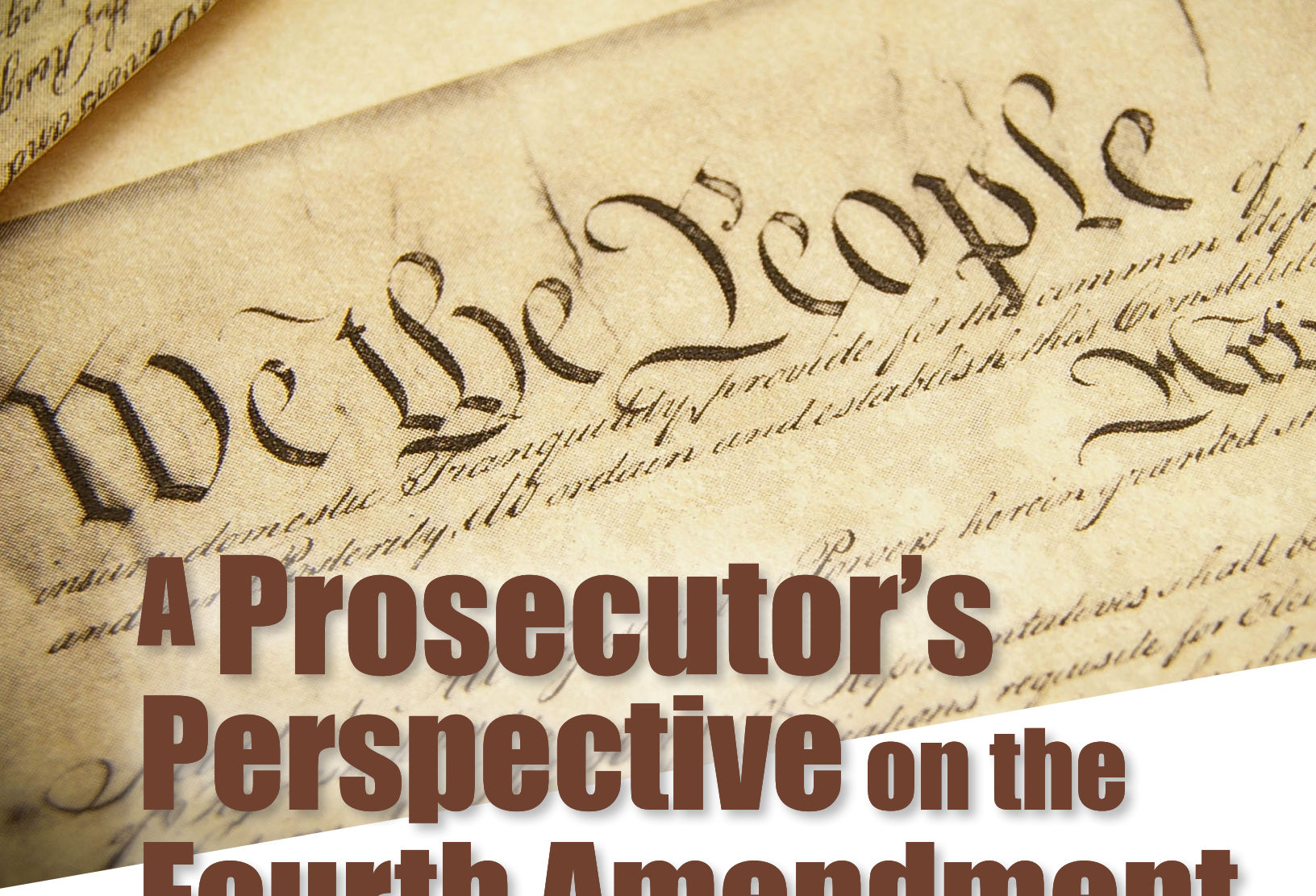

# A Prosecutor's Perspective on the Fourth Amendment

BY KENNETH CHING, ESQ., AND NICK GRAHAM, ESQ.

> *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.

Prosecutors seek justice by protecting the community and holding those who commit crimes accountable for their illegal acts. Prosecutors also take an oath to defend the U.S. Constitution, including the Fourth Amendment's prohibition on unreasonable searches and seizures. Therefore, it is not only criminal defense attorneys who protect defendants' civil rights, but also prosecutors who take seriously their high ethical duty to pursue justice for each person involved with the criminal justice system.

## Balancing Individual Liberty and Society's Safety

The Fourth Amendment's prohibition on "unreasonable searches and seizures" represents the founders' attempt to balance the liberty and privacy interests of individuals with broader society's interests in safety and protection. The Fourth Amendment grew out of the American colonial experience with the British use of "writs of assistance" and "general warrants," which were used to conduct extensive and sometimes arbitrary searches of colonial persons and property.[1] The Constitution does not prohibit the government from conducting searches and seizures of its citizens, but it requires that they be reasonable.

"The reasonableness requirement strikes a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *State v. Rincon*, 122 Nev. 1170, 1175 (2006). On one hand, the Constitution prohibits the government from interfering with people's liberty or privacy arbitrarily, even when criminal activity is suspected. On the other hand, the Constitution acknowledges society's need to protect itself from criminal activity and seek justice for victims. "Crime, even in the privacy of one's own quarters is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing." *Johnson v. U.S.*, 68 S.Ct. 367, 369 (1948). Prosecution is often a "competitive enterprise" to find facts and evidence demonstrating guilt beyond a reasonable doubt. *Id.* The codified right to be left alone by the government, at times, inhibits society's legitimate interest in obtaining truth and accountability in criminal law. As such, it is the prosecutor's role to continuously and appropriately recognize the shielding power of the Fourth Amendment as it pertains to law enforcement's gathering of evidence.

## Investigation Precedes Prosecution

District Attorneys' offices are not investigative authorities. Therefore, before bringing a criminal case, prosecutors rely upon law enforcement agencies to conduct thorough investigations of criminal activity and provide sufficient evidence to justify prosecution. Often, the investigation phase of a criminal case ends at or near the time of a suspect's arrest, at which point law enforcement will provide the findings of the investigation to the criminal prosecutor.

## Screening Criminal Cases

When a criminal case is presented to the prosecutor, the case is screened by attorneys with the purpose of determining whether the evidence presented passes legal and constitutional muster. For the Washoe County District Attorney's Office, the standard for charging a case is whether there is a realistic prospect of conviction based upon admissible evidence.

Relying upon the information provided by law enforcement, the prosecutor must determine whether *admissible evidence* would prove the defendant's guilt beyond a reasonable doubt. Whereas a civil case only requires a "preponderance of the evidence" (more likely than not), criminal prosecution is subjected to the highest evidentiary standard of proof: beyond a reasonable doubt.

The Fourth Amendment is critical to this evaluation and screening of criminal cases, as evidence that is gathered in violation of the Fourth Amendment is likely to be excluded from a case on a motion to suppress. *See* NRS 179.085. Evidence that will be suppressed cannot be used by a prosecutor to prove criminal charges, and therefore prosecutors screen cases according to whether the evidence presented to them is admissible.

> **"The Fourth Amendment grew out of the American colonial experience with the British use of "writs of assistance" and "general warrants," which were used to conduct extensive and sometimes arbitrary searches of colonial persons and property."[1]**

"[T]he government cannot benefit from evidence that officers obtained through a clear violation of an individual's Fourth Amendment rights." *State v. Beckman*, 129 Nev. 481, 491, 305 P.3d 912, 919 (2013) (citing *Florida v. Jardines*, 133 S.Ct. 1409, 1417-18.) Thus, in the evaluation of criminal cases, if at any time the prosecutor determines that evidence would be deemed inadmissible, he or she must assess the balance of the evidence to decide how to appropriately proceed.

Prosecutors therefore must seek justice and protect the welfare of the community while also upholding the constitutional rights of those accused of criminal activity. This balance is recognized in relevant portions of the Washoe County District Attorney's Office's Mission Statement: to "aggressively prosecute criminal cases" under "the highest standard of integrity and professionalism."

## The Basic Framework of the Fourth Amendment

When is the Fourth Amendment triggered? Answer: When the government engages in a search or seizure. Since the majority of cases that come to a prosecutor begin with law enforcement making an arrest and often confiscating illegal contraband and other evidence, the Fourth Amendment is almost always a factor in analyzing criminal cases.

Searches and seizures may be authorized by warrant, a document issued by a magistrate identifying the person, place, or things to be searched or seized. A warrant must be based on probable cause, and it must describe with particularity the place to be searched or the persons or things to be seized. *Mickelson v. State*, 472 P.3d 684 (Nev. 2020).

"Warrantless searches are *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well delineated exceptions." *Camacho v. State,* 119 Nev. 395, 399, 75 P.3d 370, 373 (2003). Despite this categorical language, the exceptions to the rule against warrantless searches are substantial. Many criminal cases begin with warrantless searches, which fall into a recognized exception. Below are some of the most typical situations in which searches or seizures can be made without a warrant:

- *Consent*: A person may voluntarily waive his or her Fourth Amendment rights, and a government agent may ask permission from an individual to search his or her person or private property. For example, a person's home is subject to the highest privacy protections offered by the Fourth Amendment, but that does not prevent a person from giving law enforcement permission to enter their dwelling. Once

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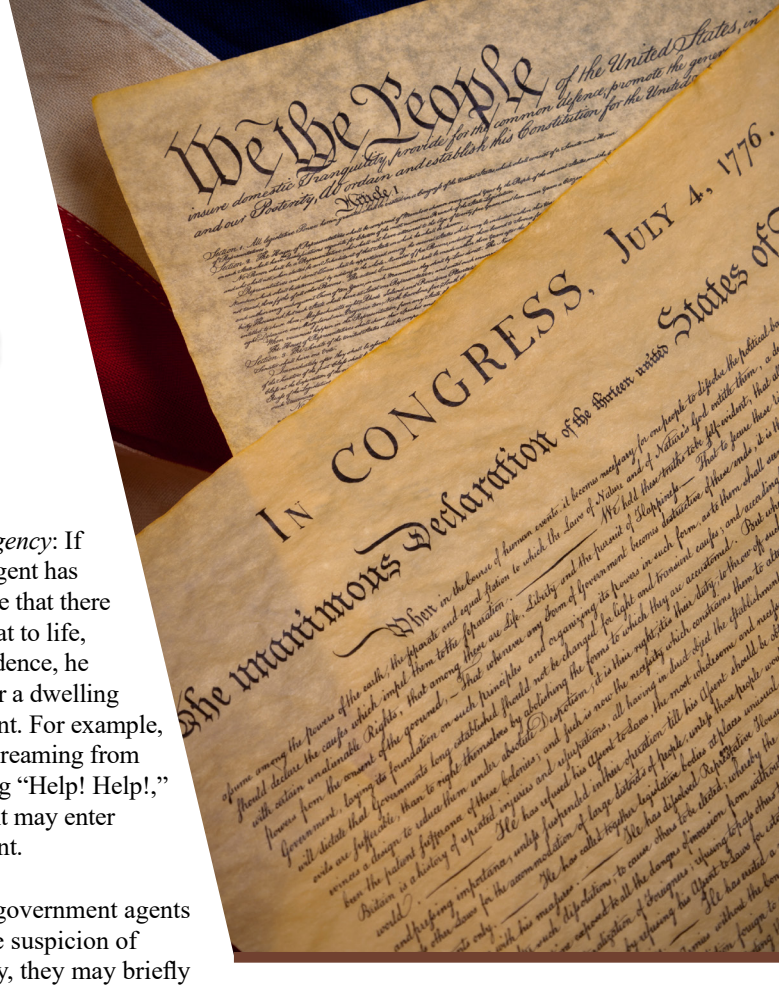
# A Prosecutor's Perspective on the 4th Amendment




access has been consensually granted, the government no longer needs a warrant to enter the dwelling. If evidence of criminal activity is discovered based upon consent, it will be fully admissible in court.

- *Arrest*: Law enforcement is allowed to search "the person" of an arrestee (the arrest must be based on probable cause). The reasonableness of such searches is based on the possibility that an arrestee may be concealing a weapon, which presents a danger to the law enforcement officer. Law enforcement may also search the area within the arrestee's immediate control without a warrant.

- *Plain View*: If a government agent observes evidence in plain view, for which its incriminating nature is immediately apparent, then the evidence may be seized without a warrant. However, the government agent must have had the legal right to be in the location from where the evidence was viewed.

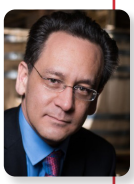
- *Vehicles*: A government agent may search a vehicle without a warrant if there is probable cause to believe the vehicle contains contraband and the vehicle is readily mobile. It would be impractical to obtain a warrant to search a vehicle suspected of containing contraband, as the vehicle could be driven away and the contraband removed before the warrant could be obtained.

- *Emergency/Exigency*: If a government agent has reason to believe that there is a serious threat to life, property, or evidence, he or she may enter a dwelling without a warrant. For example, if someone is screaming from inside a dwelling "Help! Help!," law enforcement may enter without a warrant.

- *Terry Stops*: If government agents have reasonable suspicion of criminal activity, they may briefly stop the suspect; if government agents have reasonable suspicion that the subject is armed and dangerous, they may conduct a limited pat-down search of the suspect. Notably, Terry Stops require only reasonable suspicion, a lesser burden than probable cause.

- *Community Care-Taking*: The government may stop or enter vehicles if they reasonably believe the occupants' safety is at risk. For example, a traffic accident may leave a driver of a vehicle unconscious and in need of medical attention. The government is allowed to enter such a vehicle without a warrant.

The Fourth Amendment is among the most litigated sections of the Constitution. Legal disputes and controversies abound in search and seizure law. Therefore, prosecutors are constantly analyzing Fourth Amendment issues in their cases, seeking to balance society's need for effective policing and prosecution of crime with the Constitution's guarantees of freedom from unreasonable searches and seizures.



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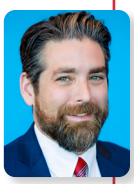

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**ENDNOTE:**

1. Orin S. Kerr, Searches and Seizures in A Digital World, 119 Harv. L. Rev. 531, 536 (2005).