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THIS EDITION'S WORDS OF WISDOM:

"*It is a curious fact that people are never so trivial as when they take themselves seriously.*" (Oscar Wilde)

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***Residential Searches and Drug-Sniffing Dogs Within the Curtilage*:**

Florida v. Jardines **(Mar. 26, 2013) __ U.S.__ [2013 U.S. LEXIS 2542]**

Rule: Use of a drug-sniffing dog within the curtilage of a residence is a search and illegal absent a search warrant.

Facts: Detective William Pedraja of the Miami-Dade Police Department received an uncorroborated tip that defendant was growing marijuana in his home. A month later, Detective Pedraja went to defendant's house with a drug-sniffing dog, "Franky." Franky

was trained to sniff out a number of illegal substances including marijuana. Leading the dog up to defendant's front door, the dog alerted on an odor, going into a frenzy, "exploring the area for the strongest point source of that odor." The dog centered on the base of the front door and sat, indicating "a positive alert for drugs." Based upon this, Detective Pedraja obtained a search warrant for defendant's residence. Marijuana plants were recovered as a result of the execution of the warrant. Defendant was subsequently arrested and charged in state court with trafficking in cannabis. He filed a motion to suppress the marijuana, arguing that the warrantless use of a drug-sniffing dog at his front porch was an illegal search in violation of the Fourth Amendment. The trial court agreed and suppressed the evidence. On the People's appeal, an appellate court disagreed, reversing the trial court. However, the Florida Supreme Court reversed again, reinstating the trial court's suppression of the evidence. (See *Florida v. Jardines* (2011) 73 So.3rd 34.) The State petitioned to the United States Supreme Court which granted certiorari.

Held: The United States Supreme Court, in a split 5-to-4 decision, affirmed the Florida Supreme Court's decision finding that the use of a drug-sniffing dog within the curtilage of one's home is a search and, without a search warrant, a Fourth Amendment violation. The Fourth Amendment protects people from warrantless governmental searches of their "persons, houses, papers, and effects." The area immediately surrounding one's home, often referred to as "*the curtilage*," has been held to enjoy the same protection as the home itself. Thus, entering and occupying the curtilage while "engag(ing) in conduct not explicitly or impliedly permitted by the homeowner" without prior judicial authorization (e.g., a search warrant), is a Fourth Amendment violation. Defendant's front porch, as "the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends,'" is certainly part of the curtilage. The Court recognized that the front porch of defendant's home is an area where the officers could have lawfully entered for the purpose of knocking on his front door, just as could "solicitors, hawkers and peddlers of all kinds." But that is not what the officers did here. Rather, they came into the curtilage of defendant's home for the specific purpose of allowing a drug-sniffing dog to seek evidence of contraband. There is no customary or implicit invitation by a homeowner to do this. Further, the Court rejected the People's argument that an officer's subjective intent is irrelevant (i.e., *Whren v. United States* (1996) 517 U.S. 806; the "pretext stop" case), and that it therefore does not matter whether the officers intended merely knock on the front door, as the Court held would be lawful, or use a drug-sniffing dog to seek out evidence of illegal contraband. The rule of *Whren* assumes that there is *some* legal basis for the officers' actions. Here, there was *no* legal basis for bringing a drug-sniffing dog onto defendant's porch to do a warrantless search. The theory of *Whren*, therefore, does not apply. The Court further rejected the argument that the dog was doing no more than sniffing the air in the public domain, and thus did not violate defendant's right to privacy. Having held that defendant's front porch. being within the curtilage of his home and thus entitled to the same protections as the home itself, other cases that allow dogs to sniff odors in non-protected places does not apply. Therefore, having conducted a warrantless search by the use of a drug-sniffing dog within the curtilage of defendant's home, the product of which was used to obtain a search warrant, the resulting evidence recovered in the execution of that search warrant was properly suppressed by the trial court.

Note: This is a case which I thought could go either way, but was not surprised at the result. To my knowledge, this is the first case to talk about a law enforcement officer's approach to a suspect's front door being limited to what would be allowed under a socially acceptable "*implicit license*." Although there is a strong dissent, the majority decision is well-reasoned, makes sense, and is consistent with the current trend emphasizing the importance of one's privacy rights in his or her home.

***Involuntary Confessions and Offers of Leniency*:**

People v. Westmoreland **(Feb. 5, 2013) 213 Cal.App.4th 602**

Rule: Expressly or impliedly inferring that confessing might lead to a lighter sentence is an offer of leniency and requires the suppression of a resulting confession.

Facts: Defendant and his girlfriend, Erica Gadberry, devised a plan to temp males into what was proposed to be an act of prostitution. The idea was for Gadberry to lure an unsuspecting male into a vacant apartment where defendant would rob him at knife-point. The plan was initiated at a dive bar called "El Rodeo" in Fairfield, east of San Francisco. With defendant observing from the shadows, Gadberry approached Francisco Sanchez and, after a few drinks, proposed that they engage in a "fiesta." Thinking that this was his lucky day, Sanchez followed Gadberry to the vacant apartment. She led Sanchez into a back room, instructed him to take off his pants, and left the room with the excuse of going to look for a condom. Defendant entered the room and confronted Sanchez with his knife, demanding his money. Sanchez's resistance led to a struggle during which he (Sanchez) was stabbed in the chest. The knife pierced his heart, causing him to bleed to death. Gadberry and defendant took Sanchez's wallet and fled. An investigation into Sanchez's murder led officers to Gadberry who quickly ratted on defendant. (She later pled out to a plea bargain and testified against defendant.) During a 42-minute interview, and after waiving his *Miranda* rights, defendant eventually confessed. However, during the interview, and before he confessed, defendant repeatedly expressed his concern that he might have to a serve life sentence. The detective told him that that was not necessarily true. It was strongly implied that if the murder had not been planned, and if he and Gadberry really only intended to rob Sanchez, defendant's prison exposure might be something less than life. Asking for "some logical explanation for what happened," defendant was told that his "honesty is what will help (him)" and that "how much trouble (he was) in depends upon "what his story was." Every time defendant expressed concern that he might have to serve life in prison, the detective intimated that unless the killing was premeditated, the sentence would likely be something less. Defendant then confessed, telling the detective that he didn't mean to kill Sanchez. Defendant was charged with first degree felony murder along with other charges, and with a special circumstance that the murder was committed during the commission of a robbery. Defendant's motion to suppress his confession as being coerced was denied by the trial court. A jury convicted him of all charges and found the special circumstance to be true. Defendant was sentenced to life without parole, and appealed.

Held: The First District Court of Appeal (Div. 5) revered, finding that defendant's confession, as the product of an offer of leniency, should have been suppressed. To be admissible in evidence, a defendant's confession must be voluntary. The prosecution must prove voluntariness by a preponderance of the evidence. The issue "is whether [the] defendant's choice to confess was not 'essentially free' because his will was overborne." There's nothing wrong with telling a suspect that it would be better for him to tell the truth, at least so long as not accompanied by either a threat or a promise of leniency. And while pointing out the benefits that flows naturally from a truthful and honest course of conduct is okay, "if . . . the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible . . . ." In this case, defendant expressed his concerns several times that he might be subject to a life sentence. Each time he did, the detective told him that that was not necessarily so, hinting that the sentence could be something less so long as the killing was not premeditated. This is an incorrect statement of the law in that any death, even an unintentional one, caused during the commission of a robbery is automatically a first degree murder under the felony murder rule. It is also a special circumstance that, if found true, mandates either death or life without the possibility of parole. (P.C. § 190.2(a)(17)) Under the circumstances of this case, it appeared that defendant's eventual confession occurred immediately following his stated fear that "I'm going to get life in prison," and the detective's response; "That's not necessarily true, my friend, . . . Did this guy attack you? Did he disrespect you? Give me some logical explanation for what happened here." The inference was that confessing to an unintentional homicide during the commission of the robbery would earn defendant something less than a life sentence; an untrue statement under the felony murder rule. As an "offer of benefit or leniency," defendant's resulting confession should have been suppressed.

Note: Although the Court mentions the detective by name, I omitted that information because I don't think it was his intention to mislead defendant with any misinformation or offers of leniency. As evidence of this conclusion, the detective also told defendant at one point that he wouldn't "get into what you may or may not get," noting that "(t)here's all kinds of variables (on that issue)." That's certainly true. Assuming that the circumstances of the interrogation are correctly reported by the court, it looks to me that at worst, the detective was doing no more than trying to walk a very thin line between a legal "exhortation . . . that it would be better for (him) to tell the truth," versus coyly implying that confessing would necessarily result in something less than a life sentence. Unfortunately, the detective slipped a little too far to the side of promising defendant a lighter sentence in exchange for a confession. The lesson to be learned here is to be careful not to even imply that by confessing, a suspect may earn a lighter sentence.

***Residential Burglary*:**
***Searches of Vehicles; Probable Cause*:**

People v. Little **(June 15, 2012) 206 Cal.App.4th 1364**

Rule: (1) A first degree residential burglary occurs even though the inhabitants are temporarily absent, and even if the only occupant is a real estate agent trying to sell the house. (1) Probable cause justifying a warrantless search of a vehicle need only show a "fair probability" that the vehicle contains contraband or evidence of a crime.

Facts: Realtor Janice Konkol held an open house at a residence in Irvine that was listed for sale. As is standard procedure, the owners/sellers of the house were not home at the time. Defendant and a companion by the name of Nakeyia Shipman came into the house ostensibly as potential buyers. While Shipman kept Konkol busy, defendant went off on his own, pretending to view the house. Shortly after the two of them left, Konkol noticed that her wallet and its contents were missing. After looking around the house and calling home to see if she'd left her wallet there, and after still being unable to find it, Konkol called the police. Responding officers obtained physical descriptions of defendant and Shipman as well as their vehicle. Sgt. Michael Hallinan was in the field nearby when he heard the broadcast concerning the theft of Konkol's wallet. He received information via the police broadcast that the suspects were male and female, both African-American, with the male wearing a white or light-colored shirt and the female wearing a green dress. The male was described as being in his 50's, about 5' 10" tall, weighing about 165 pounds. The suspects were driving a red F-150 Ford pickup truck with large chrome rims. The female was described as in her 30's. Shortly thereafter, Sgt. Hallinan observed a red F-150 Ford pickup several miles away. He could see that the occupants also matched the descriptions of the suspects. He stopped the vehicle and contacted the occupants, subsequently identified as defendant and Shipman. He noticed that defendant was wearing a light-colored grayish shirt. Shipman was wearing a green dress. Sgt. Hallinan asked Shipman if they'd been to an open house in Irvine, and she confirmed that they had. He then asked defendant if he could search his vehicle. Defendant declined. So Sgt. Hallinan searched it anyway. In the vehicle, Sgt. Hallinan found a flyer for the open house and Konkol's credit cards. Shipman gave permission to search her purse. More of Konkol's possessions were recovered from the purse. Konkol was then brought to the scene of the stop where she positively identified both subjects, resulting in their arrests. Defendant was charged in state court with first degree residential burglary and other related charges. His motion to suppress the evidence recovered from his truck was denied. Convicted by a jury of all charges and sentenced to prison for 21 years, defendant appealed.

Held: The Fourth District Court of Appeal (Div. 3) affirmed. (1) Defendant's first argument was that because the owners of the house were not home, and that the only occupant at the time was there to sell the house (i.e., for "commercial purposes"), he could only be guilty of a second degree, commercial burglary. The Court rejected this argument. The law is well-settled that a residence need not be occupied at the time of the crime for it to be a first degree, residential burglary, as described in P.C. §§ 459, 460.

The house need only be "*inhabited*." A residence is inhabited so long as someone uses the house for dwelling purposes, even though he or she may be temporarily absent. A home is no longer inhabited only after its occupants permanently cease using it as living quarters. The intent of the inhabitant is what must be considered. "After a man has established a house as his dwelling, it retains this character so long as he intends it to be his place of habitation, even though he and his entire household are away." Also, the fact that another person happens to be in the house, temporarily using it for commercial purposes such as when a real estate agent is trying to sell the house, is irrelevant. The house in this case was still inhabited under these circumstances. Defendant's crime, therefore, having entered the house with the intent to steal, was a first degree, residential burglary. (2) Defendant's second argument was that his vehicle was searched without probable cause and that the evidence found in it should have been suppressed by the trial court. The Appellate Court rejected this argument as well. For a court to determine the existence of probable cause, it must consider whether, under the totality of the circumstances, there was a fair probability that contraband or evidence of a crime will be found in a particular place. In this case, the Court noted the following factors to be applicable: (1) The truck was stopped only 33 minutes after the initial dispatch was sent out; (2) it was stopped in the city in which the crime occurred, and only about three miles away from the scene of the crime; (3) the truck was "somewhat unique" in that it was a red Ford F-150 with chrome rims; and (4) two Black people were in the truck—one male in his 50's and one female in her 30's. This was certainly enough "reasonable suspicion" to justify stopping the vehicle and investigating further. Then, upon approaching the occupants of the vehicle, (5) it was determined that the defendant and his companion had been at the house where the theft occurred. Also, (6) the clothing descriptions for both subjects matched those of the suspects. Based upon all this information, Sgt. Hallinan had sufficient probable cause to do a warrantless search of the vehicle.

Note: Not really close on either issue. The rule that the occupants of the house need not be home at the time of a burglary is well-settled. That a real estate agent happened to be the sole occupant at the time, arguably making it a "commercial burglary" only, is a novel and interesting theory. But it certainly doesn't alter the well-established rules on whether a home is "inhabited" for purposes of the burglary statutes. And while I can see some judges questioning the search of the defendant's car, that being a very fact-dependent issue and a matter concerning which reasonable minds may differ, I didn't see that issue as being all that close either. You only need a "*fair probability*," and under these circumstances, that standard was certainly met. My only suggestion might have been that the sergeant should maybe have held off searching the truck until *after* the curbstone lineup ID was made. That would have convinced even the most picky of judges. Note also that it was not an issue whether a warrant was required, it being a vehicle searched with probable cause to believe that it contained evidence of a crime.

***Use of Force*; *Pepperball Projectiles*:**

Nelson v. City of Davis **(9th Cir. July 11, 2012) 685 F.3rd 867**

Rule: The use of pepperball projectiles against non-resisting, non-violent partygoers, merely because of a failure to disperse, is unreasonable. Serious injury to a partygoer with such a projectile, even if not specifically intended, is a Fourth Amendment seizure.

Facts: University of California at Davis students staged "the biggest party of the century" in celebration of their annual Picnic Day festivities in April, 2006, at an apartment complex near the campus. Plaintiff Timothy Nelson was a student at the University who was among some 1,000 partygoers at the complex. Due to the size of the party, traffic on the street on which the apartment complex was located became gridlocked with illegally parked cars. Officers of the City of Davis Police Department started writing parking citations. In the process, some underage drinking cites were also issued. Because things were starting to get out of hand (i.e., car rocking and breaking bottles), and with the owner of the apartment complex asking police to have the party attendees leave, it was decided to break the party up. Officers first tried to individually inform those on the fringes of the crowd to leave, but were largely ignored. They then tried parking a police vehicle in or near the crowd. But this just made the vehicle a target for bottles. Finally, after being backed up by officers from the U.C. Davis Police and other agencies, about 30 to 40 officers wearing riot gear, and some armed with pepperball guns, began to move in a "skirmish line" on the crowd. For whatever reason, the officers lacked any means of amplifying their commands, so their orders to disperse as they pushed into the crowd were largely unheard, or ignored. Timothy Nelson was with some fifteen to twenty other partygoers who had congregated in a narrow breezeway on the ground floor of the complex. Per later testimony, they were attempting to leave the party but the police had blocked their only means of egress. Allegedly, no one from this group was involved in the bottle throwing. Given this stalemate and with few if any people leaving the area, officers eventually fired pepperballs into the crowd from a distance of from 45 to 150 feet. A pepperball hit Nelson in the eye. As a result he suffered temporary blindness and a permanent loss of visual acuity. It took multiple surgeries to repair the resulting ocular injury. He also lost his athletic scholarship and had to withdraw from U.C. Davis. Nelson filed suit in federal court per 42 U.S.C. § 1983, alleging that his Fourth Amendment rights (i.e., unreasonable seizure) had been violated. The civil defendants' (officers from the City of Davis and U.C. Davis Police Departments) motion for summary judgment (i.e., dismissal of the lawsuit) was denied. The district court ruled that Nelson's Fourth Amendment rights had been violated and that the officers were not entitled to qualified immunity. The officers appealed.

Held: The Ninth Circuit Court of Appeal affirmed. When a law enforcement officer's potential civil liability is at issue, a court must determine (1) whether the officer's actions violated the Plaintiff's constitutional rights, and if so, (2) whether it was a well-established rule that was violated. If the rule is not well-established, then the officer is entitled to qualified immunity from civil liability. Shooting and seriously injuring a plaintiff with a pepperball gun constitutes a use of force and a seizure under the Fourth

Amendment. It is a Fourth Amendment violation only if such use of force was unreasonable under the circumstances. Nelson alleged in his civil suit that using a pepperball gun under the circumstances of this case, resulting in his serious injury, was an excessive use of force and thus violated his Fourth Amendment rights. The federal district (i.e., trial) court had agreed. The trial court also held that the officers' should have reasonably known this, thus thwarting any argument that the officers were entitled to qualified immunity. Assuming that Nelson is able to prove that the facts were as he alleged in his suit (no trial having yet been held), the Ninth Circuit agreed that the officers should be found to be liable. (1) *Seizure*: The officers first argued that Nelson had not been "*seized*" under the Fourth Amendment. The Court rejected this argument. The facts showed that although incapacitated by a projectile filled with pepper spray, he was never taken into police custody. Rather, some unknown party transported him to a hospital. But this didn't mean that there was no seizure. A person is seized by the police under the Fourth Amendment when a police officer, "by means of physical force or show of authority, terminates or restrains (a person's) freedom of movement through means intentionally applied." By incapacitating Nelson, his freedom of movement was terminated. It is also irrelevant that Nelson himself may not have been the target. So long as the force was applied intentionally, as it was here, it is not necessary to show that Nelson was the specific target of that force. It is enough that he was a member of the group against which the force was applied. The Court further noted that it is irrelevant that the officers intended merely to disperse the crowd, and to do so by shooting the pepperballs into the area as opposed to hitting any specific person. It is sufficient to show that the officers intentionally directed their use of force at the students in general. (2) *Reasonableness*: The officers next argued that the force they used was not unreasonable under the circumstances. Determining reasonableness requires the Court to balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." It has been held before that the use of pepper spray, as a dangerous weapon, is not a minimal intrusion. Recognizing this, officers are taught that they should avoid the head, face and groin due to the risk of causing serious injury. Officers are also warned that pepperball projectiles cannot be accurately targeted beyond 30 feet. Evidence presented at the summary judgment motion showed that the involved officers were well aware of the risks that accompanied the use of pepperball projectiles, particularly when fired at a distance well beyond that approved under their guidelines. Whether the use of such a dangerous weapon was reasonable requires the need for such use to be balanced with the severity of the crime involved. Nelson and his companions, at worse, were guilty of only a misdemeanor trespass, based upon their refusal to disperse, although they weren't even charged with this. Also, even if it is assumed that the party had turned into a riot, the undisputed facts support the conclusion that the officers did not reasonably believe Nelson or his companions posed a threat. While bottles were being thrown, there is no proof that Nelson or his group, who appeared only to be taking cover in the breezeway, was involved in that activity. "(T)he general disorder of the complex cannot be used to legitimize the use of pepperball projectiles against non-threatening individuals." Also, there was no showing that either Nelson or those in his group were resisting, or attempting to evade arrest. Lastly, the Court cited the lack of any audible warnings that force was about to be used as a factor in determining reasonableness. Balancing these

factors, a civil jury could very well find that the force used was unreasonable under the circumstances. And because the officers should have been aware of the above well-established rules, they are not entitled to qualified immunity.

Note: Thus, we have yet another Ninth Circuit case finding the use of one of the various "less-lethal" weapons as being excessive under the circumstances. While you can easily complain that these appellate court justices, with no personal experience on the streets, naively expect too much from the police when confronted with an out-of-control drunken party that, within seconds, could easily turn into a full riot, don't let that anger cause you to miss the point here. "*Less lethal*" doesn't mean "*non-lethal*." Lessening the likelihood of killing a suspect doesn't mean that you can automatically use one of the less-lethal tools provided to you just because it's now a part of your arsenal. This is a fact of life that some officers seem to be having a hard time accepting.

***Detentions*:**

People v. Walker **(Oct. 18, 2012) 210 Cal.App.4th 1372; as amended at 2012 Cal.App. LEXIS 1187**

Rule: A vague suspect description, standing alone, does not provide sufficient reasonable suspicion to justify a detention.

Facts: On November 11, 2010, at about 12:20 p.m., a sexual battery occurred at the Santa Clara South light rail station in downtown San Jose. Two suspects were reportedly involved. Suspect number one was described as a Black male, in his 20's, approximately 6 foot one inch in height, 195 pounds, a short afro, clean shaven, light complexion, and unkempt. (Suspect #2 was a dumpy little guy—five-five—in his 30's.) One week later, Santa Clara County Deputy Sheriff Frank Thrall was working as a member of a "route stabilization team," which was a plain clothes detail tasked with "directed enforcement with the public transportation system . . . focusing on street level crimes." Deputy Thrall was aware of the sexual battery and had viewed several still photos of the suspects taken from a security video. He also knew the Santa Clara South station to be a high crime area, known for its narcotics activity. At 10:15 p.m. on November 18, Deputy Thrall noticed defendant on a southbound train and believed that he "possibly resembled" suspect number one. Specifically, defendant was a Black male, 19 years old, 5 foot 10 inches in height, 180 pounds, short black hair (covered by a hat), a mustache and a slight goatee, medium to dark complexion, and well-groomed. Based upon what he considered to be a similarity in appearance between defendant and suspect number one, Deputy Thrall approached him and asked him for proof of fare. Defendant asked why he was being singled out. Deputy Thrall told him that he had the right to ask for proof of fare, and then asked defendant for his identification. Defendant eventually produced a San Jose University student body card belonging to someone else, with a fare sticker attached. Defendant was arrested for falsely identifying himself, per P.C. § 148.9. A search incident to arrest resulted in recovery of cocaine base and marijuana. Charged in state court with possession of cocaine for purposes of sale, defendant's motion to suppress the evidence was denied. He pled guilty and appealed.

Held: The Sixth District Court of Appeal reversed. Defendant's argument on appeal, as it was with the trial court, was that there was insufficient reasonable suspicion to justify his detention, and that the contraband recovered from his person incident to his arrest was illegally seized. The issue, therefore, was whether defendant's resemblance to one of the sexual battery suspects was sufficient to constitute a "reasonable suspicion." The Court first listed several similarities; i.e., both were black males. Also, their ages were close (in his 20's vs. 19), as were their weights (195 vs. 180 pounds). But *not close* were their heights (6'1" vs. 5'10"), facial hair (clean shaven vs. mustache and light goatee), skin color (light vs. dark to medium complexion), and general appearance (unkempt vs. well-groomed). Upon independent review by the Court, it was noted that the photos lifted from the surveillance security video were so vague that they could not be said to have helped in identifying defendant as one of the suspects. Deputy Thrall's assertion that the photos helped him identify defendant as one of the suspects was found by the Court to be "objectively unreasonable." The Court further held that the fact that the sexual battery had occurred one week earlier, to the day, at the same location where defendant was detained, "was of little or no significance in establishing reasonable suspicion for the detention." Had defendant been contacted there immediately after the crime, the timing might have been important. But being there a week later makes defendant's presence there "inconsequential." Lastly, the fact that the area might be a high crime area known for drug trafficking was not relevant on the issue of the lawfulness of defendant's detention in this case. Based upon this, the Court determined that defendant had been illegally detained and the resulting evidence should have been suppressed.

Note: The Court ignored the Attorney General's argument that Deputy Thrall had a right to contact defendant and require him to show proof that he had a ticket for the train. They merely skipped straight to the conclusion that defendant had been unlawfully detained (as opposed to merely "consensually encountered"), disagreeing with the trial court judge who, having heard the evidence and who had defendant himself there in court in front of him, was in a much better position to evaluate how closely defendant resembled the suspect. But right or wrong, the point here is that you can't just go detaining people based upon a vague suspect description absent some significant similarities in appearance. This case should be of some value to you in attempting to determine where the line is drawn between a mere "hunch" and a reasonable suspicion.