "the three *Graham* factors." Tracy v. Freshwater, 623 F.3d 90, 97 (2d Cir. 2010).

[145] *Graham*, 490 U.S. at 396.

[146] *Id.*

[147] *Id.* at 396-97.

[148] *Id.* at 397.

[149] *Id.*

[150] *Graham*, 490 U.S. at 396.

[151] *Id.*

"of the fact that 'the integrity of an individual's person is a cherished value of our society.' "[152] In the case of *Tracy v. Freshwater*,[153] the Second Circuit found an officer's act of spraying a handcuffed suspect in the face with pepper spray while attempting to effectuate an arrest was an unreasonable use of force under the Fourth Amendment.[154] The use of pepper spray has painful and incapacitating effects, which constitutes a "significant degree of force."[155] Recognizing that the use of pepper spray constitutes a "significant degree of force," the court noted "it should not be used lightly or gratuitously against an arrestee who is complying with police commands or otherwise poses no immediate threat to the arresting officer."[156] Similarly, in *Orem v. Rephann*,[157] the Fourth Circuit held that the use of a taser gun on a woman being transported in the back seat of a police car, who was in both hand and foot restraints, was an objectively unreasonable use of force in that the taser gun was neither used to protect the officers, nor used to prevent the woman's escape.[158] On the other hand, in the Eighth Circuit case of *Mckenney v. Harrison*,[159] the court held the use of a taser on a misdemeanor suspect was objectively reasonable in order to prevent his escape as the suspect attempted to flee through a window.[160]

V. EXCLUSIONARY RULE: GROUNDS FOR SUPPRESSION

Although the Fourth Amendment does not itself provide a mechanism for enforcing its rights, it is well settled that "[w]hen law

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[152] *Hammer*, 932 F.2d at 846 (quoting *Schmerber*, 384 U.S. at 772).

[153] 623 F.3d 90 (2d Cir. 2010).

[154] *Id.* at 98. In *Tracy* the court was asked to review four separate claims of excessive force but found only the use of the pepper spray to violate the Fourth Amendment. *Id.* at 96-97. The court found the other displays of force by the officer were reasonable, specifically when the officer struck the defendant with a flashlight several times, jumped on top of the defendant when he tried to flee, and when he forcibly moved the defendant to the ground despite his claims of pain. *Id.* at 97-98.

[155] *Id.* at 98.

[156] *Tracy*, 623 F.3d at 98.

[157] 523 F.3d 442 (4th Cir. 2008).

[158] *Id.* at 446, 448-49. While the excessive force claim in *Orem* falls under the Fourteenth Amendment rather than the Fourth Amendment because the claimant, though not formally charged, had already been arrested and was in the process of being transported when she was tased, it is a noteworthy example because the court held, even under the more stringent due process standard, that the use of the taser constituted excessive force. *Id.* at 446.

[159] 635 F.3d 354 (8th Cir. 2011).

[160] *Id.* at 360.

enforcement officers violate the Fourth Amendment by conducting an unreasonable search and seizure, the exclusionary rule may bar the admission of the evidence obtained directly and indirectly from the violation."[161] The suppression of unlawfully obtained evidence is not constitutionally required,[162] but rather, the rule exists as a "prophylactic measure created by the judiciary to protect individuals' Fourth Amendment rights."[163] It was in 1914, with the case of *Weeks v. United States*,[164] that the Court first applied the exclusionary rule to federal prosecutions.[165] However, it was not until 1961, forty-six years later, in *Mapp v. Ohio*,[166] that the Court finally recognized the need for exclusionary protections at the state level and mandated the prophylactic rule be applied to the States.[167]

As the Court discussed in *Mapp*, the exclusionary rule is intended, first, to serve as a deterrent for lawless police conduct by discouraging officers from violating an individual's constitutional rights to obtain evidence; second, to maintain judicial integrity; and third, to provided a remedial measure for those individuals whose rights were violated.[168] However, due to the extremely diverse nature of encounters between police and citizens, the Fourth Amendment exclusionary rule is often difficult to properly invoke and therefore does not always carry out its intended functions.[169] Despite the practical difficulties in invoking the rule, the Court maintains, where police conduct is "over-bearing or harassing, or [ ] trenches upon personal security without the objective evidentiary justification which the

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[161] United States v. Gray, 302 F. Supp. 2d 646, 649 (S.D.W. Va. 2004).

[162] *Leon*, 468 U.S. at 906. The exclusionary rule applies both to primary evidence seized as a direct result of an illegal search or seizure as well as to derivative evidence later discovered as "fruit of the poisonous tree." Segura v. United States, 468 U.S. 796, 804 (1984).

[163] *Gray*, 302 F. Supp. 2d at 651.

[164] 232 U.S. 383 (1914), *overruled by Mapp*, 367 U.S. 643.

[165] *Id*. at 398.

[166] 367 U.S. 643 (1961).

[167] *Id.* at 660.

[168] *Id.* at 648, 651, 655-56, 659.

[169] Terry v. Ohio, 392 U.S. 1, 13 (1968). The Supreme Court recognized "[n]o judicial opinion can comprehend the protean variety of the street encounter" and because of this immeasurable variety of circumstances, the facts of each case must be viewed on a case by case basis. *Id.* at 15. On one side of the debate, law enforcement officials argue that there is a need for flexibility in dealing with potentially dangerous situations that unfold when making either a stop or an arrest, and anything discovered incident to the stop or arrest should be admissible. *Id.* at 10. On the other side, advocates of heightened Fourth Amendment protections argue that specific justification should be required for intrusions on protected personal security as it goes to the heart of the Fourth Amendment. *Id.* at 11.

Constitution requires . . . it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials."[170]

Although the Fourth Amendment exclusionary rule provides vital safeguards, it is not itself a fundamental right and therefore is not automatically applied.[171] Despite being commonly referred to as " 'the exclusionary rule' in theory it is best classified as a privilege, since it keeps out of evidence matter of probative weight in order to serve an extrinsic social policy."[172] As a general rule,

> [t]he exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search and of testimony concerning knowledge acquired during an unlawful search. Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search.[173]

As the Court stated in *Herring v. United States*,[174] "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[175] This

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[170] *Id.* at 15.

[171] *Leon*, 468 U.S. at 908. "The Court has limited the scope of the rule to 'areas where its remedial objectives are thought most efficaciously served.' " Alan Copelin, *A Time to Act: Statutory Exceptions to State-Created Exclusionary Rules*, 20 AM. J. CRIM. L. 339, 344 (1993) (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)). "Consequently, the rule does not apply in grand jury proceedings, in civil actions, for witness impeachment in criminal trials, or to challenge a state conviction in a federal habeas corpus proceeding when the state provided 'an opportunity for full and fair litigation of the Fourth Amendment claims.' " *Id.* (quoting Stone v. Powell, 428 U.S. 465, 494 (1976)).

[172] PETER J. HENNING & SARAH N. WELLING, FEDERAL PRACTICE & PROCEDURE § 408 (4th ed. 2012).

> The exclusionary rule is best known in connection with the suppression of evidence secured by an illegal search and seizure, [ ] it applies also to statements made in connection with an illegal arrest, to confessions obtained involuntarily, during a period of unnecessary delay in bringing an arrested person before a magistrate or at a time when the Miranda warnings have not been given, to identifications that are improperly made, and to evidence obtained by illegal electronic surveillance.

Id.

[173] Murray v. United States, 487 U.S. 533, 536-37 (1988).

[174] 555 U.S. 135 (2009).

[175] *Id.* at 144.

application of the exclusionary rule was further supported by *Davis v. United States*,[176] in which the Court stated that "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs."[177] The Court further explained that "when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple isolated negligence, the deterrence rationale loses much of its force and exclusion cannot pay its way."[178]

It reasonably follows from the language of the *Davis* decision that there exists, among others, a good-faith exception to the exclusionary rule. In *United States v. Leon*,[179] the Court was asked to decide whether the exclusionary rule should apply to evidence obtained pursuant to a search warrant issued by a neutral magistrate, but that was subsequently found to be unsupportable by probable cause.[180] After consideration of the exclusionary rule's primary intended function, namely deterrence of unlawful police practices, the Court held that a good-faith exception should apply to cases where police officers believed they were acting pursuant to a valid warrant and that the evidence discovered as a result, even though otherwise unlawfully obtained, should be admissible at trial as part of the prosecution's case in chief.[181] The Court reasoned that where an officer relies on the validity of a warrant, and that officer's reliance is objectively reasonable, to exclude evidence obtained in accordance with the warrant, despite later finding it to be invalid, would not further the intended functions of the exclusionary rule and therefore should not be grounds for suppression.[182]

While the good-faith exception applies to primary evidence, meaning the evidence obtained as direct result of the police misconduct, federal courts recognize three additional exceptions to the ex-

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[176] 131 S. Ct. 2419 (2011).

[177] *Id.* at 2427 (quoting *Herring*, 555 U.S. at 144).

[178] *Id.* at 2427-28 (internal quotation marks omitted). There is no justification for indiscriminately applying the exclusionary rule to all evidence obtained in violation of an individual's constitutional rights as such an unwavering application "may well 'generate disrespect for the law and administration of justice.' " *Leon*, 468 U.S. at 908 (quoting *Stone*, 428 U.S. at 491).

[179] 468 U.S. 897 (1984).

[180] *Id.* at 900.

[181] *Id.* at 913.

[182] *Id.* at 919-20.

clusionary rule, which largely apply only to secondary or derivative evidence.[183] Those exceptions are known as the independent source doctrine, the inevitable discovery doctrine, and attenuation.[184]

The attenuation exception allows for the introduction of derivative evidence where the causal link between the initial misconduct and the secondary evidence obtained becomes so distant that "the taint of misconduct was dissipated to the point that the law would not require exclusion."[185] "The point at which the taint becomes attenuated has been viewed as 'the point of diminishing returns' of the deterrence principle, at which point the detrimental consequences of the illegal police action no longer justify the cost of exclusion."[186]

The independent source doctrine, allows for the introduction of secondary evidence, upon showing that the taint of the official misconduct was not the direct cause of obtaining the secondary evidence. In other words, where secondary evidence "has been discovered by means wholly independent of any constitutional violation," said evidence my still be admissible in a criminal prosecution.[187] As the Court stated in the case of *Wong Sun v. United States*[188]

> We need not hold that 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. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the taint.[189]

The rationale behind the independent source exception has been described as follows:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive

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[183] Copelin, *supra* note 171, at 349.

[184] *Id.*

[185] *Id.* at 346.

[186] Robert M. Bloom, *Inevitable Discovery: An Exception Beyond the Fruits*, 20 AM. J. CRIM. L. 79, 90 (1992).

[187] Nix v. Williams, 467 U.S. 431, 443 (1984).

[188] 371 U.S. 471 (1963).

[189] *Id.* at 487-88 (internal quotation marks omitted).

> all probative evidence of a crime are properly balanced by putting the police in the same, not worse, position that they would have been if no police error or misconduct had occurred. When then challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.[190]

Lastly, the inevitable discovery doctrine, established by the Court in *Nix v. Williams*,[191] allows for the introduction of evidence, although otherwise unlawfully obtained, if that evidence would have inevitably been discovered through some other lawful means.[192] However, when the facts of the case, which dealt solely with admissibility of secondary evidence, are considered with the specific language of the Court's opinion, and both the rationale and case law applied by the Court, the *Nix* decision has been interpreted as applying the inevitable discovery doctrine only to derivative evidence.[193] Since *Nix* remains the sole Supreme Court decision dealing directly with this exclusionary rule exception in the context of secondary evidence, one must look to the lower federal courts for additional guidance in this area.[194]

Although the Court's limited application of the inevitable discovery doctrine to secondary evidence has found support in some of the lower federal courts, like for example, by the D.C. Circuit in case of *United States v. $639,558.00 in U.S. Currency.*[195] In that case, the court refused to extend the exception to primary evidence, which the government argued would have inevitably been discovered, despite the unconstitutional search because of a preexisting inventory search procedure.[196] However, unlike the D.C. Circuit, to date, "[m]ost of the circuits have utilized the inevitable discovery exception to allow the introduction of primary evidence."[197] The Second Circuit, for example, does not distinguish primary evidence from secondary evi-

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190 *Nix*, 467 U.S. at 443.
191 467 U.S. 431 (1984).
192 Copelin, *supra* note 171, at 347.
193 Bloom, *supra* note 186, at 90.
194 *Id.*
195 955 F.2d 712 (D.C. Cir. 1992).
196 Bloom, *supra* note 186, at 90-91.
197 *Id.* at 87.

dence when applying the inevitable discovery doctrine.[198] In the case of *United States v. Pimentel*,[199] the Second Circuit, expressly rejected the distinction between primary and derivative evidence and purposefully "characterized inevitable discovery as an exception to the exclusionary rule, rather than an exception to the fruits of the poisonous tree doctrine."[200]

VI. NEW YORK STATE

A. Search and Seizure and the Warrant Requirement

The Fourth Amendment protections against unreasonable search and seizure were first incorporated by way of the Fourteenth Amendment Due Process Clause, and therefore, made applicable to states in the case of *Wolf v. Colorado*.[201] In *Wolf*, while the Court held that the Fourth Amendment was applicable to the states, it refused to likewise incorporate the exclusionary rule.[202] However, *Wolf* was subsequently overturned by *Mapp*, in which the Court established that both the Fourth Amendment and the exclusionary rule apply to the states.[203] The rights created by the federal constitution represent the minima of rights that every state must uphold; yet, inherent in a state's police power is the authority for it to afford greater protections than those afforded under the federal constitution.

The language of Article 1, Section 12 of the New York State Constitution is identical to that of the Fourth Amendment of the United States Constitution.[204] In turn, New York courts recognize that the respective constitutions confer similar, albeit not identical, search and seizure rights on individuals.[205] Furthermore, the New York Court of Appeals "has not hesitated to expand the rights of New York citizens beyond those required by the Federal Constitution" often affording greater search and seizure protections than those afford-

198 *Id.* at 87 n.46.
199 810 F.2d 366 (2d Cir. 1987).
200 Bloom, *supra* note 186, at 87 n.46.
201 338 U.S. 25 (1949), *overruled by Mapp*, 367 U.S. 643.
202 *Id.* at 33.
203 *Mapp*, 367 U.S. at 660.
204 N.Y. CONST. art. 1, § 12.
205 *Robinson*, 767 N.E.2d at 642.

ed under the Fourth Amendment.[206]

When analyzing the constitutionality of a challenged search or seizure, the first question a court must answer is whether there was in fact a search or seizure of an individual's person or property. If there was, then the second question is whether the search or seizure was conducted in a manner that was reasonable under the circumstances. New York courts are generally in agreement with federal courts as to what actions constitute a search or seizure.[207] With respect to intrusions into a persons' body, the Court of Appeals has recognized that taking a blood or saliva sample for DNA analysis is a search under both the federal and state constitution.[208] "It is beyond cavil that an individual has a legitimate privacy expectation with respect to the blood flowing through his or her own veins, and a corresponding right to be free from the unreasonable search and seizure of such bodily fluids."[209]

With respect to what is considered a search, the major difference between the federal and New York approaches is that New York law, unlike federal law, considers discriminate and nonintrusive investigative methods, which reveal only evidence of criminality to be search.[210] As the court stated in *People v. Dunn*,[211] "[u]nlike the Supreme Court, we believe that the fact that a given investigative procedure can disclose only evidence of criminality should have little bearing on whether it constitutes a search."[212] The court further explained, "[n]ot withstanding such a method's discriminate and nonintrusive nature, it remains a way of detecting the contents of a private place."[213] Therefore, under New York law, wherever there is an intrusion by the government into an area carrying with it a reasonable expectation of privacy, a search occurs regardless of whether the investigative methods used are largely nonintrusive.[214]

With respect to the seizure of a person, under federal law, a

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[206] *Id.*

[207] People v. Dunn, 564 N.E.2d 1054, 1057 (N.Y. 1990). A search occurs when the government intrudes on an area which an individual has a reasonable expectation of privacy. *Id.* at 1058.

[208] *Smith*, 940 N.Y.S.2d at 376.

[209] People v. King, 663 N.Y.S.2d 610, 614 (App. Div. 2d Dep't 1997).

[210] *Dunn*, 564 N.E.2d at 1058.

[211] 564 N.E.2d 1054 (N.Y. 1990).

[212] *Id.* at 1057.

[213] *Id.*

[214] *Id.* at 1058.

seizure occurs when a person is either physically restrained or otherwise submits to a show of authority.[215] However, "for reasons peculiar to New York" a seizure of a person does not require an actual submission to a show of authority, but instead, "[t]he test is whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on his or her freedom."[216] Under both the federal and state constitution, a seizure of property occurs when the government interferes with an individual's recognized property interest.[217]

It is a well established that any search or seizure conducted absent a warrant properly issued by a neutral magistrate based upon a finding of probable cause is presumptively unreasonable.[218] New York Criminal Procedure Law ("NYCPL") authorizes a criminal court to issue a search warrant "upon application of a police officer, a district attorney, or other public servant acting in the course of his official duties."[219] The NYCPL defines a search warrant, in pertinent part, as

> a court order and process directing a police officer to conduct [ ]a search of designated premises, or of a designated vehicle, or of a designated person, for the purpose of seizing designated property or kinds of property, and to deliver any property so obtained to the court which issued the warrant.[220]

In New York, probable cause to issue a warrant requires, based on the totality of the circumstances, sufficient information "to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place."[221] It does not, however, "require proof sufficient to warrant a conviction beyond a reasonable doubt."[222]

When a search is conducted pursuant to valid warrant, under the NYCPL, a individual's personal property may then be subject to seizure "if there is reasonable cause to believe that it . . . [c]onstitutes

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[215] People v. Bora, 634 N.E.2d 168, 170 (N.Y. 1994).
[216] *Id.*
[217] N.Y. CRIM. PROC. § 690.05(2)-(2)(a) (McKinney 1999).
[218] People v. Hodge, 378 N.E.2d 99, 101 (N.Y. 1978).
[219] N.Y. CRIM. PROC. § 690.05(1) (McKinney 1999).
[220] N.Y. CRIM. PROC. § 690.05(2)-(2)(a) (McKinney 1999).
[221] People v. Bigelow, 488 N.E.2d 451, 455 (N.Y. 1985).
[222] *Id.*

evidence or tends to demonstrate that an offense was committed . . . or that a particular person participated in the commission of an offense."[223] The New York Court of Appeals has recognized that taking blood samples constitutes personal property within the confines of the NYCPL, and therefore, can be seized pursuant to a valid court order.[224]

Under search and seizure law, the issue of obtaining a DNA sample from an individual is two-fold in that is requires both the "seizure of the person [ ] to bring him into contact with government agents" and then "the subsequent search for and seizure of the evidence."[225] These two issues must be considered separately.[226] With respect to the initial " 'detention'–and thus the 'seizure'–of an individual to obtain physical evidence," New York courts, in accord with the Supreme Court, absent exigent circumstances require a "judicial determination of probable cause . . . prior to the seizure."[227] As the Court stated in the *Matter of Abe A.*,[228] "when the physical evidence whose possession is the *raison d'etre* for detaining a person cannot be altered or destroyed, as in the case of the type of blood integral to one's body, by definition there can be no exigency to justify exemption from the warrant standard of probable cause."[229]

Once an individual is detained for the purpose of taking a DNA sample, the conditions under which the sample is taken must comport with the individual's constitutional rights.[230] Protections against unwarranted bodily intrusion are of the highest importance under search and seizure law, and therefore, require a court find more than just the basic threshold requirements of other areas of search and seizure law.[231] A valid court order to obtain a DNA or other similar bodily sample requires a showing that there is "(1) probable cause to believe the suspect has committed the crime, (2) a 'clear indication'

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[223] N.Y. CRIM. PROC. § 690.10(4) (McKinney 1999).

[224] *In re* Abe A., 437 N.E.2d 265, 268 (N.Y. 1982).

[225] *Id.*

[226] *Id.*

[227] *Id.* at 269. The court in the *Matter of Abe A.* noted that there are several states which require a lesser showing than that of probable cause to authorize seizures for the purpose of obtaining physical evidence, however, New York courts maintain that probable cause is the proper standard in such cases. *Id.*

[228] 437 N.E.2d 265 (N.Y. 1982).

[229] *Id.* at 269.

[230] *Id.* at 270.

[231] *Smith*, 940 N.Y.S.2d at 376.

that the relevant material evidence will be found, and (3) [that] the method used to secure it is safe and reliable."[232] Further, "the issuing court must weigh the seriousness of the crime, the importance of the evidence to the investigation and the unavailability of less intrusive means of obtaining it, on the one hand, against the concern for the suspect's constitutional right to be free from bodily intrusion on the other."[233] "Only if this stringent standard is met . . . may the intrusion be sustained."[234]

Although the warrant requirement is the most basic aspect of reasonableness that is not to say that all searches or seizures conducted absent a warrant are unreasonable. Under both federal and state law, a search or seizure conducted absent a warrant may nevertheless be deemed reasonable if it falls within one of the "categorical exceptions."[235] Among the "categorical exceptions" to the warrant requirement recognized by both New York and federal courts is a search and seizure made incident to lawful arrest, the plain view doctrine, the automobile exception, consent, and exigent circumstances.[236] In support of the justifications that underlie each of these categorical exceptions, the Court of Appeals in *People v. Singleteary*[237] observed that the "law of search and seizure has not become so recondite that it condemns necessarily prompt reasonable conduct in effecting the interests of public safety in crimes involving murder, assaults, deadly weapons, and the like."[238] Thus, when obtaining a warrant would cause "inexcusable delay in an immediate and urgent investigation", especially with respect to violent crimes, which in effect could frustrate the apprehension of the person or persons who committed the crime, there is reasonable justification for dispensing the warrant requirement.[239]

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[232] *Id.* Requiring a " 'clear indication' that the intrusion will supply substantial probative evidence . . . insur[es] that the evidence expected to be found is of importance, [and thereby] guards against a 'fishing expedition.' " *In re Abe A.*, 437 N.E.2d at 270. In addition, "the method by which the authorized intrusion is to be accomplished must be safe, reliable and impose no more physical discomfort than is reasonably necessary." *Id.*

[233] *Smith*, 940 N.Y.S.2d at 376.

[234] *Id.*

[235] People v. Singleteary, 324 N.E.2d 103, 105 (N.Y. 1974).

[236] *Id.*

[237] 324 N.E.2d 103 (N.Y. 1974).

[238] *Id.* at 106.

[239] *Id.*

B. Excessive Force Claims

New York courts closely follow federal law with respect to excessive force claims. Excessive force claims made by an individual occurring "in the course of an arrest, investigatory stop of other prearraignment seizure are analyzed under the Fourth Amendment and its' standard of objective reasonableness."[240] When deciding whether the degree of force exerted was reasonable at this stage, it is relevant to consider the State Police Guidelines governing the permissible measure of force that may be used to restrain an individual.[241] The State Police Guidelines dictate six steps; "namely, the physical presence of an officer, employment of a verbal command, placement of a hand on the arrestee, the use of pepper spray, the use of physical force and the use of deadly physical force."[242] In the case of *Passino v. State*,[243] the Court of Appeals held that the use of pepper spray to restrain an arrestee who refused to be handcuffed and exhibited belligerent behavior was reasonable because the police properly complied with the first three levels of the police guidelines before resorting to the use of pepper spray.[244]

C. The Exclusionary Rule

As previously discussed, although originally only applicable in federal court, the Supreme Court in *Mapp* determined that the exclusionary rule was incorporated and made applicable to the states by way of the Fourteenth Amendment.[245] To reiterate, the exclusionary rule is a judicially created remedy allowing for the suppression of unconstitutionally obtained evidence, whether it is a direct or indirect product of the government action, which was adopted to safeguard individuals' constitutional rights and deter unlawful police conduct.[246] While "[t]he exclusionary rule 'was originally created to de-

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[240] Passino v. State, 689 N.Y.S.2d 258, 259 (App. Div. 3d Dep't 1999).

[241] *Id.*

[242] *Id.*

[243] 689 N.Y.S.2d 258 (App. Div. 3d Dep't 1999).

[244] *Id.* at 259.

[245] *Mapp*, 367 U.S. at 660.

[246] People v. Pleasant, 430 N.Y.S.2d 592, 593 (App. Div. 1st Dep't 1980). This judicially created mechanism to secure individual rights was ultimately "[f]ormulated as a pragmatic response to law enforcement procedures violative of individual liberties." People v. McGrath, 385 N.E.2d 541, 544 (N.Y. 1978).

ter police unlawfulness by removing the incentive' to disregard the law, [it] also 'serves to insure that the State itself, and not just its police officers, respect the constitutional rights of the accused' "[247] Ultimately, this rule provides a mechanism to secure and uphold individual rights as it was "[f]ormulated as a pragmatic response to law enforcement procedures violative of individual liberties."[248]

Application of the exclusionary rule is not itself a fundamental right.[249] Again, as with the federal application of the rule, unconstitutionally obtained evidence, *may* be excluded, however its application "is not without limitations," and thus, is not automatic.[250] Because the primary justification for the exclusionary rule is its intended deterrent effect, so "[w]hether the rule should apply 'depends upon a balancing of its probable deterrent effect against its detrimental impact upon the truth finding process.' "[251] In applying this balancing test, where the remedial objectives of the exclusionary rule are only tenuously demonstrated, a court might rule to uphold the challenged evidence notwithstanding the unconstitutional means with which it was obtained.[252]

In agreement with the federal approach, New York courts recognize numerous exceptions to the exclusionary rule. For instance, New York courts allow the prosecution to rely upon unconstitutionally obtained evidence in grand jury proceedings, to impeachment a defendant who takes the stand at trial, or in connection with "a witness' in-court identification."[253] Further, similar to the federal approach, with respect to secondary evidence, New York courts observe the independent source,[254] attenuation,[255] and inevitable discovery[256] exceptions. With respect to these three exceptions, however, New York courts take a slightly different approach than federal courts by limiting the application of these doctrines to secondary evidence even

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[247] People v. Jones, 810 N.E.2d 415, 419 (N.Y. 2004) (quoting People v. Payton, 412 N.E.2d 1288, 1290 (N.Y. 1980)).

[248] *McGrath*, 385 N.E.2d at 544.

[249] *Jones*, 810 N.E.2d at 420.

[250] *Pleasant*, 430 N.Y.S.2d at 593. "[T]he exclusionary rule has never enjoyed the stature of an end in itself, but, rather, has served solely as a means to an end: a remedial device operating essentially upon a principle of deterrence." *McGrath*, 385 N.E.2d at 544.

[251] *Jones*, 810 N.E.2d at 420 (quoting *McGrath*, 385 N.E.2d at 544).

[252] *McGrath*, 385 N.E.2d at 544.

[253] *Pleasant*, 430 N.Y.S.2d at 593.

[254] People v. Binns, 749 N.Y.S.2d 615, 617 (App. Div. 3d Dep't 2002).

[255] People v. Stith, 506 N.E.2d 911, 913 (N.Y. 1987).

[256] People v. Turriago, 681 N.E.2d 350, 356 (N.Y. 1997).

in cases where the prosecution can show that the primary evidence would most likely have been discovered notwithstanding its unlawful procurement.[257]

Another difference with respect to exclusionary rule exceptions is that unlike federal courts, New York courts do not recognize the *Leon* good-faith exception.[258] In the case of *People v. Bigelow*,[259] the police conducted a search of an automobile pursuant to what they believed was a valid warrant issued by a county court judge; however, subsequent to the search, the warrant was deemed invalid based on insufficient evidence to support a finding of probable cause.[260] The People in *Bigelow* argued, based on the *Leon* decision, that the evidence obtained as a result of the search should not be suppressed because it was "seized in objective good-faith reliance on a warrant mistakenly issued by the magistrate."[261] The Court of Appeals expressly rejected the *Leon* rationale that suppression of evidence obtained in good-faith reliance on a warrant would not serve the intended purpose of the exclusionary rule, specifically in deterring police misconduct.[262] In rejecting the People's rationale, the court stated:

> [w]hether or not the police acted in good faith [ ] the *Leon* rule does not help the People's position. That is so because if the People are permitted to use the seized evidence, the exclusionary rule's purpose is completely frustrated, a premium is placed on the illegal police action and a positive incentive is provided to others to engage in similar lawless acts in the future.[263]

VII. APPLICATION

In New York, before ordering an uncharged suspect to submit to a DNA sample, a court must be convinced by a showing of "probable cause to believe the suspect has committed the crime, a 'clear indication' that the relevant material evidence will be found, and

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[257] *Id.*
[258] *Bigelow*, 488 N.E.2d at 458.
[259] 488 N.E.2d 451 (N.Y. 1985).
[260] *Id.* at 457.
[261] *Id.* at 457-58.
[262] *Id.*
[263] *Id.* at 458.

[that] the method used to secure it is safe and reliable."[264] Moreover, "the issuing court must weigh the seriousness of the crime, the importance of the evidence to the investigation and the unavailability of less intrusive means of obtaining it, on the one hand, against the concern for the suspect's constitutional right to be free from bodily intrusion on the other."[265]

Upon application by the People in *Smith*, the lower court found that the People satisfied these stringent requirements, and therefore, provided sufficient justification for the court to issue an order to compel Smith to submit to a DNA sample in the form of a buccal swab.[266] Smith did not challenge that judicial determination on appeal, thereby impliedly conceding that the issuance of the order was valid.[267] In fact, Smith even complied with that court order and provided a DNA sample.[268] It was after Smith lawfully complied with the court order that the trouble began.

By no fault of his own and unbeknownst to Smith, the police compromised the sample and were forced to request a second court order.[269] Without notice to Smith, the court granted the request and issued a duplicate order, again to compel Smith to submit to a buccal swab.[270] Acting pursuant to the duplicate order the police picked up Smith in order to take a second DNA sample.[271] Although Smith did not initially resist the police when they picked him up, once at the station he refused to open his mouth and submit to the test.[272] While seated on the floor in a holding room, handcuffed, and surrounded by several officers, the police tased Smith's bare skin to force his compliance.[273] This entire exchange, starting the moment Smith was first apprehended and ending the moment he was tased, lasted less than twenty minutes.[274] On appeal, the court held that the DNA evidence obtained after Smith was tased required suppression on the grounds that the sample was secured as a result of excessive force and in vio-

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264 *Smith*, 940 N.Y.S.2d at 376.
265 *Id.*
266 *Id.*
267 *Id.*
268 *Id.*
269 *Smith*, 940 N.Y.S.2d at 376.
270 *Id.*
271 *Id.*
272 *Id.*
273 *Id.* at 378.
274 *Smith*, 940 N.Y.S.2d at 378.

lation of Smith's procedural due process rights.[275]

It is fundamental under both federal and state law that all searches and seizures carried out by the government be deemed reasonable in order to stand up in court. The most basic rule in this area is that searches and seizures conducted without a warrant issued by a neutral magistrate based on a finding of probable cause are presumptively unreasonable unless the circumstance falls within a well established and carefully delineated exception, i.e., consent, search incident to lawful arrest, and exigent circumstances.[276] The reasonableness of a search or seizure, whether conducted with or without a warrant, turns on the presence of absence of probable cause.[277] While the search and seizure of Smith's DNA evidence was conducted without a valid warrant and the second order was provided and executed in violation of his due process rights, it is clear that there was sufficient evidence to establish probable cause to search under the facts of this case.[278] However, absent a valid warrant, probable cause alone could save neither the search nor the seizure from violating Smith's constitutional rights.[279] Yet, the court did not carefully consider whether the facts warranted invocation of an exception to the warrant clause.

Under the consent exception, the People could have argued that Smith consented to the initial seizure of his person because he did not resist the police when they apprehended him to take the sample.[280] Without explanation, Smith allowed the police to handcuff and transport him to the station where he was detained.[281] However, even if Smith consented to the seizure of his person and any reasonable search that followed from that seizure, Smith's consent to search was unequivocally revoked by his actions at the station, specifically refusing to open his mouth.[282]

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[275] *Id.* at 375.

[276] *See supra* notes 58-60, 78-79, 235-36.

[277] *See supra* notes 61, 221.

[278] *Smith*, 940 N.Y.S.2d at 376.

[279] *Id.* at 376-77.

[280] *Id.* at 378.

[281] *Id.* To momentarily enter the mind of Smith, it seems like a reasonable assumption that he did not initially resist the officers when they first apprehended him because, knowing he had already provided a DNA sample, it is likely he believed was being arrested for his connection with the robbery crimes. While there is nothing in the present decision that expressly supports this assumption, it is a reasonable inference based on the facts of the case.

[282] *Id.*

With respect to the exigent circumstances exception, both federal and New York state courts have recognized that there are situations in which the need to preserve evidence is time sensitive, and thus, justifies a warrantless search.[283] An example of when such time sensitive circumstances are present is where the police must preserve evidence of a suspect's blood-alcohol level.[284] However unlike blood alcohol content, DNA evidence, by its very nature is unchanging, which means it does not fall within the exigent circumstances exception to justify the warrantless intrusion into Smith's body.[285]

The next exception to the warrant requirement worthy of consideration in this context was search incident to lawful arrest. The application of this exception is a little trickier because Smith was not technically placed under arrest before the sample was taken; however, there is no dispute that there was at a minimum, probable cause to issue the search warrant for Smith's DNA for his suspected connection with the unsolved robbery crimes.[286] Nevertheless, Smith was still classified as merely a detainee when the sample was taken, and thus, the warrantless search of his body did not fall within this exception.

When considering reasonableness, whether carried out pursuant to a valid warrant or one of the categorical exceptions to the warrant requirement, the manner in which the search or seizure is conducted is relevant to a court's assessment of its constitutionality. The second court order in the *Smith* case, although invalid for due process reasons, called for the DNA sample to be taken by a buccal swab procedure, which is a minimally intrusive, if not one of the least intrusive means of obtaining a DNA sample.[287] However, the constitutional predicament arose because Smith was forcibly tased by the police as a method used to obtain Smith's compliance with the order and submission to what would otherwise have been viewed as a minimally intrusive procedure.[288]

Excessive force claims are judged by reference to the legal status of the individual alleging the violation.[289] Claims of free citi-

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[283] *See supra* notes 86, 239.
[284] *See supra* note 92.
[285] *See supra* notes 93, 229.
[286] *Smith*, 940 N.Y.S.2d at 376.
[287] *Id.*
[288] *Id.*
[289] *See supra* note 115.

zens are analyzed under the Fourth Amendment objective reasonableness standard, while claims of arrestees, and pretrial detainees are analyzed under the Fifth and Fourteenth Amendment due process clauses applying the four-factor *Johnson* test in order to determine if the force used amounted to punishment.[290] The difficulty in applying these tests is that the courts are not clear on where the detention of a free citizen ends and where pretrial detention begins.[291] Nevertheless, this distinction is carries importance, as the Fourth Amendment standard provides greater protection to an individual's privacy and security rights than afforded by either the Fourth or Fourteenth Amendment.[292]

In the present case, Smith was a suspect who was detained to effectuate his compliance with a court order.[293] Based on that fact, Smith was still a free citizen, which means that his excessive force claim required analysis under the Fourth Amendment, using its objective reasonableness standard.[294] However, it is arguable that at some point during his detention, prior to the police's use of the taser, Smith's status transformed into that of an arrestee. Nevertheless, under the Fourth Amendment standard, the use of the taser on Smith who was handcuffed and detained at the police station, and thus, not at risk of flight and presented no immediate threat to the police, was objectively unreasonable under the circumstances.[295] Smith did not become violent or aggressive, bur rather, merely refused to open his mouth.[296] Moreover, there were no other exigencies to justify the immediate need for the police to obtain the sample.[297] As previously discussed, DNA evidence by nature is unchanging, which created a challenge for the officers to argue any justification for resorting to use of a taser on Smith.[298] The police engaged in such conduct just to obtain a sample that would have yielded precisely the same evidentiary results had they exhausted more reasonable methods first. As such, the Appellate Division properly found the use of the taser in

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290 *See supra* notes 131-36, 141.
291 *See supra* notes 121-23.
292 *See supra* notes 131-50.
293 *Smith*, 940 N.Y.S.2d at 376.
294 *Id.* at 376-78.
295 *Id.* at 378.
296 *Id.*
297 *Id.*
298 *See supra* notes 93, 229, 285.

this case amounted to a constitutional violation.[299]

When evidence is obtained in violation of an individual's constitutional rights, one remedy is to suppress the evidence at trial.[300] Because the purpose of this exclusionary rule is to deter unlawful police practices, where suppression would not serve its greater societal function, evidence obtained both as a direct and/or indirect result of the violation may still be introduced under certain circumstances.[301] These exceptions to the exclusionary rule include, inevitable discovery, attenuation, independent source, and good-faith reliance on an invalid warrant.[302]

Addressing the good faith exception first, federal courts may allow the introduction of evidence at trial, both primary and derivate, where a search or seizure was carried out by police officers in an objective good-faith reliance on a warrant, even when that warrant is later found invalid.[303] The idea is that the deterrent effect of the suppressing evidence obtained as result of unlawful police practices is not served when the police act in accordance with what they believe to be a valid warrant.[304] New York courts on the other hand, refuse to recognize this exception arguing that allowing the introduction of unconstitutionally obtained evidence, even if the police claim to have been acting in good faith, frustrates the purpose of the exclusionary rule and in effect could work as an incentive for future lawless action.[305] Accordingly, had *Smith* been decided under federal law, because the police took the sample in good-faith reliance on the validity of the second court order, even though the sample was the primary evidence obtained as a result of the constitutional violation, the DNA evidence may have been admissible at trial as part of the government's case in chief. However, under New York law, had Smith raised this issue on appeal, regardless of whether or not the police acted in good-faith reliance on the validity of the second court order, Smith's DNA evidence would likely have been suppressed.

With respect to the independent source, attenuation, and inevitable discovery exceptions, as a general rule these only apply to

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[299] *Smith*, 940 N.Y.S.2d at 377-78.
[300] *See supra* notes 245-48.
[301] *See supra* notes 171-75, 249-56.
[302] *See supra* notes 183-94, 254-57.
[303] *See supra* notes 179-80.
[304] *See supra* notes 181-82.
[305] *See supra* notes 258-63.

the admission of evidence obtained secondary to the constitutional violation.[306] In *Smith*, neither the independent source nor the attenuation exceptions are relevant under the facts presented; however, the inevitable discovery exception raises some interesting issues.

The inevitable discovery exception allows for the introduction of otherwise unconstitutionally obtained evidence at trial if through some other police practice, the challenged evidence would have inevitably been discovered.[307] To date, the Supreme Court has only dealt with the inevitable discovery exception in the context of secondary evidence, and therefore, the precedent is limited and the question of whether it applies to primary evidence remains open to state court's discretion.[308] However, most of the lower federal courts, including for example the Second Circuit, have extended the inevitable discovery exception to apply both to the introduction of primary and secondary evidence.[309] Despite this expansive interpretation by lower federal courts, New York courts refuse to extend application of the inevitable discovery exception beyond that of secondary evidence.[310]

In *Smith*, the court issued not one, but two orders compelling Smith to submit to a DNA test.[311] Interestingly, Smith complied with the first order but the police compromised the sample.[312] Thereafter, when Smith refused to submit to the second order the police forced his compliance by way of a taser gun.[313] The DNA evidence would therefore constitute primary evidence since it was obtained as a direct result of the constitutional violation. If analyzed under federal law, a majority of the lower federal courts would likely find that the DNA evidence admissible at trial. Not only did the court issue two orders prior to the violation, but those orders were supported by probable cause.[314] Furthermore, had the police exhausted other options to force Smith to comply with the order, such as holding him in contempt, the police would have inevitably obtained the DNA evidence. However, in a minority of federal courts and under New York law, the inevitable discovery exception would not apply because Smith's

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306 *See supra* notes 185-94, 253-55.
307 *See supra* notes 191-92.
308 *See supra* notes 191-94.
309 *See supra* notes 193-94.
310 *See supra* notes 256-57.
311 *Smith*, 940 N.Y.S.2d at 376.
312 *Id.*
313 *Id.*
314 *Id.*

DNA sample was primary evidence, thus requiring suppression at trial to remedy the constitutional violation.

VIII. CONCLUSION

The New York State Constitution generally provides individuals with greater search and seizure rights than those afforded under the United States Constitution. When evidence is obtained in violation of an individual's constitutional rights, under New York law, courts are more likely to suppress unconstitutionally obtained evidence at trial than federal courts. Interestingly, despite the fact that the right to be free from unreasonable searches and seizures by the government, particularly in the area of forced bodily intrusions, is one of the most fundamental rights of for individuals, the federal interpretation of the exclusionary rule, in many instances, may leave an individual without remedy for constitutional violations in this area. New York State's interpretation of the exclusionary rule is more protective of individuals' rights, and therefore, the protections afforded to individuals against unreasonable searches and seizures would best be served if all courts followed New York's more protective interpretation.

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