ADDENDUM:

APPLICABLE SUBSTANTIVE LAW

for

STATE OF ARIDA VS. TERRY E. JAMESON

I. PROBABLE CAUSE FOR A WARRANTLESS SEARCH

The fourth amendment to the U.S. Constitution, applicable to the states through the fourteenth amendment, prohibits unreasonable searches by state officials. Elkins v. United States, 364 U.S. 206, 213, 80 S.Ct. 1437, 1442, 4L.Ed2d 1669 (1960). It does not apply to a search, even an unreasonable one, by a private individual who is not acting as an agent of the government or with the participation or knowledge of any government official. United States v. Jacobson, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed. 2d 85 (1984). The fourth amendment protects only expectations of privacy that are reasonable or that society is prepared to recognize as legitimate, Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed. 2d 393 (1984); Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed. 2d 633 (1980), and the fourth amendment may protect containers of contraband that are not shown to be readily apparent as contraband. Robbins v. California, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed 2d 744 (1981). There is no legitimate expectation of privacy, however, in readily apparent contraband and a "field test" of suspected contraband compromises no legitimate privacy interest. Jacobson, 466 U.S. at 121-23, 104 S.Ct. at 1661-62. There is, however, a reasonable expectation of privacy in a rented storage locker. United States v. Karo, 468 U.S. 705, 720 n.6, 104 S.Ct. 3296, 3306 n.6, 82 L.Ed. 2d 530 (1984).

All searches by government officials without a valid warrant are presumptively unreasonable unless shown to fall within one of the exceptions to the rule that a search must rest upon a valid warrant and the burden is on the person seeking to uphold the search to show that it comes within an exception. Coolidge v. New Hampshire, 403 U.S. 443, 455, 91 S.Ct. 20022, 2032, 29 L.Ed 2d 564 (1971); Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.ed 2d 856 (1964).

Probable cause is flexible, common sense standard. It exists where the facts and circumstances within the police officer's knowledge and of which they have reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that an offense has been, or is being committed. Ker v. California, 374 U.S. 23, 35, 83 S.Ct. 1623, 1630 (1962). The existence of probable cause is to be determined only from what the officers had reason to believe at the time of entry. Id. at n.12 A practical, nontechnical probability that incriminating evidence is involved is all that is required to establish probable cause. Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed 2d 1879 (1949).

Probable cause to search, plus exigent circumstances, may justify a warrantless search. Note that probable cause alone is insufficient; it must be coupled with exigent circumstances before a warrantless search is justified. Vale v. Louisiana, 357 U.S. 30, 90 S.Ct. 1969, 26 L.Ed. 2d 409 (1970). (What constitutes exigent circumstances is discussed below).

NOTE: In New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed 2 720 (1985), the Supreme Court held that a student had a legitimate expectation of privacy in the contents of her purse and held that searches by school officials are protected by the fourth amendment, although less than probable cause may justify a search. The court left open the question of whether a student's expectation of privacy extends to his locker, n.5, and further left open the question of

whether a school search conducted by law enforcement agents may be justified when supported by something less than probable cause. Note 7.

II. DUE DILIGENCE IN PROCESSING A WARRANT

The cases are not clear concerning when, and for how long, the police may delay in seeking a search warrant. In United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed 2d 538 (1977), the Supreme Court held that a person had a reasonable expectation of privacy in the contents of his footlocker and, once the police gained exclusive possession of the footlocker, a warrantless search conducted one hour later was unreasonable and not justified by exigent circumstances. Similarly, in Arkansas v. Sanders, 442 U.S. 753, 766, 99 S.Ct. 2586, 2594, 61 L.Ed. 2d 235 (1979), the Supreme Court held that once the police, without risking the loss of evidence, had detained a suspect and secured his suitcase, the police should have delayed the search of the suitcase until they obtained a search warrant. In United States v. v. Johns, 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed. 2d 890 (1985), however, the Supreme Court held that because the police could have conducted a warrantless search of packages seized from a truck immediately, a three day delay in searching the packages was reasonable, even though no search warrant was obtained. The deciding factor appears to be whether or not the police have the right to conduct a search immediately when they gain exclusive possession of the object to be searched. If the police, because probable cause plus exigent circumstances, are entitled to search the object as soon as they gain exclusive possession of it, they need not delay the search and seek a warrant. If, however, exigent circumstances do not exist at the time the police gain exclusive possession of the object, the police cannot immediately conduct a search. Instead, they must obtain a warrant.

III. EXIGENT CIRCUMSTANCES JUSTIFYING A WARRANTLESS SEARCH

Exigent circumstances, when coupled with probable cause, may excuse the requirement that a warrant be obtained before a search is conducted but, even when applying this principle, the Supreme Court has emphasized that a warrant should be obtained where practicable. See United States v. United States District Court, E.D. of Michigan, Southern Div., 407 U.S. 297, 318, 92 S.Ct. 2125, 2137, 32 L.Ed. 2d 752 (1972). The seriousness of the offense alone does not create an exigent circumstance that would justify a warrantless search. Mincey v. Arizona, 437 U.S. 385, 394, 98 S.Ct. 2408, 2414, 57 L.Ed. 2d 290 (1978).

One exigent circumstance the Supreme Court has recognized is that when there is a danger that evidence will be lost or destroyed while a warrant is sought, a warrantless search may be reasonable, Arkansas v. Sanders, 442 U.S. at 759, 99 S.Ct. at 2590-91, because subjects have no constitutional right to destroy or dispose of evidence. Ker, 374 U.S. at 39, 83 S.Ct. at 1633. Narcotics specifically have been held to be uniquely "quickly and easily destroyed." Id.

The test for determining whether exigent circumstances exist so as to excuse the failure to obtain a warrant is whether the officer reasonably believed that he was confronted with an emergency in which the delay necessary to obtain the warrant, under the circumstances, threatened the destruction of evidence. Schmerber v. California, 384 U.S. 757, 770, 86 S.Ct. at 1826, 1835 (1966). In applying such a test, the answer is not to be determined by hindsight;

instead, the state of mind of the police at the time the search was made is the relevant factor. Cf. Ker, 374 U.S. at 40, N.12, 83 S.Ct. at 1633, n.12.

IV. PLAIN VIEW

The plain view doctrine authorizes the seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior fourth amendment justification and who has probable cause to suspect that the item is connected with criminal activity. Texas v. Brown, 460 U.S. at 738 and n.4, 741-42, 103 S.Ct. at 1540 and n.4, 1542-43. The plain view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost; the owner may retain incidents of title and possession but not privacy. Illinois v. Andreas, 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed. 2d 1003 (1983).

Where the initial intrusion that brings the police within plain view of the object is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, seizure of the object is permitted, Coolidge, 403 U.S. at 465, 91 S.Ct. at 2037; however, plain view alone is insufficient to justify warrantless seizure of evidence. Exigent circumstances must also exist, Coolidge, 403 U.S. at 468, 91 S.Ct. at 2039, and the search or seizure of objects in plain view must be supported by probable cause. Arizona v. Hicks, 107 S.Ct. 1154 (1987) (moving a stereo to see serial numbers was a search which could only be supported by probable cause). In addition, the discovery of items in plain view may have to be inadvertent; where the police know in advance the location of evidence and intend to seize it, a warrant is required absent exigent circumstances. Coolidge, 403 U.S. at 469, 91 S.Ct. at 2040 (plurality opinion never adopted by a majority of the court, see Arizona v. Hicks, 107 S.Ct. 1149, 1155 (White, J., concurring).