#  PARTICULAR RIGHTS—FOURTH AMENDMENT—UNREASONABLE SEARCH—GENERALLY

As previously explained, the plaintiff has the burden of proving that the act[s] of the defendant[s] [*name[s]*] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant[s] deprived [him] [her] of [his] [her] rights under the Fourth Amendment to the Constitution when [*insert factual basis of the plaintiff’s claim*].

Under the Fourth Amendment, a person has the right to be free from an unreasonable search of [his] [her] [person] [residence] [vehicle] [*other object of search*]. To prove the defendant[s] deprived the plaintiff of this Fourth Amendment right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

* + 1. [*Name[s] of applicable defendant[s]*] searched the plaintiff’s [person] [residence] [vehicle] [*other object of search*];
		2. in conducting the search, [*name[s]*] acted intentionally; and
		3. the search was unreasonable.

[A person acts “intentionally” when the person acts with a conscious objective to engage in particular conduct. Therefore, the plaintiff must prove the defendant intended to search the plaintiff’s [person] [residence] [vehicle] [*other object of search*]. It is not enough if the plaintiff only proves the defendant acted negligently, accidentally or inadvertently in conducting the search. However, the plaintiff does not need to prove the defendant intended to violate the plaintiff’s Fourth Amendment rights.]

[In determining whether the search was unreasonable, consider all of the circumstances, including:

1. the scope of the particular intrusion;
2. the manner in which it was conducted;
3. the justification for initiating it; and
4. the place in which it was conducted.]

# Comment

Use this instruction in conjunction with the applicable elements instructions, Instructions 9.3–9.8, and an applicable definition of an unreasonable search, such as Instruction 9.13 (Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Search Incident to Arrest) and Instruction 9.15 (Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Consent). In cases in which there is no applicable definition of unreasonableness in another instruction, consider using the second bracketed paragraph of this instruction, which sets out general principles for assessing the reasonableness of a search, derived from *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). *See also Byrd v. Maricopa Cnty. Sherriff’s Dep’t*, 629 F.3d 1135, 1141 (9th Cir. 2011) (en banc).

In *United States v. Thomas*, 726 F.3d 1086, 1092-93 (9th Cir. 2013), the Ninth Circuit discussed how the Supreme Court’s decision in *United States v. Jones*, 565 U.S. 400 (2012), altered the *Katz* reasonable-expectation-of-privacy focus and stated that case law now directs “if the Government obtains information by physically intruding on persons, houses, papers, or effects, a ‘search’ within the original meaning of the Fourth Amendment has ‘undoubtedly occurred.’” In *Jones*, government officials installed a GPS-tracking device to the underside of a vehicle located in a public parking lot, and then utilized the device to monitor the vehicle’s movements. The Court held that when “[t]he Government physically occupied private property for the purpose of obtaining information,” a physical intrusion occurred and constituted a search under Fourth Amendment principles. *Jones*, 565 U.S. at 404-11.

The Supreme Court has also held that the government’s use of a drug dog within the curtilage of a home used “to investigate the home and its immediate surroundings” was a search within the meaning of the Fourth Amendment. *Florida v. Jardines*, 133 S. Ct. 1409, 1414-18 (2013).

The Fourth Amendment’s protection against unreasonable searches extends beyond criminal investigations. *Grady v. North Carolina*, 135 S. Ct. 1368 (2015) (per curiam) (holding that state conducts search subject to Fourth Amendment when it attaches tracking device to recidivist sex offender’s person without consent after civil proceedings).

Section 1983 “contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right.” *OSU Student All. v. Ray*, 699 F.3d 1053, 1072 n.12 (9th Cir. 2012) (quoting *Daniels v. Williams*, 474 U.S. 327, 328 (1986)). It is well settled that “negligent acts do not incur constitutional liability.” *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002), *abrogated on other grounds by County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017). Specific intent to violate a person’s rights “is not a prerequisite to liability under § 1983.” *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992) (citations omitted).

With respect to the Fourth Amendment, the Supreme Court has defined a seizure as “a governmental termination of freedom of movement *through means intentionally applied*.” *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (emphasis in original); *see also Nelson v. City of Davis*, 685 F.3d 867, 876-77 (9th Cir. 2012) (discussing intent and concluding that defendant officers intentionally seized plaintiff under the Fourth Amendment). The Committee assumes the same intentional mental state is required to prove a § 1983 claim based on an unreasonable search in violation of the Fourth Amendment, although there does not appear to be any Supreme Court or Ninth Circuit decision directly on point. Thus, this instruction includes an optional definition of the term “intentionally” for use when it would be helpful to the jury.

“Determining the reasonableness of any search involves a two-fold inquiry: first, one must consider whether the … action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.” *C.B. v. City of Sonora*, 769 F.3d 1005, 1023 (9th Cir.2014) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985)); *see also Cates v. Stroud*, 976 F.3d 972, 978-85 (9th Cir. 2020) (examining search of prison visitor and holding that prior to strip search, visitor must be given opportunity to leave prison); *Ortega v. O’Connor*, 146 F.3d 1149, 1156 (9th Cir. 1998) (examining search of private office); *cf. Maryland v. King*, 133 S. Ct. 1958, 1970 (2013) (holding that court should weigh “the promotion of legitimate governmental interests against the degree to which [the search] intrudes upon an individual’s privacy” (alteration in original) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)) (internal quotation marks omitted)), *Blight v. City of Manteca*, 944 F.3d 1061, 1067 (9th Cir. 2019) (concluding search of property with two residences supported by probable cause that suspect controlled whole premises).

When a warrantless search is conducted pursuant to a condition of probation, the court may wish to consider drafting a “totality of the circumstances” instruction. *See United States v. Knights*, 534 U.S. 112, 118 (2001); *Smith v. City of Santa Clara*, 876 F.3d 987, 992 (9th Cir. 2017).  *See also United States v. Dixon*, 984 F.3d 814 (9th Cir. 2020) (holding warrantless search of vehicle pursuant to supervised release condition requires probable cause that supervisee owns or controls vehicle).

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