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Fourth Amendment Overview for the Non-Litigator

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I. INTRODUCTION

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, 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 persons or things to be seized.

U.S. Const., amend. IV.

The Fourth Amendment is included within the Bill of Rights, ratified December 15, 1791. While the language of the amendment is relatively straightforward, applying that language, more than 230 years later with technological and other advances and changes, is an ever-developing area of law. This paper is provided in response to a request by the TCAA Board to provide a general overview of the Fourth Amendment, primarily for the "non-litigator" audience.

II. GENERAL OVERVIEW OF THE FOURTH AMENDMENT

Put simply, the Fourth Amendment prevents state actors from engaging in "unreasonable" searches and seizures. As part of the reasonableness requirement, it also requires that warrants be based on facts that are sworn to and that establish probable cause to a judge, and requires that warrants be limited in scope.

The purpose of the Fourth Amendment is to protect individuals' privacy and security from arbitrary invasions by the government. *Carpenter v. United States*, 585 U.S. 296, 303 (2018) (quoting *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 528 (1967) ("The 'basic purpose of [the Fourth] Amendment,' our cases have recognized, 'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'")).

Recall that restrictions or limitations within constitutional amendments, including the Fourth Amendment, apply only to state action by governmental entities and "state actors." Constitutional limitations do not apply to non-state actors. Practically speaking, Fourth Amendment issues most often arise in the context of law enforcement personnel engaged in investigating crimes or interacting with suspected violators. Accordingly, cases interpreting the Fourth Amendment generally seek to balance two potentially competing interests: (a) the privacy, property, and liberty rights of citizens against, (b) the need for law enforcement to investigate crimes, gather evidence, and detain alleged violators.

A significant amount of caselaw addressing the Fourth Amendment pertains to the exclusionary rule in the context of criminal appeals and suppression of evidence. The Supreme Court set out the exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643 (1961), which provides that evidence obtained through a search in violation of the Fourth Amendment cannot be used against a defendant in a criminal trial.

However, for the purposes of those practicing in the field of municipal law, the more relevant concern is that a violation of the Fourth Amendment can create civil liability exposure. Most civil lawsuits, which are brought through 42 U.S.C. §1983, that assert Fourth Amendment violations generally fall within the following three categories:

> (a) allegations that a state actor searched property or a person in violation of the Fourth Amendment;
>
> (b) that a person was unlawfully detained or arrested without the requisite reasonable suspicion or probable cause, including prolonged detention claims; and
>
> (c) that during a Fourth Amendment seizure, an officer used excessive force.

The following discussion aims to provide a high-level understanding of the issues presented in those types of cases and scenarios, including case citations to be utilized for greater research and understanding as needed.

III. An Expectation of Privacy Generally Triggers The Fourth Amendment for Search Purposes

To claim protection under the Fourth Amendment for a search, one must generally be able to demonstrate a reasonable expectation of privacy in the place searched. *Minnesota v. Carter*, 525 U.S. 83, 83-84 (1998). Location matters. For example, one certainly has a superior expectation of privacy in one's home—such is expressly stated in the Fourth Amendment. And searches or seizures inside one's home without a warrant are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573 (1980). Furthermore, curtilage (areas immediately around the home such as porches, driveways close to the home, etc.) is protected as part of the home. However, open areas beyond curtilage generally do not require a warrant under the "open fields" doctrine.

What about an overnight guest in someone else's home, does the guest have an expectation of privacy even though it is not his/her home? In *Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990) the Supreme Court answered yes, finding that an overnight guest had a legitimate expectation of privacy in another's home.

While location certainly matters, consider that "the Fourth Amendment protects people, not places." *Katz v. United S*tates, 389 U.S. 347, 352 (1967). Therefore, whatever the location, the primary issue is usually whether a person has a reasonable expectation of privacy. This determination requires considering two elements: (1) whether the individual has a *subjective* expectation of privacy; and (2) whether that expectation is *objectively* reasonable (that is others in the same situation would find the expectation reasonable).

The places and issues that raise potential expectation of privacy considerations are infinite. However, below are a few examples of courts considering the reasonable expectation of privacy:

- **Privacy in a public phone booth**: *Katz v. United States*, 389 U.S. 347 (1967)—Mr. Katz frequented a particular phone booth in Los Angeles. The government became suspicious that Mr. Katz was engaged in gambling and considered that perhaps his many calls at the phone booth were related. FBI agents attached a listening and recording device to the

outside of the public phone booth, obtained incriminating information, and used the recording against Mr. Katz in his prosecution. The Supreme Court denied that a physical intrusion into the phone booth was necessary to violate the Fourth Amendment and further concluded that Mr. Katz had a reasonable expectation of privacy in his conversations in the phone booth and, therefore, that the FBI violated Katz's Fourth Amendment rights.

- **No expectation of privacy in video footage filmed by a third party**: *United Sates v. Gaulden*, 73 F.4th 390 (5th Cir. 2023) involved a rapper—YoungBoy Never Broke Again—who paid someone to follow him around and film his everyday life. A 911 call reported men with Uzis and other guns walking down the street in Baton Rouge, and police arrested YoungBoy and others. A warrant was obtained for a memory card in a camera, but the warrant was found defective. The memory card showed YoungBoy, a convicted felon, in possession of a weapon. The district court found that YoungBoy had a protected Fourth Amendment interest in the videos on the card, although he had no interest in the card itself, and therefore suppressed the videos. The Fifth Circuit reversed, finding that YoungBoy failed to show that he had a constitutionally protected reasonable expectation of privacy, noting "[a] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."

- **Privacy in cell phone data and location information**: *Carpenter v. United States*, 585 U.S. 296 (2018), in a 5-4 decision, found that an individual has a legitimate expectation of privacy in the record of his or her physical movements captured through cell-site location information. This decision reversed the Sixth Circuit, which found no expectation of privacy because the caller had shared location information to the caller's phone carrier.

It is worth noting that a Fourth Amendment violation can occur even if the matter does not necessarily invoke a reasonable expectation of privacy, if there is an otherwise unreasonable search. This is demonstrated in the case of *United States v. Jones*, 565 U.S. 400 (2012).

Jones involved an owner of a nightclub in the District of Columbia who law enforcement suspected of trafficking drugs. A federal judge issued a warrant authorizing an electronic tracking device to be placed on a vehicle within D.C. and within 10 days. Law enforcement installed the device on the 11th day, and in Maryland. A lower court held that most of the data was admissible because "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." However, the Supreme Court found that the expectation of privacy question was immaterial—"[h]ere, the Court need not address the Government's contention that Jones had no 'reasonable expectation of privacy,' because Jones's Fourth Amendment rights to do not rise or fall with the *Katz* formulation."

Jones explained that the reasonable expectation of privacy test has been added to, but not substituted for, the common-law trespassory test. Based on the facts in *Jones*, the Court found the placement of the device on the vehicle fell within the parameters of a search that the Fourth

Amendment protected and therefore required a valid warrant—regardless of any expectation of privacy analysis.

IV. WARRANTS AND PROBABLE CAUSE

Unless an exception applies, the Fourth Amendment requires a warrant to search private property. As noted above, the text of the Fourth Amendment provides that there are three requirements for a warrant: (a) that it is based on probable cause; (b) the cause is sworn to; and (c) the warrant must particularly describe the place to be searched and the persons or things to be seized.

Probable case can be summarized as a reasonable basis to believe:

(a) that a crime occurred; and

(b) either:

(i) the person to be searched or arrested committed the crime, *OR*

(ii) evidence of the crime is at the location to be searched.

Probable cause is more than reasonable suspicion and must be based on facts that are: specific, objective (more than a mere hunch), and articulable. Courts acknowledge that constitutes probable cause "is incapable of precise definition or quantification into percentages" and "depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 370–71 (2003). Further "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Id*.

At the same time, case law also provides that probable cause is a "practical and common-sensical standard." *Florida v. Harris*, 568 U.S. 237, 244 (2013). Probable cause requires only "a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n. 13 (1983). Probable cause "exists 'when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense.'" *Spiller v. City of Texas City, Police Dept.,* 130 F.3d 162, 165 (5th Cir. 1997).

Probable cause does not equate to a high likelihood for a conviction. Rather, a "fair probability" that the suspect has committed a crime is enough to establish probable cause. *United States v. Garcia*, 179 F.3d 265, 269 (5th Cir. 1999). In fact one recent Fifth Circuit decision provides that the likelihood that the individual committed the crime "need not reach [even] the fifty percent mark." *Espinal v. City of Houston*, 96 F.4th 741, 745 (5th Cir. 2024).

While a discussion of the details for arrest and search warrants is beyond the scope of this paper, note that Texas law provides for the requirements for both arrest warrants (Article 15 of the Texas Code of Criminal Procedure) and search warrants (Article 18 of the Texas Code of Criminal Procedure).

V. WARRANTLESS SEARCHES OF PROPERTY

"Warrantless searches 'are *per se* unreasonable,' 'subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 556 U.S. 332 (2009) (quoting *Katz,* 389 U.S. at 357). A significant amount of Fourth Amendment caselaw pertains to whether one or more exceptions apply to the search warrant requirement in the context of alleged unlawful searches. The following are the most common exceptions to the search warrant requirement:

Consent: No warrant is required if the owner of the property consents to a search. In addition to the owner, consent can also come from a person in *control* of the property. For example, a roommate could give consent to search the general areas of an apartment that the roommate has access to and control over. However, Roommate 1 could not consent to Roommate 2's private bedroom that Roommate 1 did not have control over. Consent searches can be of a home, building, vehicle, or personal property. Consent can be limited in scope, and any search beyond the limitation falls outside of the consent exception. Further, consent can be withdrawn at any time, upon which the officer must immediately end the search pursuant to consent.

Search Incident to Arrest: No warrant is required for an officer to search a person and the person's immediate surroundings if the search is conducted following a lawful arrest.

Inventory—No warrant is required to search and inventory the contents of property if the property is being inventoried after being impounded or logged into custody after an arrest. Note that the requirements for an impoundment must be followed, for example in the case of impounding a vehicle.

Plain View: An officer can seize illegal items without a warrant that are in the officer's plain view. However, the officer must have a legal right to be where the officer was for the plain view doctrine to apply. A question often arises as to whether an officer can use a flashlight or binoculars to aid the officer's ability to view the contraband. The use of aids such as binoculars and flashlights has been held to *not* negate the application of the plain view doctrine.

An officer can also contort his body or otherwise place himself in an unusual position (such as lying down and looking under a vehicle) and stay within the plain view exception—as long as the officer has a lawful right to be present. Finally, the Supreme Court has acknowledged that "officers may generally take actions that 'any private citizen might do,'" such as approaching a home and knocking on the front door without a warrant. *Caniglia v. Strom*, 593 U.S. 194, 198 (2021) (citing *Florida v. Jardines*, 569 U.S. 1, 8 (2013)). An officer could not use that ability, however, to engage in law enforcement activities, such as walking a police canine up to the front door.

Police Canines: A police canine, in a public place, can sniff the air without invoking any warrant requirement. This includes having a canine walk around a vehicle on a roadside to determine if there is any contraband inside a vehicle or walking around and sniffing a person in a

public place. However, any detention may not be unreasonably prolonged to allow for the canine to arrive.

Exigent Circumstances: Property may also be entered and searched without a warrant when a genuine exigent circumstance exists. An exigent circumstance exists when there is "a compelling need for official action and no time to secure a warrant." *Kentucky v. King*, 563 U.S. 452, 460 (2011). Note that the officer cannot have created the exigency for this exception to apply. Generally, the exigency presented must establish the need for immediate action to prevent harm to an individual or prevent the destruction of evidence. The following have been deemed sufficient exigent circumstances to justify a warrantless entry and search:

- Entry to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.
- Entry into a building on fire.
- Entry to prevent the imminent destruction of evidence or the imminent escape of a suspect.
- Entry in "hot pursuit" of a fleeing felon. Note that in *Lange v. California*, 594 U.S. 295 (2021) the Supreme Court noted that hot pursuit of a suspect for a misdemeanor violation does not, categorically, justify a warrantless entry into a home. In the misdemeanor context, the exigency must be determined and evaluated on a case-by-case basis.

VI. THE "COMMUNITY CARETAKING FUNCTION" DOES NOT PROVIDE AN INDEPENDENT BASIS FOR WARRANTLESS SEARCHES AND SEIZURES

In 1973, the Supreme Court noted that police officers are often called on to discharge noncriminal "community caretaking functions," such as responding to disabled vehicles or investigating accidents. *Cady v. Dombrowski*, 413 U.S. 433 (1973). In 2021, the Supreme Court considered whether this community caretaking function can independently justify a warrantless search and seizure in a home. *Caniglia v. Strom*, 593 U.S. 194, 196 (2021). The Supreme Court found that it does not.

During an argument with his wife inside their home, Mr. Caniglia retrieved a handgun from a bedroom, set it on the dining room table and asked his wife to "shoot me know and get it over with." Ms. Caniglia elected to leave the home and go to a hotel for the night. The next morning, Ms. Caniglia could not reach her husband by phone and called the police to accompany her and perform a welfare check.

Police officers responded to the home, where they found Mr. Caniglia on his front porch. While Mr. Caniglia denied being suicidal, the officers felt he posed a risk to himself or others and

called an ambulance. Mr. Caniglia agreed to go to the hospital for a psychological evaluation, but only if the officers promised not to confiscate his firearms inside.

The officers agreed, but once the ambulance left with Mr. Caniglia, the officers entered the home and seized two handguns under the justification of safety if Mr. Caniglia returned. Mr. Caniglia later sued the officers and the city, alleging that the officers violated the Fourth Amendment when they entered and seized his firearms without a warrant.

The district judge granted summary judgment for the defendants. The First Circuit affirmed on appeal, finding a "community caretaking exception" to the warrant requirement since the officers acted to protect Mr. Caniglia and those around him. However, the Supreme Court reversed and rejected a stand-alone "community caretaking" exception to the warrant requirement. In doing so, the Court noted that no other exigent circumstances existed in the case—Mr. Caniglia had left the home and there was no immediate risk of danger. The Supreme Court noted that the fact that the search and seizure occurred inside the home was important, leaving open the idea of a possible exception to the same type of conduct in a vehicle or elsewhere.

VII. WARRANTLESS SEARCHES OF VEHICLES

A vehicle is an "effect" as that term is used in the Fourth Amendment. *United States v. Chadwick,* 433 U.S. 1, 12 (1977). Therefore, the requirement that any search of a vehicle be reasonable and based on probable cause applies. The question arises, however, in what context can a vehicle be searched without a warrant.

In 1925 the Supreme Court, in *Carroll v. United States*, 267 U.S. 132 (1925), recognized that vehicles come with a reduced right to privacy as compared to a home or office. In *Carroll*, prohibition agents stopped and searched a vehicle after agents unsuccessfully attempted to purchase illegal whiskey from the suspect. During the search, agents discovered sixty-eight (68) bottles of alcohol. The Supreme Court found that the warrantless search did not violate the Fourth Amendment. In doing so, the Court noted that agents had articulable probable cause that Carroll was transporting illegal contraband and that it was impractical to attempt to get a warrant, including because vehicles can move quickly and avoid the effectiveness of a warrant.

Despite vehicles having a reduced expectation of privacy, the Fourth Amendment still prohibits arbitrary vehicle searches. A warrantless search of the vehicle must be based on probable cause that a vehicle contains evidence of criminal activity. Without probable cause that the vehicle contains evidence of a crime, the vehicle cannot be searched unless another exception applies, such as consent or one of the other exceptions discussed above. And keep in mind that the initial stop of the vehicle must be based on at least reasonable suspicion that a traffic violation occurred or that criminal activity is afoot.

One issue that tends to create some confusion for officers is to what extent the officer can search a vehicle after arresting a suspect. Of course, as discussed above, if the vehicle is properly impounded, an inventory search can be conducted. But what about on scene—can the officer

search the vehicle just because the person that was arrested was inside? The answer is no. For purposes of a search incident to arrest, an officer can search the vehicle only if the officer has a reasonable basis to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest. *Arizona v. Gant*, 556 U.S. 332 (2009). A generalized search of the vehicle just because the arrestee was inside is not justified.

Finally, most vehicle searches based on probable cause occur on roadsides after traffic stops. In 2018, the Supreme Court considered whether a vehicle could be searched without a warrant when it was parked in a driveway that was part of the curtilage of a home. In *Collins v. Virginia*, 584 U.S. 586 (2018) an officer learned that a motorcycle was stolen and based on Facebook postings, saw that the motorcycle was parked in Mr. Collins' driveway. The officer drove to the house and, from the street, saw the motorcycle under a tarp in the same location as in the Facebook photos. The officer walked up the driveway, removed the tarp, confirmed the motorcycle was stolen by running the VIN and license plate, took a picture of the motorcycle, replaced the tarp, and went back to his patrol vehicle to wait for Mr. Collins to leave. When Mr. Collins exited the home, the officer arrested him.

Mr. Collins filed a motion to suppress evidence, asserting his Fourth Amendment rights were violated in the search of the vehicle. The trial court denied the motion, which the Virginia Court of Appeals affirmed. The Virginia State Supreme Court also affirmed, with that court finding that the warrantless search was justified under the Fourth Amendment's automobile exception. However, the Supreme Court reversed, noting that "automobile exception" does not permit the warrantless entry of a home or its curtilage to search a vehicle.

VIII. WARRANTLESS SEIZURES OF PERSONS

The Fourth Amendment also prohibits unreasonable seizures of people. Often, a police officer develops facts, submits an affidavit to a magistrate who determines if probable cause exists and, if so, an arrest warrant is issued for a criminal suspect's arrest. As noted above, Texas law sets forth the requirements applicable to arrest warrants in Article 15 of the Texas Code of Criminal Procedure.

However, an officer may also "seize" an individual without a warrant under certain circumstances. Note that any officer interaction that constitutes a "seizure" triggers the Fourth Amendment and its reasonableness standard. Therefore, identifying what constitutes a seizure is important. "A seizure occurs when an officer '*objectively* manifests an intent to restrain' the liberty of an individual through either use of physical force or a show of authority. *United States v. Wright*, 57 F.4th 524, 530-31 (5th Cir. 2023) (quoting *Torres v. Madrid*, 592 U.S. 306 (2021) (emphasis in original)).

If an officer uses physical force against an individual, a seizure occurs. However, seizures most often occur without the use of physical force, but rather by verbal commands or other show of authority by the officer. "In the absence of physical force to restrain a suspect, '[a] police officer may make a seizure by a show of authority ..., but there is no seizure without actual

submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned.'" *Wright*, at 531 (quoting *Carroll v. Ellington*, 800 F.3d 154, 170 (5th Cir. 2015) (quoting *Brendlin v. California*, 551 U.S. 249, 254 (2007))). In other words, if no physical force is involved, a two-step evaluation is used to determine whether a seizure occurred under the Fourth Amendment. The first step is to determine whether the officer exerted a sufficient show of authority, and the second question is whether the individual submitted to the authority. *Wright*, at 531.

For the first consideration, whether the officer made a sufficient showing of authority, courts consider whether, in the light of "all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Wright*, at 531 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). When a person "has no desire to leave for reasons unrelated to the police presence, the coercive effect of the encounter can be measured better by asking whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id*. (quoting *United States v. Flowers*, 6 F.4th 651, 655 (5th Cir. 2021)). A show of authority would certainly exist in the context of a verbal order but could also be found by an officer flagging someone over—the question is whether a reasonable person would feel they were free to leave the interaction with the officer. If so, there is no detention.

The second consideration, whether the individual submitted to the show of authority, is obviously determined by the individual's response. Compliance with an officer's command or order constitutes submission to authority. *United States v. Darrell*, 945 F.3d 929, 933 (5th Cir. 2019). Otherwise, an evaluation of the individual's conduct before and after the show of authority must be conducted. *Wright*, at 532.

Seizures primarily consist of arrests and investigatory detainments, each having different applicable legal requirements under the Fourth Amendment. As discussed below, the general rule is as follows: detainments require reasonable suspicion, whereas arrests require probable cause. Importantly, a seizure "must be 'justified at its inception.'" *Wright*, 57 F.4th at 530 (quoting *United States v. Flowers*, 6 F.4th 651, 655 (5th Cir. 2021)). Therefore, reasonable suspicion must exist at the time of an investigatory detainment, or probable cause must exist at the time of the arrest. Information learned after commencing the detainment or after arrest cannot be used to support the initial reasonable suspicion or probable cause.

Investigatory Detainments—"*Terry* Stops"

An investigatory detainment is a warrantless, temporary seizure of a person for the purpose of investigating whether a crime occurred or is about to occur. Such a seizure is commonly referred to as a "*Terry* stop," named after the Supreme Court decision in *Terry v. Ohio*, 392 U.S. 1 (1968). While probable cause to initiate a *Terry* stop is not required, the officer must at least have "a reasonable suspicion supported by articulable facts that criminal activity may be afoot." *Wright*, at 534 (quoting *United States v. Martinez*, 486 F.3d 855, 861 (5th Cir. 2007)).

"An officer has reasonable suspicion if, based on the totality of the circumstances at the time of the stop, she has a 'particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Wright*, at 533 (quoting *United States v. Cortez*, 449 U.S. 411,

417-18 (1981)). This is a fact-intensive test "judged against an objective standard." *Wright*, at 533 (quoting *Terry*, 392 U.S. at 21)). The reasonable suspicion standard is "dependent upon both the content of the information possessed by police and its degree of reliability." *Wright* at 534 (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)).

Keep in mind that an officer can *request* anyone, at any time, speak to the officer for purposes of investigating a potential crime. Reasonable suspicion is not required for an officer to make such a request, albeit the person's cooperation is voluntary and not required.

Also consider that a detention may not last in duration longer than necessary to confirm or dispel the officer's suspicion. If the investigatory detention exceeds that duration, a Fourth Amendment violation occurs.

Finally, if an officer conducts a supported investigatory detention, the officer may also conduct a Fourth Amendment permissible search of the individual being detained. However, that search can only consist of a frisk or pat down to search the suspect for weapons. The officer cannot search for drugs, paraphernalia, or other contraband as part of the frisk. Further, the officer should be able to articulate reasonable suspicion that the person may be armed or otherwise to support the officer's safety concerns to justify the frisk.

Warrantless Arrests

There are two considerations when evaluating a warrantless arrest: (a) what does the Fourth Amendment allow; and (b) what does state law allow. As discussed below, the Fourth Amendment's warrantless authority is broader than Texas' state law limitations.

Under the Fourth Amendment, a police officer is authorized to make a warrantless arrest, as long as it is based on probable cause, for *any* offense committed in the officer's presence. This includes misdemeanor offenses, even if the misdemeanor is punishable by fine only. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). Further, case law establishes that an officer can make a warrantless arrest for a felony that did not occur in the officer's presence.

The question is, then, whether an officer can make a warrantless arrest for a *misdemeanor* violation that did not occur in the officer's presence. The Supreme Court left that question open in *Atwater v. City of Lago Vista*. *See* 532 U.S., at 340, n. 11 ("[w]e need not, and thus do not, speculate whether the Fourth Amendment entails an 'in the presence' requirement for purposes of misdemeanor arrests.")

Just a few months ago, on February 24, 2025, the United States Supreme Court denied certiorari on a petition presenting this issue. Justice Sotomayor set forth an opinion in the denial, joined by Justice Gorsuch, noting that the Court should at some point consider whether the Fourth Amendment does incorporate an "in-the-presence" of requirement for misdemeanors based on historic common law limitations. *Gonzalez v. United States*, 604 U.S. ---, 145 S.Ct 529 (2025).

While the Fourth Amendment's reasonableness requirement permits rather broad authority for warrantless arrests (based on probable cause), most states restrict the authority for

warrantless arrests. Article 14 of the Texas Code of Criminal Procedure provides limitations and authority on what crimes an officer may make a warrantless arrest for.

Article 14.01(b) provides that "[a] peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view." Note, however, the legislature separately identifies three offenses for which an arrest may not be made unless the suspect refuses to sign a written notice to appear (a citation). Those three non-arrestable offenses in Texas are: (a) speeding; (b) use of a wireless communication device under Transportation Code § 545.4251; and (c) violation of the open container law in Penal Code § 49.031. *See* TEX. TRANS. CODE § 543.004.

Otherwise, for offenses *not* occurring in the officer's presence or view, Article 14.03 sets forth crimes that an officer can make a warrantless arrest for, all of which require probable cause to be established. Otherwise, the general law under Texas law is that a warrant is required for an offense not committed in the officer's presence.

IX. EXCESSIVE FORCE CLAIMS ARE CONSIDERED WITHIN THE CONTEXT OF A SEIZURE UNDER THE FOURTH AMENDMENT

As discussed above, when physical force is used by a state actor, a Fourth Amendment seizure occurs. Therefore, excessive force claims that arise during an attempt to detain or arrest a person are analyzed under the Fourth Amendment and its reasonableness requirement. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Entire articles and presentations can focus on excessive force, which is certainly a significant area of developing civil litigation. However, this paper provides only a general overview of excessive force in the context of the Fourth Amendment.

There are three elements that a plaintiff must establish to present an excessive force claim under the Fourth Amendment: (1) an injury; (2) that resulted directly and only from the use of force that was excessive to the need; and (3) the force used was objectively unreasonable. *Hamilton v. Kindred*, 845 F.3d 659, 662 (5th Cir. 2017).

The injury requirement requires more than a *de minimis* injury, but claims such as significant bruising, pain, and seeking medical attention generally support the injury element. The plaintiff must then go further and show that any actionable injury resulted "directly and only" from excessive force that was objectively unreasonable.

A court gauges the objective reasonableness of force by balancing the amount of the force used against the need for the force. *Hobart v. Estrada*, 582 F. App'x 348, 355 (5th Cir. 2014). "The '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." *Graham*, 490 U.S. at 396. This determination "requires careful attention to the facts and circumstances of each particular case." *Trammell v. Fruge*, 868 F.3d 332, 340 (5th Cir. 2017) (quoting *Graham*, at 396)).

When making this analysis, courts consider what are known as the three "*Graham* factors: (a) the severity of the crime at issue, (b) whether the suspect poses an immediate threat to the safety of the officers or others, and (c) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Escobar v. Montee*, 895 F.3d 387, 394 (5th Cir. 2018).

X. DEFENSES/REQUIREMENTS TO IMPOSE LIABILITY FOR FOURTH AMENDMENT VIOLATIONS

In closing, while this paper is intended to provide general, high-level information on the Fourth Amendment for the non-litigator, it is also important to consider that if a claimant alleges a violation of the Fourth Amendment there are generally two primary potential defenses to challenge the viability of Fourth Amendment claims.

Qualified Immunity

First, if an individual is sued for an alleged Fourth Amendment violation, the individual can assert the defense of qualified immunity. "[Q]ualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S.800, 818 (1982)).

To overcome qualified immunity, the *plaintiff* must establish that: "(1) the official violated a statutory or constitutional right, and (2) the right was 'clearly established' at the time." *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011, *en banc*) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)).

Courts apply a two-prong test to evaluate assertions of qualified immunity. First, the court must determine whether the "facts alleged show the officer's conduct violated a statutory or constitutional right." *Morgan,* at 401; *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). Second, the court must determine whether "the right was clearly established … in light of the specific context of the case." *Id*. To be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right—the objective reasonableness test. *Ashcroft*, 563 U.S. at 741; *see also Goodson v. City of Corpus Christi*, 202 F.3d 730, 736 (5th Cir. 2000). An official's conduct is objectively reasonable unless all reasonable officials in the official's circumstances would have then known that the conduct violated the law. *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 419 (5th Cir. 2008). The court may consider the two prongs in either order. *Pearson*, at 231.

Importantly, depending on the reason, the denial of an official's qualified immunity may provide the ability to take an immediate, interlocutory appeal of the denial.

Municipal Liability Under *Monell*

If the claimant sues the municipality for an alleged Fourth Amendment violation, the claimant must meet the heightened legal standards to impose municipal liability under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691(1978) and its progeny.

A municipality cannot be liable for an alleged Fourth Amendment violation simply because an employee allegedly committed a constitutional violation. *Monell*, at 692. Indeed, "[m]unicipalities are not liable 'on the theory of respondeat superior' and are 'almost never liable for an isolated unconstitutional act on the part of an employee.'" *Hutcheson v. Dallas County,*

Texas, 994 F.3d 477, 482 (5th Cir. 2021) (quoting *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009)); *see also Webb v. Town of Saint Joseph*, 925 F.3d 209, 214 (5th Cir. 2019).

Rather, liability against a municipality for a constitutional violation may occur "only when it can be fairly said that the *city itself* is the wrongdoer." *Gonzalez v. Ysleta ISD*, 996 F.2d 745, 755 (5th Cir. 1993) (emphasis added). One district court summarized it this way—"it is far more difficult for [a] plaintiff to establish municipal liability...than to establish individual liability." *Ayers v. City of Holly Springs*, 2006 WL 2943295, at *4 (N.D. Miss. Oct. 13, 2006); *see also Jackson ex rel. Martin v. Town of Tutwiler*, 2018 WL 6033596, at *3 (N.D. Miss. Nov. 16, 2018) ("[T]his court acknowledges that federal law does, in fact, make it quite difficult for plaintiffs to recover against municipalities in § 1983 cases.").

To establish municipal liability for a Fourth Amendment violation, "a plaintiff must show the deprivation of a federally protected right caused by action taken pursuant to an official municipal policy." *Hutcheson*, 994 F.3d at 482 (internal quotation marks omitted) (quoting *Valle*, 613 F.3d at 541)). To do so, "[a] plaintiff must identify '(1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose moving force is that policy (or custom).'" *Hutcheson*, 994 F.3d at 482 (quoting *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002)).