

Agenda

Advisory Committee on Model Civil Jury Instructions

September 11, 2017
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome, announcements, and approval of minutes	4:00	Tab 1	Juli Blanch, Chair
Subcommittees and subject area timelines	4:03	Tab 2	Juli Blanch
Finish Civil Rights Instructions Set 1: CV1317-1319	4:05	Tab 3	Heather White
Other business	5:55		Juli Blanch

[Committee Web Page](#)

[Published Instructions](#)

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 p.m. unless otherwise stated.

October 9, 2017
November 13, 2017
December 11, 2017
January 8, 2018
February 12, 2018
March 12, 2018
April 9, 2018
May 14, 2018
June 11, 2018
September 10, 2018
October 15, 2018
November 19, 2018
December 10, 2018

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

June 12, 2017

4:00 p.m.

Present: Honorable Ryan M. Harris (acting chair), Marianna Di Paolo, Joel Ferre, Ruth A. Shapiro, Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester. Also present: Alyson C. McAllister from the Civil Rights subcommittee

Excused: Juli Blanch (chair), Tracy H. Fowler, Patricia C. Kuendig, Peter W. Summerill, Christopher M. Von Maack

Judge Harris conducted the meeting in Ms. Blanch's absence.

1. *Minutes*. Ms. McAllister noted a correction on page 2 of the May 8, 2017 minutes ("probable cause" for "probably cause"). With that correction, Ms. Shapiro moved to approve the minutes, seconded by Mr. Ferre. The motion passed without opposition.

2. *Civil Rights Instructions*. The committee continued its review of the Civil Rights instructions.

a. *State v. Martinez*. Ms. McAllister said that the Utah Supreme Court's recent decision in *State v. Martinez*, 2017 UT 26, does not change any of the instructions.

b. *CV1311, Search or entry of property, and CV1312, Lawful [entry/search] of real property*. Ms. McAllister said she thought that "entry" could be deleted from CV1311 and CV1312, since an entry is a subcategory of a search. Ms. Sylvester noted that the cases cited in the references all involved searches of residences. Judge Harris asked if the elements are different for a nonresidence. Ms. McAllister did not think the elements were different, but the nature of the real property searched could affect the "reasonableness" analysis. Mr. Simmons noted that "reasonableness" factors in two ways: CV1310 defines "search" of property in terms of whether a person would have a "reasonable" expectation of privacy in the property, and CV1311 requires that the search be "not 'reasonable.'" Ms. McAllister said that Ms. White and Ms. Cepernich of the Civil Rights subcommittee did not think that CV1312 covered all situations and came up with six different ways a search could be valid: (1) a search pursuant to a valid warrant; (2) a search pursuant to consent; (3) a search with probable cause and under exigent circumstances; (4) a "search" of items in plain view; (5) a *Terry* stop frisk; and (6) an auto search. Dr. Di Paolo suggested bracketing the six ways. Mr. Simmons noted that there is already an instruction on *Terry* stops, CV1307A. Judge Harris thought that CV1312 should be limited to searches of real property rather than trying to cover all searches. On motion of

Mr. Simmons, seconded by Judge Stone, the committee approved CV1311 and CV1312 as revised, without the additional three circumstances.

c. *CV1315, Search of residence pursuant to arrest warrant.* The committee changed the title to “Protective security sweep.” At Ms. Shapiro’s suggestion, the committee started a new paragraph after the first sentence. Dr. Di Paolo noted that “cursory” and “pursuant to” were problematic words. The committee replaced “pursuant to” with “based on” and revised the third sentence to say, “It is a limited inspection of just those spaces where a person may be found.” Judge Stone suggested deleting the last sentence. At Judge Harris’s suggestion, the last sentence was revised to read, “An arrest warrant does not authorize any search greater than a protective security sweep,” and it was made its own paragraph. On motion of Judge Stone, seconded by Mr. Simmons, the committee approved CV1315 as revised.

d. *CV1316, [Entry/Search] of residence pursuant to search warrant.* The committee preferred the first version to the alternative. Judge Harris noted that a search warrant can lack probable cause even if it is accurate, but, as Judge Stone noted, if the judicial officer issues the warrant without probable cause, the officer cannot be sued for executing it. Judge Stone noted that the warrant may be valid, but it is only a civil rights violation if an officer lied to obtain the warrant, and only the person who lied is subject to liability. Judge Harris noted that the issue for the jury is not whether the warrant was supported by probable cause. Judge Harris noted that it is a constitutional violation to knowingly include false information in a search warrant application. Mr. Simmons suggested that the question for the jury is the officer’s intent or knowledge in providing information for the warrant application. Ms. Shapiro suggested that the instruction be renamed, “Validity of search warrant application.” The committee rewrote the instruction to read:

In this case, [name of plaintiff] claims that, even though the officer had a search warrant, the search was nonetheless unconstitutional. In order to prevail on this claim, [name of plaintiff] must prove by a preponderance of the evidence that--

1. at the time of the search warrant application, [name of defendant(s)] knowingly, intentionally, or with reckless disregard for the truth, omitted information from or included false statements in the application, and
2. the information, if accurately included, would have changed the magistrate’s decision to issue the warrant.

The committee deleted the committee note. On motion of Mr. Simmons, seconded by Judge Stone, the committee approved the instruction.

e. *CV1317, Consent.* Judge Harris questioned placing the factors for the jury to consider in a committee note rather than in the text of the instruction. He suggested moving them to the text and bracketing them. Judge Stone did not think it was proper to list the factors at all. He noted that they are based on exclusionary rule cases and did not think they applied to a private, civil cause of action for damages. He was uncomfortable saying that a person gets a private right of action for what is essentially a violation of the criminal law's exclusionary rule. Judge Harris did not necessarily agree. He thought the standard was the same and that the factors were just that--things for the jury to consider, none of which is necessarily dispositive. Ms. Shapiro suggested saying that the circumstances the jury could consider "include but are not limited to the following." Judge Stone thought the factors were irrelevant. He thought it was purely a matter of contract. He noted that duress can be a defense to a contract claim. Ms. Shapiro thought it was confusing to put factors for the jury to consider in the body of the instruction. Dr. Di Paolo suggested just saying that it depends on the circumstances and not give examples, allowing the attorneys to argue the circumstances. Dr. Di Paolo thought that the second sentence of the instruction should read "expressed [rather than 'express'] or implied." Judge Harris suggested saying, "expressly stated or implied by conduct." The committee debated who has the burden of proof on the issue of consent. Ms. Sylvester cited *Amato v. City of Richmond*, 875 F. Supp. 1124, 1133 (E.D. Va. 1994), for the proposition that it is the plaintiff's burden to prove involuntary consent. Judge Stone agreed. He thought the burdens of proof are very different depending on whether the case is a criminal case or a civil rights case. The government has the burden of proving voluntary consent in a criminal suppression case, but, he asked, why should an officer be liable for relying on a plaintiff's consent in a civil case if he had no reason to doubt the plaintiff's consent? But Ms. McAllister thought that the government has the burden of proving an exception to the warrant requirement in a civil context, and consent is an exception to the warrant requirement. At Judge Harris's suggestion, the committee sent the instruction back to the subcommittee to answer certain questions: Who has the burden of proof? Is the definition of the voluntariness of consent different in the civil and criminal contexts? Is there civil authority for the factors listed in the committee note? Whose state of mind is relevant? Is the question the voluntariness of the consent or whether a reasonable officer would have thought that the consent was voluntary? Ms. McAllister noted that the considerations could go to the question of qualified immunity, which is a question for the court, not the jury.

3. *Next meeting.* The next meeting is Monday, September 11, 2017, at 4:00 p.m.

Minutes
June 12, 2017
Page 4

The meeting concluded at 5:50 p.m.

Tab 2

Priority	Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing Month	Comments Back?
1	Civil Rights: Set 1	Yes	Ferguson, Dennis (D); Meija, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D)	September-16	September 2017 (wrap up 1/2, then send for comment)	
2	Fault/Negligence	N/A	Judge Lawrence	October-17	October-17	Revisit old instructions
3	Economic Interference	Yes	Frazier, Ryan (D) (Chair); Shelton, Ricky (D); Stevenson, David (P); Simmons, Paul (P); Kuendig, Patricia (P)	October-17	November-17	
4	Injurious Falsehood	Yes	Dryer, Randy; Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David (Chair); Stevens, Greg	December-17	February-18	
5	Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	March-18	May-18	
6	Trespass and Nuisance	Yes (more members needed)	Hancock, Cameron; Figueira, Joshua (researcher); Abbott, Nelson (P); Steve Combe (D)	June-18	October-18	
7	Insurance	Yes	Johnson, Gary (chair); Pritchett, Bruce; Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez; Stewart Harman (D); Ryan Marsh (D)	November-18	January-19	
8	Unjust Enrichment	No (instructions from David Reymann)	David Reymann	February-19	February-19	
9	Abuse of Process	No (instructions from David Reymann)	David Reymann	March-19	March-19	
10	Directors and Officers Liability	Yes	Call, Monica; Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory; Love, Perrin; Buck, Adam	April-19	June-19	
11	Wills/Probate	No	Barneck, Matthew (chair); Petersen, Rich; Tippet, Rust; Sabin, Cameron	September-19	November-19	
12	Civil Rights: Set 2	Yes	Ferguson, Dennis (D); Meija, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D)	December-19	February-20	
13	Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	March-20	May-20	

Tab 3

Model Utah Civil Jury Instructions, Second Edition
Civil Rights: Set 1

CV1301 SECTION 1983 CLAIM—ELEMENTS. Approved 12/12/16.	2
CV1302 SECTION 1983 CLAIM—Deprivation of Rights. Approved 11/14/16.	2
CV1303 WARRANTLESS ARREST. Approved 4/10/17.	2
CV1304 PROBABLE CAUSE. Approved 1/9/2016.	3
CV1305 UNLAWFUL ARREST—ANY CRIME. Approved 1/9/2016.	3
CV1306 UNLAWFUL ARREST – MINOR CRIME. Approved 3/13/17.	4
CV1307 REASONABLE SUSPICION. Approved 4/10/17.	4
CV1308 EXCESSIVE FORCE—INTRODUCTORY INSTRUCTION. Approved 9/19/16.	5
CV1309 EXCESSIVE FORCE—STANDARD. Approved 9/19/16.	5
CV1310 SEARCHES OF PROPERTY. Approved 1/9/2017.	6
CV1311 SEARCH OF PROPERTY. Approved 6/12/17.	6
CV1312 LAWFUL SEARCH OF REAL PROPERTY. Approved 6/12/17.	6
CV1313 SEIZURES OF PROPERTY. Approved 1/9/2017.	7
CV 1314 ENTRY OF RESIDENCE PURSUANT TO ARREST WARRANT. Approved 2/27/17.	7
CV1315 PROTECTIVE SECURITY SWEEP. Approved 6/12/17.	7
CV1316 VALIDITY OF SEARCH WARRANT APPLICATION. Approved 6/12/17.	8
CV1317 CONSENT.	8
CV1318 Probable Cause – Search Of Residence.	9
CV1319 EXIGENT CIRCUMSTANCES.	9

CV1301 SECTION 1983 CLAIM—ELEMENTS. Approved 12/12/16.

To establish [his/her] claims under Section 1983, [plaintiff's name] must demonstrate, by a preponderance of the evidence, the following three elements:

First, that [name of defendant] was a state employee and was acting, purporting to act, or pretending to act in performance of [his/her] official duties.

Second, that this conduct deprived [name of plaintiff] of a right protected by federal law; and

Third, that [name of defendant]'s conduct was a cause of harm sustained by [name of plaintiff].

References

W. v. Atkins, 487 U.S. 42, 49, 108 S. Ct. 2250, 2255, 101 L. Ed. 2d 40 (U.S. 1988)

Committee Note

See CV209 for a definition of “cause.”

In the first element above, the committee has attempted to define “acting under color of state law” in plain language. The United States Supreme Court case of *W. v. Atkins*, 487 U.S. 42, 49, 108 S. Ct. 2250, 2255, 101 L. Ed. 2d 40 (U.S. 1988) provides that “[t]he traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”

If the claim is that the defendant was purporting to act under color of state law, the judge may need to define what it means to purport to do something.

CV1302 SECTION 1983 CLAIM—DEPRIVATION OF RIGHTS. Approved 11/14/16.

The second element of [name of plaintiff]'s claims is that [name of defendant]'s conduct deprived [him/her] of a right protected by federal law. [Name of plaintiff] claims in this case that [he/she] was deprived of [his/her] right to [list the right or rights].

I will explain [this/these] right[s]] later in the Instructions.

CV1303 WARRANTLESS ARREST. Approved 4/10/17.

The Constitution prohibits the police from carrying out unreasonable seizures. An arrest is considered a “seizure” within the meaning of the Constitution. Under the Constitution an arrest may be made only when 1) a police officer has an arrest warrant, or 2) when a police officer has

probable cause to believe that the person arrested has engaged in criminal conduct. An arrest without either an arrest warrant or a probable cause is an unreasonable seizure.

[Name of plaintiff] claims that [he/she] was unlawfully arrested by [name of defendant] on [date]. [Name of defendant] did not have an arrest warrant. Therefore, you must determine whether [name of defendant] had probable cause to arrest [name of plaintiff].

Committee Note

Utah Code section 77-7-2 places limitations on when a police officer can make a warrantless arrest.

CV1304 PROBABLE CAUSE. Approved 1/9/2016.

Probable cause does not require that the officer had proof beyond a reasonable doubt, or even proof by a preponderance of the evidence. Probable cause exists when an officer has knowledge of facts and circumstances that are of such weight and persuasiveness as to convince a prudent and reasonable person of ordinary intelligence, judgment, and experience that it is reasonably likely that a crime has been committed and the person arrested committed that crime.

The existence of probable cause is measured as of the moment of the arrest, not on the basis of later developments. Thus, the ultimate resolution of the criminal charges is irrelevant.

CV1304A OFFENSES AT ISSUE. Approved 3/13/17.

You are to determine whether [name of defendant] had probable cause to believe [name of plaintiff] committed [any of] the following offense[s]:

- 1)
- 2)
- 3)

Committee note

In this instruction, the parties will need to insert each offense. The elements of each offense will need to be listed in separate instructions.

CV1305 UNLAWFUL ARREST–ANY CRIME. Approved 1/9/2016.

It is not necessary that [name of officer[s]] had probable cause to arrest [name of plaintiff] for the offense with which [he/she] was charged, so long as [name of officer[s]] had probable cause to arrest [name of plaintiff] for some criminal offense.

CV1306 UNLAWFUL ARREST – MINOR CRIME. APPROVED 3/13/17.

If a police officer has probable cause to believe a person has committed any criminal offense, however minor, he may arrest the person without violating the Constitution.

You are not to consider whether you think [name of defendant] should have arrested [name of plaintiff]. Instead, you must decide whether [name of defendant] had probable cause to believe that [name of plaintiff] committed [any of] the offense[s] listed in [CV1304A].

CV 1307A INVESTIGATIVE STOP. Approved 3/13/17.

The Constitution permits a law enforcement officer to detain a person without arresting [him/her] if two requirements are met.

First, the officer must have reasonable suspicion that the person detained has committed a crime.

Second, the officer's actions must be reasonably limited in time and scope to the investigation of the suspected crime.

References:

U.S. v. Fonseca, 744 F. 3d 674, 680-81 (10th Cir. 2014) (“A twofold inquiry determines whether a Terry stop is reasonable under the Fourth Amendment. ‘First, the officer’s action must be ‘justified at its inception.’” *United States v. King*, 990 F.2d 1552, 1557 (10th Cir.1993) (quoting *Terry*, 392 U.S. at 20, 88 S.Ct. 1868). Thus, “[f]or an investigative detention, the officer must have an articulable and reasonable suspicion that the person detained is engaged in criminal activity.’ *Id.* Second, the officer’s actions must be ‘reasonably related in scope to the circumstances which justified the interference in the first place.’” *Id.* (quoting *Terry*, 392 U.S. at 20, 88 S.Ct. 1868). ‘There is no bright-line rule to determine whether the scope of police conduct was reasonably related to the goals of the stop; rather our evaluation is guided by common sense and ordinary human experience.’ *United States v. Albert*, 579 F.3d 1188, 1193 (10th Cir.2009) (internal quotation marks omitted).”
State v. Chettero, 2013 UT 9 n.11 (Terry stop “must be justified at its inception”)

CV1307 REASONABLE SUSPICION. APPROVED 4/10/17.

Reasonable suspicion means the officer was aware of specific facts that would lead a reasonable officer to conclude that the person in question committed a crime. The level of suspicion required for reasonable suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. But reasonable suspicion requires something more than a mere guess or hunch.

Whether an officer has reasonable suspicion is evaluated objectively under all of the circumstances known to the officer.

References

State v. Peterson, 2005 UT 17 ¶ 11 (“Whether an officer has reasonable suspicion to subject an individual to a Terry stop and frisk is ‘evaluated objectively according to the totality of the circumstances.’”)

CV1308 EXCESSIVE FORCE—INTRODUCTORY INSTRUCTION. Approved 9/19/16.

[Plaintiff’s name] claims that [Officer’s name] used unreasonable force in [arresting/stopping] [him/her].

[Officer’s name] claims the force [s]he used in [arresting/stopping] [Plaintiff’s name] was reasonable.

It is your duty to determine whether [Plaintiff’s name] has proved [his/her] claims against [Officer’s name] by a preponderance of the evidence.

CV1309 EXCESSIVE FORCE—STANDARD. Approved 9/19/16

A person interacting with a law enforcement officer has a constitutional right to be free from unreasonable force. A police officer is entitled to use such force as is reasonably necessary to lawfully stop a person, take an arrested citizen into custody or prevent harm to the officer or others. A police officer is not allowed to use force beyond that reasonably necessary to accomplish these lawful purposes.

The test of reasonableness requires careful attention to the specific facts and circumstances of the case. The reasonableness of a particular use of force must be judged from the perspective of an officer on the scene rather than with the 20/20 vision of hindsight.

In determining whether [Officer’s name] used unreasonable force with [Plaintiff’s name], you should consider all the facts known to [Officer’s name] at the time [he/she] applied the force. You are not to consider facts unknown to [Officer’s name] at the time [Officer’s name] applied force to [Plaintiff’s name].

You are not to consider [Officer’s name]’s intentions or motivations, whether good or bad. Bad intentions will not make a constitutional violation out of an objectively reasonable use of force, and good intentions will not make an unreasonable use of force proper.

Reference:

Graham v. Connor, 490 U.S. 386 (1989)

MUJI 1st
15.7

CV1310 SEARCH OF PROPERTY--DEFINITION. Approved 1/9/2017.

Search has a special meaning under the law. A “search” of property occurs if a [government actor] intrudes into an area in which a person would have a reasonable expectation of privacy.

References:

Soldal v. Cook County, 506 U.S. 56, 62, (1992)
United States v. Jacobsen, 466 U.S. 109, 113 (1984)
United States v. Hutchings, 127 F.3d 1255, 1259 (1997)

CV1311 SEARCH OF PROPERTY—CONSTITUTIONAL RIGHT. Approved 6/12/17.

A person has a constitutional right to be free from an unreasonable [search/entry] of [his/her] [property]. To prove [Defendant(s)’ name(s)] violated [Plaintiff’s name]’s constitutional right, [Plaintiff’s name] must prove the following by a preponderance of the evidence:

1. [Defendant(s)] [searched/entered] [Plaintiff]’s [property];
2. [Defendant(s)] intended to [search/enter] the [property]; and
3. The [search/entry] was not “reasonable.”

“Reasonable” has a special meaning under the law. I will now instruct you on what “reasonable” means.

References:

Minnesota v. Carter, 525 U.S. 83 (1998)
Kentucky v. King, 563 U.S. 462 (2011)

Committee Note:

These instructions refer to ”property” in brackets, but it may be clearer to refer to the specific type of property involved in the case, such as residences, businesses, vehicles, backpacks, computer files, etc.

CV1312 LAWFUL SEARCH OF REAL PROPERTY. Approved 6/12/17.

A search of real property is reasonable if:

1. The officer has a valid warrant;
2. The officer has obtained consent; or
3. The officer has probable cause, and exigent circumstances exist.

References:

Steagald v. U.S., 451 U.S. 204, 101 S.Ct. 1642 (1981)

Committee note:

If one or more of the above is not at issue in this case, it should be omitted from the instruction. Similar exceptions will be applicable to other searches, such as automobile searches.

The committee has here attempted to define reasonableness in a single, common context. But in contexts other than real property, be it automobiles, backpacks, computers, etc., the parties and the court should define what a reasonable search or entry is,

CV1313 SEIZURES OF PROPERTY. Approved 1/9/2017.

Seizure has a special meaning under the law. A “seizure” of property occurs when a [government actor] [takes/removes] a person’s property or otherwise interferes in a meaningful way with a person’s right to possess that property.

References:

Soldal v. Cook County, 506 U.S. 56, 62, (1992)

United States v. Jacobsen, 466 U.S. 109, 113 (1984)

CV 1314 ENTRY OF RESIDENCE PURSUANT TO ARREST WARRANT. Approved 2/27/17.

To lawfully enter a residence based on an arrest warrant, the officer must have reason to believe at the time of entry that 1) the person named in the arrest warrant was living at that residence; and 2) that person was actually in the residence at the time.

References:

Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371 (1980)

Committee note:

This instruction is limited to entries of residences based only on an arrest warrant. It does not apply to entries based on a search warrant, consent, or exigent circumstances and probable cause.

CV1315 PROTECTIVE SECURITY SWEEP. Approved 6/12/17.

If an officer has lawfully entered a residence based on an arrest warrant, the officer is allowed to conduct a “protective security sweep” if the officer has reasonable suspicion that a person posing danger to the officer or others is in the area to be searched.

A “protective security sweep” is a limited search of the residence for the sole purpose of securing the officers’ safety during the arrest. It is a limited inspection of just those spaces where a person may be found.

An arrest warrant does not authorize any search greater than a protective security sweep.

References:

Maryland v. Buie, 494 U.S. 325, 327 (1990)

Fishbein ex rel. Fishbein v. City Of Glenwood Springs, Colorado, 469 F.3d 957, 961 (10th Cir. 2006)

State v. Grossi, 2003 UT App 181, 72 P.3d 686

CV1316 VALIDITY OF SEARCH WARRANT APPLICATION. Approved 6/12/17.

In this case, [name of plaintiff] claims that, even though the search was based on a search warrant, the search was nonetheless unconstitutional. In order to prevail on this claim, [name of plaintiff] must prove by a preponderance of the evidence that:

- 1) at the time of the search warrant application, [defendant officer(s)] knowingly, intentionally, or with reckless disregard for the truth omitted information from or included false statements in the application, and
- 2) the information, if accurately included, would have changed the magistrate’s decision to issue the warrant.

References:

Salmon v. Schwarz, 948 F.2d 1131, 1139 (10th Cir. 1991)

Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978)

Malley v. Briggs, 475 U.S. 335, 345, (1986)

Committee note:

Some of the issues in this instruction may be questions for the judge to decide, rather than the jury. It will be up to the parties and the judge to determine how to appropriately tailor the instruction for the jury.

CV1317 CONSENT.

Consent is permission for something to happen, or an agreement to do something. Consent must be voluntary, but it may be either expressly stated or implied. [Name of

defendant] has the burden to prove by a preponderance of the evidence that there was consent to a warrantless search, and to prove that such consent was voluntary.

References:

United States v. Dewitt, 946 F.2d 1497 (10th Cir. 1991)

Committee Note:

In determining whether consent to search is voluntary, consider all of the circumstances, including:

- whether the consenting person was in custody;
- whether officers' guns were drawn;
- whether the consenting person was told he or she had the right to refuse a request to search;
- whether the consenting person was told he or she was free to leave;
- whether Miranda warnings were given;
- whether the consenting person was told a search warrant could be obtained;
- any other circumstances applicable to the particular case.

Comment [NS1]: Is the definition of voluntariness different in civil than criminal context? Who has the burden of proof here? Does it go to the plaintiff to prove involuntary or defendant to prove voluntary? See *Amato v. City of Richmond*, 875 F. Supp. 1124 (E.D. Va. 1994), aff'd, 78 F.3d 578 (4th Cir. 1996). To what extent is the standard different in civil versus criminal cases? If going to include the factors in the instructions, would need civil case law on this.

Comment [NS2]: This is a criminal case, not a civil rights case.

CV1318 PROBABLE CAUSE – SEARCH OF RESIDENCE.

Probable cause to search exists when the facts and circumstances known to the officer, based on reasonably trustworthy information, are such that a reasonable officer would believe [that the property to be seized/subject of the arrest warrant will be found in the residence] [that there is a substantial chance that criminal activity is occurring in the residence].

References:

Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987)

Committee Note:

Mere suspicion that a suspect might be in the home of a third party generally does not establish probable cause to enter/search the third party's home. Speculation that a suspect was in a home because he visited it in the past does not justify entry/search.

CV1319 EXIGENT CIRCUMSTANCES.

Exigent circumstances exist when there was insufficient time to get a search warrant, and an officer, acting on probable cause and in good faith, reasonably believes, based on the totality of the circumstances known to the officer at the time, that [entry/search] of the residence is necessary to prevent:

- (1) Evidence or contraband from being immediately destroyed; or

(2) An immediate risk of danger to the officer or a third person.

References:

Kirk v. Louisiana, 536 U.S. 635, 122 S. Ct. 2458 (2002)

Armijo ex rel. Armijo Sanchez v. Peterson, 601 F.2d 1065, 1071 (10th Cir. 2010)
