CRIMINAL PROCEDURE

Theory and Practice

3RD EDITION

Jefferson L. Ingram

ROUTLEDGE

CRIMINAL PROCEDURE

3rd Edition

Criminal Procedure: Theory and Practice, 3rd Edition, presents a broad overview of criminal procedure as well as a detailed analysis of specific areas of the law that require specialized consideration. The 3rd Edition provides students with an updated, comprehensive text written in reader-friendly language to introduce them to the field of criminal procedure.

Significant edited legal cases are integrated into each chapter, and comments, notes, and questions accompany each case. This edition features a new chapter covering searches of Internet-connected devices and electronic devices that may store personally connected data. The chapter "The Internet of Things" introduces search and seizure concepts related to electronics. In addition, a section at the conclusion of each chapter, "How Would You Decide," allows readers to examine the facts of a real case that contain some of the important concepts form each chapter. The reader can compare the individual's resolution of the case with the way the actual court determined the issue. Using a balanced text/case format, the author provides an overview of general criminal procedure as well as guidance for law enforcement actions that honor constitutional protections and comport with the rule of law. Instructor support material prepared by the author is available on our website, including lecture slides and instructor's manual with test bank, as well as online updates on new case law in the area of criminal procedure.

This textbook is ideal for all criminal justice programs in both four-year and two-year schools, especially those preparing future police officers, as well as a reference for law students and attorneys.

Jefferson L. Ingram holds the rank of Professor in the Department of Political Science at the University of Dayton, teaches political science courses, and also teaches some courses for the Department of Criminal Justice and Security Studies. He has a B.S. in secondary education, an M.A. in American history, and a Juris Doctor degree. He is a member of the Ohio Bar, the Florida Bar, the Bar of the federal courts for the Southern District of Ohio, and the Bar of the Supreme Court of the United States. Ingram is the author of many books on criminal justice and U.S. law, including *Constitutional Law for Criminal Justice*, 15th Edition, and *Criminal Evidence*, 14th Edition.

"I appreciate the author providing a historical context for not only the Bill of Rights but the distinction between federal and state applications of those rights, particularly the Fourth, Fifth, Sixth, and Fourteenth Amendments. I find that if my students understand the rationale for the establishment of rights, the 'why,' their understanding of all that follows is enhanced."

Chris Carmean, *JD, Program Director, Law Enforcement & Criminal Justice, Houston Community College & Peace Officer Training Academy*

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Preface

The third edition of *Criminal Procedure: Theory and Practice*, encompasses the many substantive changes that courts have made that alter some of the jurisprudence for the field of criminal procedure. New material has been added with the goal of capturing both the changes that electronic technology has brought to criminal procedure and how courts have reacted to new events. Chapter organization has been slightly altered, with the addition of a new chapter on the Internet of Things with respect to search and seizure of data from electronic devices, whether worn on the body, installed in the home, or built into motor vehicles. The edited legal cases from the prior edition that were presented within the text of the book at relevant places remain, while some new cases are now presented that represent recent departures from older decisions. Clarifications on the hot pursuit doctrine, changes to state unanimity of twelve jurors, reaffirmation of separate sovereigns in double jeopardy issues, and the importance of the home curtilage are among the changes that have been included in this third edition. The edited cases for each chapter are nested within the book's text so that the student can read the case in context with the material that describes the relevant legal principles.

The book presents contemporary legal decisions as well as classic landmark criminal procedure cases that are illustrative and demonstrative of criminal procedure concepts. Where appropriate, a modest number of graphics and court forms that are explanatory or descriptive of the text are placed within the chapters as a way of illustrating the legal procedures that they depict. To assist the reader, this edition continues with a presentation of learning objectives at the front of each chapter that stress the desired educational outcomes for the particular block of material. The reader who masters the learning objectives and the new terms that follow the learning objectives will have attained the knowledge that the chapter contains. Near the conclusion of each chapter, review questions and exercises have been suggested that offer a self-test to determine whether the basic learning objectives have been met. Carrying over from the prior edition, at the conclusion of each chapter, in a section titled "How Would You Decide," the author has included two edited case problems that are demonstrative of material within the particular chapter. Many of these case problems have been updated with recent court cases to capture the current state of the particular criminal procedure issue. Ideally, after having read the first part of the case problem, the student, reader, or attorney will be able to address and solve the problem or issue suggested by the case based on the knowledge gained from mastery of the chapter. The solution to the legal problem follows the presentation of the case facts and contains a legal citation where additional study may be addressed.

The field of criminal procedure provides part of the matrix of fairness and justice that promotes equality of treatment for persons suspected or accused of crime. Since the genesis and basis for criminal procedure come from both the Constitution of the United States and the constitutions of the several states, its substance and application will vary in some fashion from jurisdiction to jurisdiction. Although federal constitutional decisions are mandatory and binding on the states, such decisions dictate only the minimal legal protections required under our federal system. Every state may go beyond the basic minimum federal guarantees by offering an accused enhanced or greater state constitutional protections. For example, a state is free to allow vicarious standing to suppress evidence following a Fourth Amendment violation, or it may require the presence of a parent or guardian before a juvenile may waive *Miranda* rights or may give the right to counsel at post-arrest photographic arrays. States also may grant enhanced criminal procedure protections based on considerations of state appellate case law and state statutory law.

New technology and social developments often present novel situations that were not envisioned by the Framers of the United States Constitution, so that courts must attempt to reconcile and apply older constitutional provisions to fit novel technological and social situations while retaining the logical, if not original, intent or the practical intent of the Framers. The constitutional and statutory rules and court interpretations regulate how state and federal governments must treat persons accused or suspected of committing crimes. Changing interpretations of the rules dictating the way law enforcement officials interact with individuals who are mere suspects for particular crimes both inform and restrain the approaches that law enforcement officers must follow. When investigations have moved beyond their initial stages to the point where criminal suspects have been identified, the rules of criminal procedure provide a road map that all law enforcement officials must follow. Where officials fail to observe recognized criminal procedural rules, such deviation may jeopardize any eventual successful criminal prosecution. Society and accused persons benefit when police follow and apply proper rules of criminal procedure. Failure to follow constitutional decisions and criminal procedure rules may result in the failure of justice for the accused individual and for society.

Similarly, when law-enforcement officials have turned their work product over to the prosecutor's office, the personnel presenting the government's case must carefully follow additional rules regulating fair conduct in order to accord due process to the accused. The prosecution has no duty to win a case at all costs but possesses the overall obligation to see that justice is the eventual outcome of the trial process. Defense attorneys have a role within the rules of criminal procedure to ensure that the government has played fairly during the investigation, pretrial, and trial phases; they also are obligated to provide a vigorous defense consistent with the Constitution and state rules and regulations.

During criminal trials, judges must carefully weigh the arguments of the contending parties whether they are arguing over criminal procedural issues relative to the admission or exclusion of evidence or over more traditional admission of evidence under evidence codes. Whether a judge presides over pretrial issues, the trial itself, or post-trial motions or serves on an appellate panel reviewing trial-level judicial decisions, every judge possesses a duty to ensure due process to both the prosecution and the defense. Roughly

translated, due process implies fundamental fairness and fair dealing to all parties during all the important stages of the criminal justice process.

While the case study method of instruction is common to learning legal principles, the book combines textual material with the case study method of instruction, where students read the text presentations and are also exposed to significant appellate decisions. A goal of this book is to bring the richness of textual description to each chapter while presenting important edited appellate cases. The latest case material is available to the student by browsing to www.criminalprocedurebyingram.com; the web site presents edited updated legal cases that coordinate with this book's table of contents. When a new decision by the Supreme Court of the United States alters or modifies a criminal procedure concept covered by this book, the new edited case will be placed on the book's website in a matrix that coordinates the new material with the respective chapter. Having the book's web resource enables the student to both learn the traditional case precedents from the book and integrate those principles with the latest court decisions covering a particular topic of criminal procedure.

Significant developments and changes in constitutional criminal procedure have generally come from landmark case decisions of the Supreme Court of the United States. Critical cases that incorporated various bill of rights guarantees into application against the states have provided much change to criminal procedure in the past sixty years. From the right to a trial by jury to the right to counsel and the right to silence under *Miranda* and protections relative to search and seizure, all have come from significant Supreme Court decisions. Implementation of the rules and principles of criminal procedure has largely been delegated to state legal systems, where state courts have developed slightly divergent interpretations and applications of these legal principles. The federal rules of criminal procedure and state rules of criminal procedure owe much of their content to the codification of legal principles announced by the Supreme Court of the United States and to common-law practice. Many states have adopted local versions of rules for criminal procedure based substantially or loosely on the federal rules of criminal procedure.

The first chapter of this edition offer historical lessons about the history of the Bill of Rights and the significant constitutional alterations that followed the American Civil War (1861–1865) that may not be well known to readers. This introductory chapter of the book allows the student to develop a historical context for many of the important concepts and theories in criminal procedure, as well as to gain knowledge about the direction in which courts may take recent jurisprudence and build for the future. Historical knowledge concerning the past legal practice helps the current student or attorney appreciate the legacy that historical figures have left to present generations. Subsequent chapters detail police, attorney, and judicial practices that have developed since the adoption of the Constitution of the United States and the changes due to the Fourteenth Amendment and its due process clause. It is the implementation of constitutional and case law principles, coupled with related changes, that drives most of modern criminal procedure and which the individual chapters present in an ongoing and dynamic fashion.

The initial chapter offers a detailed presentation concerning how state and federal courts are organized and operate and the jurisdiction of the federal courts of appeal. Subsequent chapters cover basic Fourth Amendment principles of search and seizure,

the exclusionary rule, stop and frisk principles, *Miranda* practice, and the proper use of search warrants and where they are required. Special needs searches are covered in a separate chapter, as is Fifth Amendment confession practice. The chapter on the Internet of Things covers search and seizure principles, covering many electronic devices that store and transmit data over which a Fourth Amendment claim of privacy may be made.

This book involved compromise concerning what material was essential to include, and every effort has been made to make those decisions properly and intelligently to benefit the reader with the greatest exposure to the important issues in criminal procedure. Any errors or omissions belong to the author, who has received most generous assistance from everyone involved at Taylor and Francis. Special thanks to Ellen Boyne and Pam Chester for cooperating and helping get this edition into proper form. I wish to thank everyone behind the scenes who has devoted many hours to making this book a better book, from grammar suggestions to book organization. Thanks to Dr. Grant Neely, chairman of the Political Science Department, for general encouragement and especially for supporting a sabbatical that enabled much of the work for this book to be accomplished.

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University of Dayton
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Introduction to the Constitutional and Legal Process

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Learning Objectives

1. Explain what the Framers of the three post-civil war amendments, the Thirteenth, Fourteenth, and Fifteenth Amendments, intended.
2. Analyze the basic theory behind the selective incorporation doctrine that gradually incorporated some of the Bill of Rights into the due process clause of the Fourteenth Amendment.
3. Identify the rights in the Bill of Rights that have been incorporated into the due process clause of the Fourteenth Amendment.
4. Recognize and identify the more recent rights that have been selectively incorporated into the Fourteenth Amendment's due process clause.
5. Be able to explain why successive prosecutions by a state and the federal government are not considered double jeopardy.
6. Explain the difference between an indictment and an information.
7. Verbally trace the major trial process from jury selection to the verdict.
8. Be able to explain the essential steps of the typical appellate process.

Chapter Outline

KEY TERMS

1. Articles of Confederation
2. Bill of Rights
3. Thirteenth Amendment
4. Fourteenth Amendment
5. Fifteenth Amendment
6. Selective Incorporation
7. Grand Jury Indictment
8. Information
9. Indictment
10. Privilege Against Self-Incrimination
11. Speedy Trial Right
12. Habeas Corpus
13. Jury Instructions
14. Preliminary Hearing
15. Pretrial Hearings
16. Trial by Jury

Part I
Constitutional Introduction

1. Constitutional Basis of Rights for Persons Accused of Crime

Over the past ten centuries, English and Western thought developed the concept that fundamental fairness should prevail in relationships between governments and their people.[1] Concepts of fairness and due process were written in the Magna Carta of 1215, a document signed by the English monarch, King John, which guaranteed individual rights that the government would respect. The Magna Carta provided, among other things, that the king would be bound by law and that the people would be free from unlawful imprisonment, would be tried by the judgment of their peers, and justice would not be bought or sold.[2] British and colonial governments and leaders made efforts to extend some of the concepts of fundamental fairness found in the Magna Carta to all persons in their relations with their governments, including those accused of criminal activities. This is not to say that there have not been miserable failures of governments to observe fundamental fairness [slavery and unfair trials, etc.] on many occasions both civil and criminal, but political thinkers of the pre- and post-Revolutionary War period, who had been influenced by concepts included in the Magna Carta and rational theories offered during the Age of Enlightenment,[3] endeavored to enshrine fairness and due process by the use of written instruments of government. It was believed that a static written form of governance would ensure civil and criminal justice, both in the several states and in our national government.

Despite a fairly enlightened view of justice, people in the colonies and later in states and localities continued to fear that a distant government, especially a strong national one, could eventually erode their rights and institute unfair laws and practices that local people could do little to counteract. This fear resulted in compromises that created a weak central government under the Articles of Confederation and caused problems with ratification of the stronger government represented by the Constitution of the United States.

Under the Articles of Confederation, the states were free to conduct their criminal justice systems as each saw fit, with virtually no involvement with the central government. Most criminal justice 200 years ago, then as now, occurred at the local level, with state and local members of the executive branch directed to take wrongdoers into custody. State and local judicial officials had the task of ensuring a measure of justice consistent with the heritage of English common law and the common practice of the era. The overall fear of a national government interfering with local freedoms, especially ones involving crime and justice, had been a recurring American theme and one that has existed throughout the history of the nation, whether prior to the Articles of Confederation, during the Articles, or under the Constitution. The fear of a strong central government under the Constitution prompted agitation for a Bill of Rights and was directed to ensure that the traditional rights of Englishmen[4] continued under the newest version of the national government. The fear explains the perceived need for protections from the federal government against illegal searches and seizures; the desire for grand jury indictments; the need for providing protection against double jeopardy; the desire to ensure due process; and protections against unreasonable fines, bails, and punishments. While such fears explain many of the reasons there is a Bill of Rights, other political and judicial factors and political tensions explain why these guarantees in the Bill of Rights have come to be nationalized and applied against the states in contravention of the intent of the original Framers. In some respects, the concept of selective incorporation of the Bill of Rights against the states has been to protect local individuals from overreaching or unfair treatment not from an all-powerful national government but from increasingly powerful state governments. Civil liberties and criminal justice fairness have become federalized as a way to ensure that their basic guarantees remain and continue. This chapter starts with the government under the Articles of Confederation and traces some of the later developments and constitutional trends that occurred as state and national courts interpreted the newer Constitution of the United States. These interpretations and later constitutional amendments have created a living document that, among other things, regulates much criminal procedure of the present day.

2. Articles of Confederation

At the beginning of the Revolutionary War, the colonial legislatures generally transformed themselves into governing bodies of independent states, with each state developing its own constitution. There were variations in how these independent states adapted their forms of government with new constitutions, but generally the individual states continued their forms of government in ways that were recognizable before the

Declaration of Independence. Where colonial governors might once have been appointed, following independence, as a general rule, governors were elected by properly qualified voters, and the states that had two houses in their legislatures had their members elected by voters. Universal suffrage remained a future development since women and African Americans were not permitted to vote.

The Continental Congress attempted to devise a constitution that would cover all of the states in a new form of government, but that proved a very difficult task. Concerns about how representation should be based, whether on population or by some other fair measure, consumed much of the time of members of Congress. Difficult compromises had to be made among all the states, especially those like New York and Virginia, which continued to have claims on western lands far beyond their present borders. Small states were concerned that they might end up with insufficient power and be dominated by the larger states. The resulting constitution, called the Articles of Confederation, was probably the best and strongest document that could have received enough support by a sufficient number of states to have been accepted as the national charter. As is true with most negotiated documents, compromises sometimes are necessary to attain initial agreement, but necessary compromises also inject some weaknesses that may need to be corrected or renegotiated at a later time. Governmental difficulties under the Articles caused a variety of national problems.

In practice, the national government that emerged under the Articles of Confederation exhibited weaknesses that required cooperation among the states that, in many instances, was difficult to attain. Upon request from the national government under the Articles, states would furnish their allotted number of military service members, but the national government had no way to ensure that the allotted number of soldiers, properly equipped, would actually show up for service. Under the Articles, the government had no central control or even influence over interstate or foreign commerce, so each individual state acted more like a sovereign nation rather than part of a larger nation-state. A glaring weakness under the Articles of Confederation involved the inability to levy and collect taxes from either the states or from individuals, while many states taxed goods coming to their respective states. From a perspective of national unity, trade, taxation, and foreign affairs, the Articles of Confederation demonstrated weaknesses that cried out for a new approach.

3. The Constitution: Revision in National Government

Delegates from five states responded to a Virginia call to a meeting designed to address problems affecting interstate commerce. The delegates eventually assembled in Philadelphia, Pennsylvania, in 1787 and initiated work related to resolving interstate trade problems that the Articles of Confederation either helped create or did not solve. What developed from the meetings of the delegates for the summer of 1787 after extensive wrangling and compromise was the United States Constitution under which we operate today. If compromises were difficult when drafting the Articles of Confederation, they might have been small compared to the issues with which the delegates had to deal

in writing a new document for that would serve as new governmental charter. The new government was to have power over interstate and foreign commerce as a way of solving one of the major problems under the Articles of Confederation. Central-government power over interstate and foreign commerce was added. The old concerns that divided the large states and the small states with respect to representation and relative power and authority in the new government were solved by having a Senate where each state had two senators and a lower house, called the House of Representatives, where the number of representatives was to be based on a state's population. This created a new problem, because in the slaveholding states, those delegates wanted slaves counted as whole people, and delegates from non-slaveholding states did not want to count each slave as a person for the purposes of apportioning representation. While there were many conflicts concerning how to organize the government, eventually the delegates settled upon a plan that had three equal branches, the legislative, executive, and judicial. The delegates eventually resolved these and many other issues and presented the document to the Congress under the Articles of Confederation. Congress sent the new document to the states for consideration by state conventions called for that purpose.

4. The Constitution: Challenges to Ratification

Given the divergent opinion on political and economic matters, state ratification of the new constitution was not a foregone conclusion at the time it was submitted to the states for consideration. Article VII stated that "The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same." In addition to acquiring the proper number of state votes, the merits of the new constitution created significant public discussion both for and against its adoption. One of the common arguments against adopting the new constitution concerned the fact that it had no Bill of Rights that would guarantee either individual or state rights, a concern that related back to the general fear of a strong national government. Many arguments were made that the new government created under the new constitution sacrificed state sovereignty, might levy taxes in an unfair or burdensome way, or might unfairly favor one section of the country over another. In some quarters, there was the fear that the presidency might evolve into a king-like institution or position. In many states, public meetings involved raucous gatherings of partisans who argued one way or the other, and newspapers and broadsides offered their particular political wisdom both in support of ratification and in agitation against ratification.

Strong opposition in the Commonwealth of Massachusetts developed, where the anti-Federalists argued that it should be amended before it would be acceptable. The Massachusetts convention eventually voted to accept the Constitution but recommended that amendments should be considered by the first Congress under the new constitution.

> At the Massachusetts ratifying convention in early 1788, Federalists won assent for the new federal Constitution only by promising that they would support subsequent amendments that would provide a bill of rights. This concession caught on elsewhere. Without it ratification by the necessary minimum of nine states would have been impossible.[5]

Several other states that ratified the Constitution included language recommending that amendments in the form of a bill of rights be offered in the new Congress contemplated by the Constitution. Eventually a sufficient number of states, through conventions, indicated their respective approval for the new document, but many states expressed reservations concerning the absence of a bill of rights and urged that adoption of a bill of rights should be an early consideration of the new national government.[6] The Congress under the Articles passed a resolution that placed the Constitution of the United States as the governing document.

5. The Rationale and Need for the Bill of Rights

During the period when people in the states discussed the relative merits of whether the Constitution should be ratified, agitation, both for and against adoption, swirled around the nation in the form of papers, letters, and broadsides. One position argued that a Bill of Rights was necessary because rights would be best protected when they were enumerated or listed as rights that individuals possessed. The argument suggested that such a list of rights was necessary to prevent governmental encroachment on the rights of citizens. Others contended that if the rights were listed, the implication might be drawn that these were the only ones that existed, so that if a right was not listed, it did not exist. The concern remained that the federal government might become too powerful and that having a list of guaranteed rights and clear limitations on governmental prerogatives would be the best way to reduce the chances of tyranny that a stronger national government might present. Guarantees that prohibited Congress from legislating concerning religion, the right of people to be free from unreasonable federal governmental searches, and the right not to be tried twice for the same crime were considered crucial and were included within the twelve proposals submitted to the states for consideration as amendments by the new Congress. Fresh remembrances of colonists transported to England for trial suggested that a right to a trial in the district where the crime was allegedly committed was an important right, and this trial right was also included within the twelve proposals. The people agitating for a Bill of Rights wanted to make sure that the rights traditionally enjoyed by Englishmen,[7] including a speedy and a public trial while represented by counsel, were guaranteed by the proposed Bill of Rights. To prevent lengthy pretrial incarceration, the Bill of Rights guaranteed the right to bail in a proper case, while cruel and strange punishments were prohibited. To defuse the argument that listing rights might imply that others did not exist, proposed within the Bill of Rights was the notation that the inclusion of certain rights within the Constitution could not be used to deny or disparage others that were retained by the people. To ensure that the national government could not become too powerful, the proposed Bill of Rights provided that if certain powers had not been given to the national government, they belonged to the states or to the people. With the views that were expressed in the twelve proposed amendments passed by the Congress and sent to the states for ratification, the complaints of many who voted for ratification were eliminated or substantially reduced.

6. History of the Bill of Rights

With the ratification of ten of the twelve proposed changes to the Constitution, the Bill of Rights became part of the Constitution in 1791 and stands on an equal footing with all of the other original provisions of the Constitution. Some states approved all twelve of the proposed amendments, while others did not approve all of them, but sufficient state approval led to the addition of the first ten amendments to the Constitution of the United States. One of the original twelve proposals for amendments passed by the First Congress on September 25, 1789, that initially failed to be approved with the first ten amendments finally received sufficient ratification by three-fourths of the states on May, 18, 1992.[8] The proposal became the Twenty-Seventh Amendment to the Constitution, stating that, "No law varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."[9]

The legislative intent of Congress that submitted the twelve proposals to the states for consideration was that the amendments would limit or restrict the federal government in its dealings with individuals. There was no legislative intent to limit state powers when a particular state dealt with an individual because less fear existed that a state would oppress its own people. The amendments were aimed clearly and solely at placing restraints on the federal government. It was not believed that clear limitations on state prerogatives and powers would be necessary because individual citizens were closer to their governments in each state, and the population could control state excesses should they occur through the ballot box. Only after the passage of the Fourteenth Amendment, which contained a due process clause, did any argument develop that concept of due process might include some guarantees against state activity under the Bill of Rights.[10]

In a case known as *The Slaughter-House Cases*,[11] the Louisiana legislature had altered some of the rules for slaughtering animals in the city of New Orleans, a fact that harmed some business owners involved in the slaughter and preparation of meat for human consumption. Among other theories, the argument offered by the affected business owners contended that the post-Civil War Thirteenth and Fourteenth Amendments to the Constitution altered the way states could legislate based on the privileges and immunities clause in the Fourteenth Amendment. The city of New Orleans, by limiting the way meat processors could operate, the plaintiffs contended, interfered with their privileges and immunities guaranteed by the Fourteenth Amendment. The Court rejected the argument that the amendments passed following the War Between the States had fundamentally changed anything other than what the amendments were clearly designed to accomplish. The Court mentioned that the original purposes of the post-war amendments were to end slavery, make citizens of all persons born in the country, and allow the right to vote, and, according to the Supreme Court, the amendments were not intended to accomplish anything else.

The Bill of Rights fundamentally began to change when the Supreme Court decided *Gitlow v. New York*, 268 U.S. 652, in 1925, where the Court stated,

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are

> among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.[12]

The *Gitlow* case involved a prosecution for criminal anarchy in violation of New York law because Gitlow had written and orally advocated the necessity of overthrowing organized state and federal governments. The lower courts determined that the speech constituted direct incitement for others to attempt to overthrow organized government, and, although the Supreme Court assumed that concepts contained within due process included freedom of speech and press, it refused to overturn the convictions. Significantly, the Court, for the first time, determined that the due process clause of the Fourteenth Amendment protected the First Amendment rights of speech and of press, a decision that was contrary to doctrine mentioned by the Court in the *Slaughter-House Cases*. This case operated as a preview of what would later become known as the selective incorporation doctrine, where the Supreme Court incorporated many of the guarantees of the Bill of Rights into the due process clause of the Fourteenth Amendment and applied them against the states.

7. Constitutional Developments: Civil War and Aftermath

The Thirteenth Amendment, ratified in 1865, abolished slavery and involuntary servitude within the United States, except where it might be used as a punishment for a criminal conviction. This result had become one of the primary goals of the war and had followed on the heels of President Lincoln's 1863 Emancipation Proclamation in which he ordered that all persons held as slaves in areas not controlled by the United States were to be considered free persons from the date of the Emancipation Proclamation forward.

The Thirteenth Amendment clearly outlaws slavery as it was known prior to the Civil War, but some individuals have argued that different situations involving involuntary custody violated the spirit of the Thirteenth Amendment. For example, in one case, a group of Mexican nationals who had entered the United States illegally were being held against their will as material witnesses by the federal government. They contended that the Thirteenth Amendment prevented their detention while being paid a dollar per day as witnesses because it amounted to involuntary servitude.[13] The material witness prisoners could not afford to make bail, so they waited in jails prior to giving their testimony in a pending criminal case. Even though they were being involuntarily held by the government of the United States, they were being paid one dollar a day as compensation during the time the trial court was in session, when their presence was necessary. The Court concluded that there was no substance to the arguments made by the illegal aliens that the one dollar a day payment was so low as to impose an involuntary servitude that had been prohibited under the Thirteenth Amendment.[14]

Court cases have considered whether the federal government's act of drafting individuals for military service amounts to involuntary servitude that would violate the Thirteenth Amendment.[15] In one instance, the defendant had been indicted for failure to register under the Military Selective Service Act of 1967. In rejecting the defendant's claim, the district court noted that involuntary servitude has never been interpreted as

pertaining to military service. The court believed that involuntary servitude included only forced labor such as peonage and was not intended to include lawful military service. Essentially, the Thirteenth Amendment did not infringe on the power of Congress to raise and equip an army.

Efforts of litigants to make the Thirteenth Amendment serve other purposes have traditionally been rejected by the courts, and it seems limited to its original purpose of eliminating human slavery from our nation.

The Framers of the Fourteenth Amendment intended to make certain that persons who had formerly been held as slaves possessed citizenship, and they wanted to prohibit the individual states from infringing upon the privileges and immunities[16] that a citizen might possess. The Framers of the Amendment borrowed the concept of due process from the Fifth Amendment and forbade any state from denying due process to any person. At the time the Fourteenth Amendment was proposed, the concept of due process meant that a government must deal fairly with all of its citizens. A right that was not mentioned in the Fifth Amendment that the Framers added to the Fourteenth Amendment was the concept of equal protection that required that all states treat their citizens with substantial equality. The concept of due process (or a guarantee of fundamental fairness) eventually proved to be the legal vehicle that the Supreme Court used to selectively incorporate individual guarantees offered by much of the original Bill of Rights into the due process clause of the Fourteenth Amendment so as to apply them against state action to prevent state infringement of a federally guaranteed right. The process of incorporating some constitutional rights began with *Gitlow v. New York* when, in a criminal case, the Court assumed that the First Amendment applied to limit state action and based its decision on the due process clause of the Fourteenth Amendment.[17] According to various United States Supreme Court decisions, some rights are so basic and so essential to fundamental fairness that they must be deemed to be included within the term "due process." Among these essential rights that the Supreme Court eventually determined were necessary to due process are the right to be free from unreasonable searches and seizures, the right to a trial by jury, the right not to be tried twice for the same crime, the right to counsel, the right to a speedy and public trial, and the right not be subjected to cruel and unusual punishments. In every instance where the Court has found that these rights are essential to meeting the due process standard, it has not hesitated to hold that a particular right must be written into and considered part of the due process clause of the Fourteenth Amendment.

The final post-Civil War-generated amendment, the Fifteenth Amendment, effective in 1869, provided that the right of citizens of the United States to vote could not be limited by the United States or any state where that limitation was based on a person's race, color, or prior status of servitude. The intention of this amendment was not that every person, including females and newly freed slaves, would be permitted to vote; the intention was to remove disabilities relative to voting based on race and previous status as a slave. Property or gender qualifications that were otherwise necessary to be eligible to vote were not intended to be disturbed or altered by the Fifteenth Amendment. The Amendment extended the franchise to anyone who could meet the existing tests or property qualifications for voting that had general application to all citizens. Naturally, consistent with the law and custom of the time, the law did not allow women to vote, and the Fifteenth Amendment did not alter this fact.

8. The Selective Incorporation Doctrine: Federalization of Criminal Procedure

The selective incorporation doctrine takes the view that since the Fourteenth Amendment contains a due process clause, some or all of the rights listed in the Bill of Rights should be considered to foster due process and should be included within the concept of due process. Arguably, all of the Bill of Rights guarantees should be part of the Fourteenth Amendment's due process clause and should apply to the states when they interact with an individual, whether in a civil or criminal matter. An argument could be made that only the rights that are crucial to justice should be incorporated, and the Court has never had a majority that held that all rights of the Bill of Rights are incorporated. Prior to development of the selective incorporation doctrine, none of the individual rights or limitations on the federal government mentioned in the Bill of Rights applied in any way so as to limit the actions of the states. The original intent of the Bill of Rights, and especially of the first eight amendments, was only to restrain the federal government, and there was never any intention that these rights would be applied to limit state governments in their activities. In an early case, *Barron v. The Mayor and City Council of Baltimore*, 32 U.S. 243 (1833), a litigant contended that the takings clause of the Fifth Amendment should apply to a state so that a state would have to compensate the suing parties for injuries sustained to their wharf from actions taken by the city. The Fifth Amendment, among other rights, provided that private property would not be taken for use by the public unless the federal government compensated the owner. In making some land improvements, the diversion of streams, and other civil engineering efforts, the plaintiffs sustained damage to their property that would not have otherwise occurred but for the city's actions. The Court in *Barron* held that the Fifth Amendment provided no remedy because it "must be understood as restraining the power of the general government, not as applicable to the states."[18] The Supreme Court was simply interpreting the Constitution and the Fifth Amendment in the manner that the original Framers had intended. At this point in history, the Court was not willing to make new law by interpreting the Constitution in a way that would have given the *Barron* litigants a fair measure of justice that had been denied by the City of Baltimore. Although the *Barron* case did not involve any right of a person accused of a crime, it stands for the proposition that in the early years, the Court interpreted the Constitution based on its perceived original intent.

Initial efforts to get the Supreme Court to incorporate parts of the Bill of Rights into the due process clause of the Fourteenth Amendment failed in *The Slaughter-House Cases*[19] (Section 5, previously) when the Court refused to interpret the Fourteenth Amendment as doing anything more then placing the post-Civil War results in the Constitution. The Thirteenth Amendment, by its terms, clearly freed the people previously held as slaves, and the Fourteenth Amendment made every effort to protect those individuals by making them citizens and by limiting the laws than any state could enact that could restrict their newly won freedoms and citizenship.

In a 1897 case, *Chicago, Burlignton & Quincy R.R. v. Chicago*,[20] where the city had taken some of the land owned by the railroad and for which the railroad wanted

compensation, the railroad argued that the Fourteenth Amendment guarantee of due process and prohibition against taking property without due process required that the government taking the interest in private real property compensate the railroad for the property. Additonally, the railroad contended that the Seventh Amendment guarantee of civil jury trials should be applied against the states. The Supreme Court affirmed the judgment of the Supreme Court of Illinois on its merits by ruling that a dollar was sufficient compensation for the interest in land actually taken. However, the Court noted,

> In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument.[21]

This language opened up the door for the Court later to begin incorporating some of the rights guaranteed in the Bill of Rights into the due process clause of the Fourteenth Amendment. In *Gitlow v. New York*, 268 U.S. 652 (1925) (see Section 6, this chapter), the Court began the process known as selective incorporation; although that term may not have exactly applied in 1925, hindsight permits the conclusion that the process seems to have begun with this case. *Gitlow* involved a criminal prosecution where a defendant had been convicted and sentenced for criminal anarchy because he advocated the overthrow of all state governments and the federal government. The Court did not find the defendant's arguments persuasive that his right to free speech had been improperly curtailed, but the Court did observe:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.[22]

While this case did not open the floodgates to changes in the content of the Fourteenth Amendment's due process clause, it appears to have initiated the process whereby other rights mentioned in the Bill of Rights would and could be applied to limit state activity by incorporating these rights into the due process clause of the Fourteenth Amendment.

In the years following *Gitlow*, on a case-by-case basis, the Supreme Court of the United States determined that the Fourth Amendment guarantee against unreasonable searches and seizures, the Fifth Amendment protection against double jeopardy and the protection against self-incrimination, and other guarantees of the Bill of Rights applied to the states through the due process clause of the Fourteenth Amendment. Not all of the guarantees under the Bill of Rights have been incorporated against the states as of the present time, and it remains to be seen whether those guarantees will be incorporated in future years.

According to the original intent, under the Fourth Amendment, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," where the intruder is a federal official cloaked with federal authority. The Fourth Amendment also contains a clause that

indicates no warrants shall be issued except where there is proof of probable cause that has been supported by an oath and the warrant particularly describes the objects or people to be seized. In a landmark case, *Weeks v. United States*, 232 U.S. 383 (1914), the Court determined that where federal officials violated the Fourth Amendment by seizing private materials without the benefit of a warrant, such evidence would be suppressed from federal criminal trials. While the new rule requiring suppression of illegally seized evidence changed federal criminal procedure, the ruling, and later ones, remained true to the concept that the Fourth Amendment limited only the federal government. The *Weeks* Doctrine became known as the exclusionary rule that helped support and enforce the Fourth Amendment by removing the law enforcement incentive to violate it when securing evidence of crime. When illegally seized evidence cannot be used at trial, there is little reason to illegally seize evidence.

In a later state case, *Wolf v. Colorado*, 338 U.S. 25 (1949) (Case 1.1), the defendants had been convicted of conspiracy to commit criminal abortion by virtue of evidence illegally seized in the absence of a warrant. Had this been a federal prosecution, the Fourth Amendment would have clearly applied and the *Weeks* exclusionary rule would have prevented the evidence from being introduced in court. In an appeal from his state court conviction to the Supreme Court, the defendants contended that the due process clause of the Fourteenth Amendment required that the evidence illegally seized by state police officers should be suppressed. At that time, the Court refused to order that illegally seized evidence in state cases be suppressed from introduction into state criminal trials. In this case, the Court was not yet willing to take the next step by following the selective incorporation doctrine to incorporate the Fourth Amendment into the due process clause of the Fourteenth Amendment. The *Wolf* Court noted, "[I]n a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[23] The Court did express the opinion that if a state were to affirmatively sanction this type of illegal entry and seizure, the due process clause of the Fourteenth Amendment would have been violated.

Case 1.1 LEADING CASE BRIEF: DUE PROCESS DOES NOT FORBID THE USE OF ILLEGALLY SEIZED EVIDENCE IN STATE CRIMINAL PROSECUTIONS

Wolf v. Colorado
Supreme Court of the United States
338 U.S. 25 (1949).

CASE FACTS:

Wolf and others were charged in state court by information with conspiracy to commit criminal abortion. They contended that the state illegally seized some of their records and material and used that evidence against them at trial. If the prosecution had been in a federal court, the evidence would have been excluded under the *Weeks* [*v. United States*, 232 U.S. 383 (1914)] exclusionary rule.

LEGAL ISSUE:

Does a conviction by a state court for an offense deny due process of law

guaranteed by the Fourteenth Amendment solely because the same evidence would have been inadmissible in a federal trial due to a violation of the Fourth Amendment?

THE COURT'S RULING:

After struggling with the concept of due process, the Court determined that the case would not be reversed and that the conduct did not violate due process so that it was permissible to use the illegally seized evidence so long as the state did not make this method of seizing evidence into the state's affirmative policy.

ESSENCE OF THE COURT'S RATIONALE:

* * *

Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of "inclusion and exclusion." *Davidson v. New Orleans*, 96 U.S. 97, 104. This was the Court's insight when first called upon to consider the problem; to this insight the Court has on the whole been faithful as case after case has come before it since *Davidson v. New Orleans* was decided.

The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

Accordingly, we have no hesitation in saying that were a state affirmatively to sanction such police incursion into privacy, it would run counter to the guarantee of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct

should be checked, what remedies against it should be afforded, and the means by which the right should be made effective are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

* * *

[The Court reviewed the various ways of enforcing the right to not be subjected to unreasonable seizures. It noted that some states excluded evidence wrongly seized and others allowed suits against the police officers. Although this case virtually indicated that the Fourth Amendment's protection against unreasonable searches was incorporated into the due process clause of the Fourteenth Amendment, the Court was not ready to dictate the same remedies for state prosecutions as it had required for cases where the federal government violated the Fourth Amendment. See *Weeks v. United States*, 232 U.S. 383 (1914).]

We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.

Affirmed. [the conviction of Wolf and others.]

CASE IMPORTANCE:

By announcing that if a state policy affirmatively permitted the seizing of evidence in a manner that would be illegal under the Fourth Amendment, such a policy would violate the due process clause, the Court was "telegraphing" that it had virtually incorporated the Fourth Amendment into the due process clause of the Fourteenth Amendment. The Court took the final step in *Mapp v. Ohio*, 367 U.S. 643 (1961).

In 1961, in *Mapp v. Ohio*, 367 U.S. 643, the Court finally determined that the due process clause of the Fourteenth Amendment included the protections involving search and seizure under the Fourth Amendment and adopted the exclusionary rule announced in *Weeks* and applied it to state criminal trials. As a matter of due process, evidence that has been illegally seized in a state case violates the Fourth Amendment and must be excluded from proof of guilt. The Court used the doctrine of selective incorporation to determine that Fourth Amendment guarantees must be observed as part of constitutional due process. Following the *Mapp* case, for evidence that has been illegally seized, whether the law enforcement person was clothed with federal or state governmental authority, the exclusionary rule dictates that the evidence must not be introduced against a person whose Fourth Amendment rights have been violated.

In another area where the Supreme Court of the United States used the selective incorporation doctrine, on a case-by-case basis, to make one of the original guarantees of the Fifth Amendment applicable against the states, the Court determined that the privilege against self-incrimination was applicable in state courts. The original intent of the Framers of the Fifth Amendment was to limit only the federal government, and the Fifth Amendment did not apply to the states. An example of selective incorporation occurred

in *Malloy v. Hogan*, 378 U.S. 1 (1964) (see Case 1.2). In this case, the litigant contended that he had been held illegally in contempt of court because he asserted that the Fifth Amendment privilege against self-incrimination was available to him as a witness in a state criminal proceeding in which another person was the defendant. Connecticut contended that the Fifth Amendment did not apply in this case and that Connecticut law did not give him the right not to testify against another person after he pled guilty to a separate offense. The Supreme Court in *Malloy* reconsidered older decisions[24] that originally held the Fifth Amendment privilege against self-incrimination is not protected against state action under the due process clause the Fourteenth Amendment. In taking a new look concerning whether the Fifth Amendment privilege against self-incrimination should be applied against the states, the Court noted

> Although many Justices have deemed the Amendment to incorporate all eight of the Amendments, the view which has thus far prevailed dates from the decision in 1897 in *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, which held that the Due Process Clause requires the States to pay just compensation for private property taken for public use. It was on the authority of that decision that the Court said in 1908 in *Twining v. New Jersey, supra*, that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."
>
> 211 U.S., at 99[25]

The *Malloy* Court determined that the due process clause of the Fourteenth Amendment incorporated the Fifth Amendment privilege against self-incrimination and that under such an interpretation, the Connecticut courts had misapplied the previously nonexistent federal interpretation Fifth Amendment. In *Malloy*, the Supreme Court followed what has been known as the selective incorporation doctrine by determining on a case-by-case basis that various rights under the Bill of Rights exist or nest within the due process clause of the Fourteenth Amendment.

Case 1.2 LEADING CASE BRIEF: THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS INCORPORATED INTO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Malloy v. Hogan, Sheriff
Supreme Court of the United States
378 U.S. 1 (1964).

CASE FACTS:

The petitioner, Mr. Malloy, was on probation for a gambling and misdemeanor. Sixteen months later, he was ordered to testify in front of a judicial official who was investigating gambling and related activities. Mr. Malloy refused to testify, alleging that the Fifth Amendment privilege against self-incrimination allowed him to remain silent concerning gambling activity. A court found him in contempt and sent him to jail until he was willing to talk. The Superior Court and the state's top court upheld the contempt adjudication. The Connecticut Supreme Court

of Errors held that the Fifth Amendment did not apply to Connecticut and extended no privilege to him. Malloy contended that the Fifth Amendment privilege against self-incrimination should limit state action when it was applied through the due process clause of the Fourteenth Amendment.

LEGAL ISSUE:

Should that the Fifth Amendment privilege against self-incrimination be incorporated into the due process clause of the Fourteenth Amendment and the assertable in a state case?

THE COURT'S RULING:

The Court reviewed prior cases in which some of the individual rights mentioned in the Bill of Rights had previously been incorporated into the due process clause. The court found that the privilege against self-incrimination was one of the principles of a free government and therefore had to be incorporated into the due process clause of the Fourteenth Amendment.

ESSENCE OF THE COURT'S RATIONALE:

* * *

The extent to which the Fourteenth Amendment prevents state invasion of rights enumerated in the first eight Amendments has been considered in numerous cases in this Court since the Amendment's adoption in 1868. Although many Justices have deemed the Amendment to incorporate all eight of the Amendments, the view which has thus far prevailed dates from the decision in 1897 in *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, which held that the Due Process Clause requires the States to pay just compensation for private property taken for public use. It was on the authority of that decision that the Court said in 1908 in *Twining v. New Jersey*, supra, that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." 211 U.S., at 99.

The Court has not hesitated to reexamine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme. Thus, although the Court as late as 1922 said that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech'," *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543, three years later, *Gitlow v. New York*, 268 U.S. 652, initiated a series of decisions which today hold immune from state invasion every First Amendment protection for the cherished rights of mind and spirit—the freedoms of speech, press, religion, assembly, association, and petition for redress of grievances.

[The Court reviewed other cases that had once declared a right not applicable against the states but were later reversed. *Palko v. Connecticut* (1937) had its decision involving the double jeopardy clause reversed, and *Mapp v. Ohio* (1961)

reconsidered the earlier rejection of the Fourth Amendment and the exclusionary rule being applied to the states.]

* * *

We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States. Decisions of the Court since *Twining* and *Adamson* have departed from the contrary view expressed in those cases. We discuss first the decisions which forbid the use of coerced confessions in state criminal prosecutions.

* * *

The marked shift to the federal standard in state cases began with *Lisenba v. California*, 314 U.S. 219, where the Court spoke of the accused's "free choice to admit, to deny, or to refuse to answer."

* * *

This conclusion is fortified by our recent decision in *Mapp v. Ohio*, 367 U.S. 643, overruling *Wolf v. Colorado*, 338 U.S. 25, which had held "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure," 338 U.S., at 33. *Mapp* held that the Fifth Amendment privilege against self-incrimination implemented the Fourth Amendment in such cases and that the two guarantees of personal security conjoined in the Fourteenth Amendment to make the exclusionary rule obligatory upon the States.

[The Court reversed the Connecticut Supreme Court of Errors decision that the Fifth Amendment privilege against self-incrimination did not apply in a state case. On remand, the defendant will be able to search the Fifth Amendment privilege.]

CASE IMPORTANCE:

By continuing to follow the selective incorporation model, the Court incorporated the Fifth Amendment privilege against self-incrimination into the due process clause of the Fourteenth Amendment with the result that the Fifth Amendment privilege against self-incrimination applies in both state and federal contexts.

In another example of using the selective incorporation litigation to make some constitutional rights applicable against the states, historically, the Supreme Court determined that the Fifth Amendment guarantee against being tried twice for the same crime did not apply to state criminal prosecutions. The prior case, *Palko v. Connecticut*, 302 U.S. 319 (1937), involved a defendant who had been tried for murder in the first degree but convicted of second-degree murder and given a life sentence. The defendant chose not to appeal. However, the prosecution successfully appealed the case. The reviewing court granted a new trial, after which the retrial verdict was for first-degree murder with a death sentence. Palko appealed his second conviction to the Supreme Court of the United States and contended that what was prohibited by the Fifth Amendment's double jeopardy clause was also prohibited by the due process clause of the Fourteenth

Amendment. The Supreme Court rejected Palko's arguments based on prior case law and because the scheme of justice or ordered liberty would not cease to exist if a person were tried twice for the same crime. The Court said of the second trial, "Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry."[26]

In incorporating another right into the due process clause, the Court reversed *Palko* in *Benton v. Maryland*, 395 U.S. 784 (1969), in a case where the defendant had been accused of burglary and larceny, but the jury found him guilty of burglary but not guilty of larceny. Because of errors in the way the grand jury and the trial jury had been selected, Benton was given a new trial, at which time he was convicted of both the burglary and larceny charges, even though the first jury had acquitted him of larceny. Benton's appeal involved the argument that the double jeopardy provision of the Fifth Amendment should be read so as to apply to the states to prohibit retrials of the same issue. The *Benton* Court reversed the earlier decision, *Palko v. Connecticut*, and held that the retrial of the larceny charge for which Benton had previously been acquitted violated the Fifth Amendment protection against double jeopardy applicable to the states through the due process clause of the Fourteenth Amendment. The *Benton* Court discovered that the double jeopardy provision was "a fundamental ideal in our constitutional heritage," although the Court in *Palko* failed to acknowledge this principle.

Consistent with the original intent of the Framers, the Sixth Amendment guarantees the right to be able to confront and examine adverse witnesses who testify for the prosecution in a federal case. In a state prosecution in *Pointer v. Texas*, 380 U.S. 400 (1965), the chief witness against an accused in a robbery prosecution failed to show up for the trial, although the witness had testified at the preliminary hearing. The trial judge permitted the introduction of the witness's preliminary hearing transcript, a procedure that failed to permit the defendant to conduct cross-examination of the missing witness. The Supreme Court reversed the conviction on basis that the Sixth Amendment guaranteed the right of confrontation and cross-examination as applied to the states through the due process clause of the Fourteenth Amendment.

Once again, following the doctrine of selective incorporation, the Court considered whether a right was fundamental to the ordered scheme of justice and determined that another part of the Bill of Rights involved fundamental protections that were included within the Fourteenth Amendment and were therefore enforceable against the states.

The fairly recent right incorporated into the due process clause of the Fourteenth Amendment was the Second Amendment, involving the Second Amendment right of the people to keep and bear arms. In *McDonald v. City of Chicago*, 561 U.s.742 (2010), the Court found that the right to keep and bear arms was a fundamental right that could be regulated by states but not in a way to prevent law-abiding citizens from possessing firearms. Prior to *McDonald*, the Court incorporated the right to a jury trial in serious cases in *Duncan v. Louisiana* (1968). Most recently, as it decided *Ramos v. Louisiana*, the Court refined the *Duncan* incorporation case in a dispute involving the voting pattern of a twelve-person jury and now requires a unanimous verdict. The *Ramos* Court found that when a right was incorporated, it meant the same thing in the states as it did in federal cases. Earlier, the right to a speedy trial, found in the Sixth Amendment, was incorporated in *Klopfer v. North Carolina*, 386 U.S. 213 (1967). Prior to that ruling, in 1948, the Sixth Amendment right to a public trial was incorporated in *In re Oliver*,

333 U.S. 257. In 2019, the Court in *Timbs v. Indiana*, 586 U.S. ___ (2019), found that the excessive fines protection of the Eighth Amendment applied to limit criminal fines that a state may levy following a conviction. Most recently, the Court refined *Duncan* by revisiting the voting pattern of a twelve-person jury and now requires a unanimous verdict as it decided *Ramos v. Louisiana*, ___ U.S. ___, 140 S.Ct. 1390 (2020).

Although states must adhere to the minimum guarantees of constitutional rights that have been selectively incorporated into the due process clause of the Fourteenth Amendment, it must be noted that states are free to offer greater protections to criminal defendants than are minimally required under federal constitutional interpretations. In some states, the right to counsel at lineups exceeds the federal minimum, and some jurisdictions provide for parental involvement in waiving *Miranda* warnings. Some states offer trial by jury in cases that are not mandated by the incorporated trial by jury right under *Duncan* and related cases.

Part II
Overview of State and Federal Court Organization

9. An Introduction to the Criminal Justice System

All civilized societies recognize certain norms of human behavior and have developed methods for dealing with those individuals whose conduct seriously deviates from the expected level of normalcy. For societies that wish to deal with criminal deviancy and related behavior in a fair manner, some sort of standardized process must evolve that treats each individual in a substantially similar way, no matter what the criminal charge may involve. The states of the United States and the United States government inherited the British common law legal system[27] and have adapted it to the needs of the states and of the United States as the events of history and experience have dictated. Although the nation and the states began with a common heritage of criminal justice theory, it is not unusual to have some significant differences[28] among the state systems and between those systems and federal practice, even though they possess great similarities.

The system of justice in the United States consists of a dual system of justice that overlaps in many places, with some crimes constituting offenses under both state and federal laws. In some situations, the one act may be an offense under a state law but not violate federal law. A few criminal acts may violate federal criminal law but not be recognized under state law. All jurisdictions within the territory that composes the United States follow a process that is roughly similar to the procedure indicated by the flow chart that has been adapted from a report of the President's Commission on Law Enforcement and Administration of Justice, 1967.[29]

Where a crime has been reported and an investigation launched, the case may enter the system and exit just as quickly when sufficient evidence does not indicate that a crime has actually been committed. Alternatively, if sufficient facts and circumstances

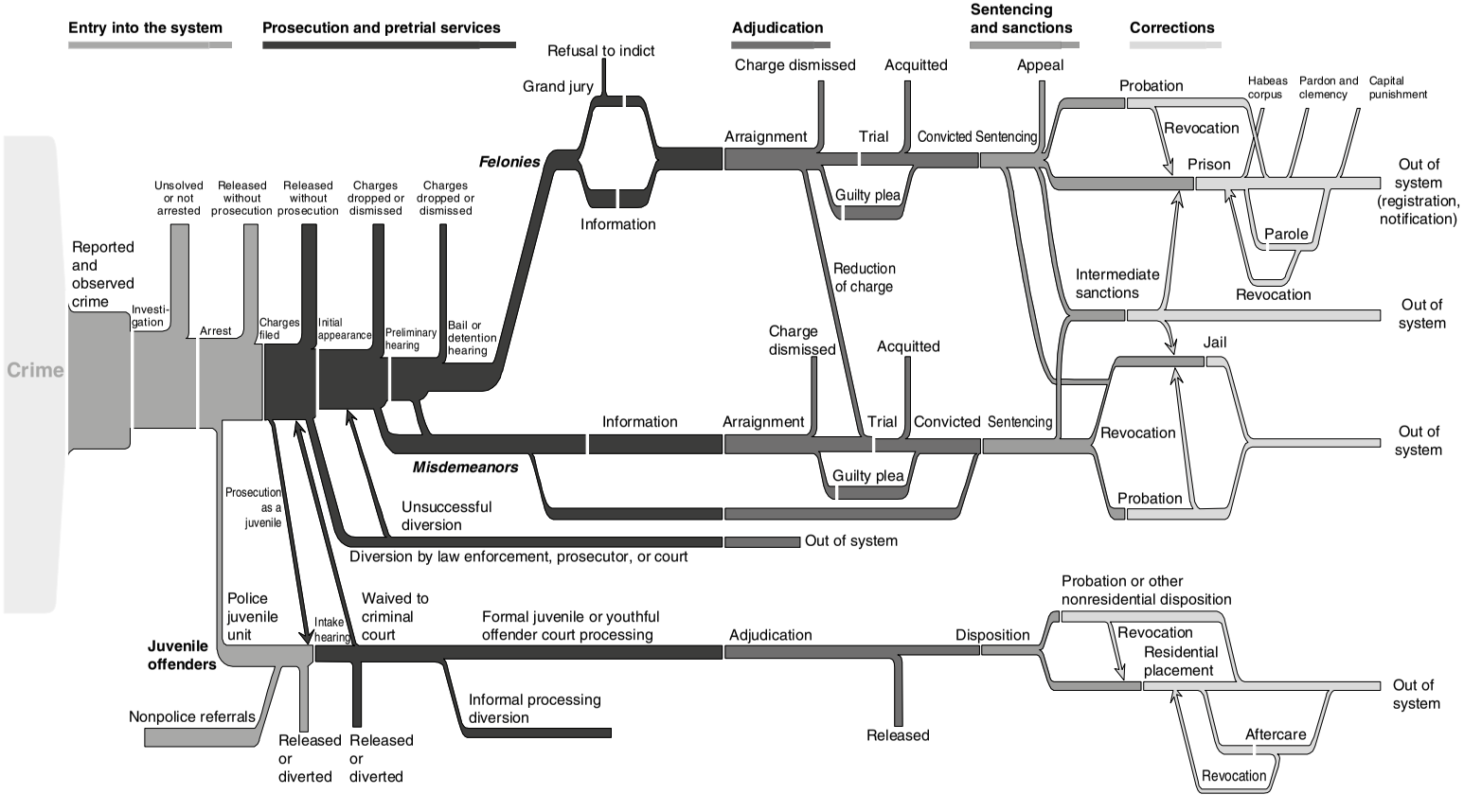

FIGURE 1.1 This flowchart gives a graphic representation of how cases may enter the justice system and leave or be recycled and finally be terminated out of the system with a variety of different outcomes.

NOTE: This chart gives a simplified view of casseflow through the criminal justice system. Procedures vary among jurisdictions. The weights of the lines are not intended to show actual size of caseloads.

SOURCE: Adapted from The challenge of crime in a free society President's Commission on Law Enforcement and administration of Justice, 1967. This revision, a result of the Symposium on the 30th Anniversary of the persident's Commission, was prepared by the Bureau of Justice Statistics in 1997.

indicate that a crime has been committed, an arrest may be the next step taken by police, who are members of the executive branch of government. In some situations, an arrest may not be followed by a prosecution due to the exercise of discretion by the prosecutor not to pursue the case. Where criminal evidence leads toward a juvenile and where the evidence indicates that the juvenile might be amenable to treatment within the juvenile justice system, a juvenile court will typically hear and adjudicate the case. In some jurisdictions and for some accused crimes, a prosecutor may have the option to directly file a case involving a juvenile in adult court without having to persuade a juvenile court to waive juvenile jurisdiction.[30] Under such circumstances, the juvenile may be diverted from the normal procedure and receive adjudication and treatment as if the juvenile were an adult.

When facts indicate that a crime has been committed and an arrest has been effectuated, the subject may still exit the system if the prosecutor subsequently declines to prosecute further or where a judge determines that probable cause to hold the individual does not exist. In most jurisdictions, first-time offenders may be offered a diversion from the traditional prosecutorial system, and where the individual meets the requirements demanded by the diversion program, the person may be processed out of the system, typically without a criminal conviction. Where diversion is not an option or is not appropriate under the circumstances, the next major decision will involve a consideration of whether the alleged offense is to be classified as a felony or as a misdemeanor.

As a general but not exclusive rule in serious state prosecutions, a prosecutor empanels a grand jury to determine whether probable cause exists to believe that a particular person has committed a crime or crimes.[31] For example, an Ohio rule of criminal procedure provided that all felonies shall be prosecuted by an indictment unless the right to an indictment is waived.[32] If a grand jury returns an indictment, the accused defendant will stand trial unless some other resolution of the criminal charge occurs, such as a guilty plea, a guilty plea based on a plea bargain, or a dismissal. If a grand jury refuses to indict based on facts presented to it, the accused exits the system at this point. Many states allow a prosecutor to initiate a serious criminal prosecution by the use of an information, which is a plain statement of facts accusing a particular person or persons of criminal activity and contains enough additional facts to place the person on notice concerning the alleged crimes against which the accused individual must defend. Regardless of whether the case proceeds to trial based on an indictment or based on information, the court procedures that follow do not differ based on how the prosecutor initiated the charges.

Less serious charges involving infractions and misdemeanors may be brought on the basis of a complaints filed by police officers, a complaint filed by a witness, or by the prosecutor after discussing the evidence and the situation with those individuals involved. A prosecutor may decline to prosecute a particular case for a variety of reasons, whether the evidence is believed to be insufficient or because the prosecutor's office has a hierarchy of offenses that must be given a resource priority.

Following the indictment or information, the defendant will be subjected to judicial hearings, one of which may be called an arraignment. At this hearing, the charges are read to the defendant, and the court may ask for a plea to the charges. Where a grand

[For use for municipal offenses]
[Metropolitan Court Rule 7-201, and
Municipal Court Rule 8–201]
STATE OF NEW MEXICO
COUNTY OF _____
[CITY OF _____]
IN THE _____ COURT No. _____
Date filed: _____
STATE OF NEW MEXICO
CITY OF _____]

v.

_____, Defendant

CRIMINAL COMPLAINT

CRIME: _____ *(common name of offense or offenses)*

The undersigned, under penalty of perjury, complains and says that on or about the _____ day of _____, _____, in the City of _____, State of New Mexico, the above-named defendant did: _____ *(here state the essential facts)* contrary to Section[s] _____ *(set forth applicable section number of municipal code or municipal ordinance and date of adoption)*.

I SWEAR OR AFFIRM UNDER PENALTY OF PERJURY THAT THE FACTS SET FORTH ABOVE ARE TRUE TO THE BEST OF MY INFORMATION AND BELIEF. I UNDERSTAND THAT IT IS A CRIMINAL OFFENSE SUBJECT TO THE PENALTY OF IMPRIS0NMENT TO MAKE A FALSE STATEMENT IN A CRIMINAL COMPLAINT.

_____
Complainant

_____
Title *(if any)*
Approved:

_____

_____
Title

FIGURE 1.2 Example of a Complaint Used When Less Serious Crimes Are Charged That Are Not Felonies. This figure is in the public domain and is documented in the text of Figure 1.2.

jury has issued an indictment, it is unlikely that a case will be dismissed at the stage of the arraignment because a grand jury has previously determined the issue of probable cause to believe the defendant has committed a particular crime or crimes. For felony prosecutions, the issue of whether to grant bail and the conditions and amount will be considered by the court at some point during the pretrial stage of a criminal prosecution, whether this occurs at an arraignment, at an initial appearance, or at a subsequent time. If an accused offender does not have legal counsel, the hearing may be continued so that

an attorney may be hired, or the judge may appoint an attorney at this hearing. In some jurisdictions, especially those that initiate serious criminal prosecutions by the use of an information, a preliminary hearing may follow the filing of an information with the court clerk, at which time the judge may require testimony that establishes probable cause to believe that the accused has done the crime or crimes, an attorney may be appointed, and bail concerns, among other issues, may be resolved.

Where the results of an arraignment or a preliminary hearing have not caused the defendant to be turned out of the criminal justice system, the accused defendant, through his or her attorney, may engage in some negotiation with the prosecutor with a view toward resolving the criminal case in a plea bargain. In most situations, both prosecution and defense must give away some of their respective strong points in order to get the opposition to agree to resolve the case. In the event that the plea negotiations do not conclude the criminal case, both prosecution and the defense must prepare for trial, at which time a guilty verdict or an acquittal will be the most likely outcome.

A trial in a felony case will trigger the right to a trial by jury, but in some cases, a defendant will take the option of a trial to a judge rather than face a jury. Most misdemeanors generally do not carry the right to a trial by jury, but some of the more serious misdemeanors will permit the defendant to demand a jury trial where the potential sentence is greater than six months.[33] According to the Supreme Court in *Lewis v. United States*, even a prosecution for multiple petty offenses does not carry the right to a trial by jury because the "Sixth Amendment reserves the jury trial right to defendants accused of serious crimes."[34] In *Blanton v. North Las Vegas*, the Court refused to interpret the Sixth Amendment as requiring a jury trial for a case where the maximum penalty was only a six-month incarceration.[35] Criminal sanctions following a jury or a judge verdict may range from probation to incarceration and may involve monetary fines that must be paid by the defendant.

Following a trial, every convicted defendant has the right to appeal and may take advantage of this right, especially where there are possibilities for a positive appellate outcome. Where a defendant wins an appeal, the higher court may order that the conviction be reversed and the defendant freed from custody, but the more likely outcome following the reversal of a conviction is to begin the criminal process virtually all over again. In cases where a defendant does not prevail during the appellate process but has been free on appellate bail, the defendant will have to surrender and begin serving the sentence. In some cases where a sentencing judge has allowed probation following trial, the loss of an appeal will not generally have any effect on the defendant. For a defendant whose appeal was not successful, the defendant must begin serving the sentence. In jurisdictions that permit parole, the possibility of parole after serving a significant part of the sentence may be available. Once the person has served all of the time, less the time that is reduced for good behavior, the defendant generally exits the criminal justice system.

The flowchart presented previously graphically displays the different ways that criminal offenders are processed in, out, and through a state criminal justice system. A federal criminal case follows much the same process to which states adhere, except that Congress eliminated parole for federal offenses committed after November 1, 1987.[36]

10. Organization of Courts, State and Federal: A Dual System

The court system in the United States consists of a dual system that includes state-based courts that have sovereign power[37] and authority and federal courts that get their power under the federal Constitution. The power of the states to conduct criminal trials and apply punishments predates the existence of both the United States Constitution and the earlier Articles of Confederation. As Justice O'Connor, writing for the Court in *Heath v. Alabama*,[38] stated,

> The States are no less sovereign with respect to each other than they are with respect to the Federal Government. Their powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment.

The states had power to prosecute criminally that predated the existence of the United States under either the Articles or the Constitution and are not dependent upon any grant of federal power. Therefore, under our federal form of government, the states and the federal government have concurrent jurisdiction over many crimes. This means that criminal activity by one individual might violate both state and federal criminal law, and both jurisdictions could prosecute this individual for distinct federal and state crimes. For example, possession of various recreational pharmaceuticals offends both federal and state law, and an individual could be prosecuted first in a state court and later in a federal court. Armed bank robbery of a federally insured institution is an offense against the United States as well as an offense against the state in which the bank is located. For example, in an Illinois case, a defendant allegedly robbed a federally insured bank but was acquitted of federal bank robbery. The state of Illinois later successfully prosecuted the robber in a state court for state bank robbery.[39] State prosecution following an unsuccessful federal prosecution for the possession of recreational pharmaceuticals or for bank robbery would be appropriate and would not offend any federal constitutional provision.[40] In a slightly different context, some criminal activity might transgress the laws of two separate states, each of which may choose to prosecute the individual for the violation of that state's law.[41] The federal government could later prosecute the person if the same act was also a violation of federal law without running afoul of the double jeopardy provision of the Fifth Amendment.

Some criminal offenses are recognized only in a particular state and may not be considered offenses by the federal government or by other state governments. For example, speaking on a cellular telephone while driving an automobile has been prohibited by New York law, but this practice is perfectly legal under the laws of many other states and is not illegal under federal criminal law. In a different context, possession of medicinal marijuana has been approved under a state statutory scheme regulating medical marijuana in California, whereas the possession in California of the same medicinal marijuana has been prohibited by federal law.

Since the states and the federal government have dual sovereignty and concurrent jurisdiction with respect to many criminal acts, both may prosecute the same person

when a criminal act violates both state and federal law. In addition, states may serially prosecute a defendant whose single act violates the law of two individual states.[42] This practice is simply the recognition of a federal system involving states that have individual sovereignty in all criminal prosecutions involving breaches of state law.

Although there may be overlapping jurisdiction shared between the states and the federal government with respect to criminal jurisdiction, the collective judicial system of the fifty states is much larger and adjudicates many times the number of cases when compared to the judicial system of the United States. The vast majority of the criminal cases that are prosecuted are brought in state and local courts. It can be argued that the federal courts deal with many matters, both criminal and civil, that have national consequence,[43] but state and local courts adjudicate matters of grave importance as well, whether it involves criminal activity, domestic relations, or business and commercial litigation.

State courts are generally organized on a three-tiered system with courts of general jurisdiction with the trial courts considered at the lowest level of the pyramid or triangle. Trial courts are known by a variety of official names and may be called superior courts, courts of common pleas, supreme courts, and juvenile courts. Some of the trial courts are considered courts of general jurisdiction and may try both felonies and misdemeanors, while other courts such as municipal courts or city courts are permitted to try only misdemeanors. In the latter case, the court is said to have a limited jurisdiction, even though felony arrestees may be arraigned or face an initial court appearance in a municipal or county court. State courts of limited jurisdiction include small claims courts, juvenile courts, and domestic relation courts. These limited jurisdiction courts generally involve civil cases, but some limited jurisdiction courts may involve criminal cases, such as a drug court. With respect to the state trial court system, these courts collectively have a broad and expansive jurisdiction that involves every type of case from criminal, domestic relations, and tort cases to issues of state law and the state constitution. At the trial court level, witnesses introduce physical evidence, oral testimony is taken, and juries decide the results. The trial courts employ an adversarial system in which prosecution and defense emphasize the most important points of their respective positions while attempting to illuminate the flaws in the opposing side's evidence. In criminal cases, defendants are generally present in court and are represented by legal counsel, while the government is represented by a prosecutor. In the state court system, every criminal defendant is allowed to appeal to the next stage or level of the system to a court of appeal. In some jurisdictions, the court of appeal is known simply as the court of appeal or court of appeals, but the terminology may vary with the particular state. By whatever name the court of appeal may be known, it has the function to review the lower trial court result and decisions made by the trial judge and consider whether errors of law were made that had the effect of changing the outcome of the case. No witnesses appear at the court of appeal stage of the criminal justice process, but the defense and prosecuting attorneys representing each side prepare written briefs explaining their view of the case and either present the briefs to the court of appeals without oral argument or may request to be granted an opportunity to personally argue the merits of the case in front of the judges. The top-level court in each state court system is a state supreme court, but the official court title may not include the name "supreme court." The function of the top-level

state court with respect to criminal justice is to review the decisions of appellate courts to determine if they made the correct decision in reviewing the trial court process. The supreme court in each state has the last word when interpreting and determining the meaning of the states' law and constitution. Although not part of the state court system, criminal defendants who allege that the state judicial system violated the defendant's rights by violating federal law, the federal constitution, or a federal treaty may be able to get the Supreme Court of the United States to hear an appeal from the top state court. When four justices of the Supreme Court of the United States vote to hear a case, a writ of certiorari issues, and the whole Court will consider the defendant's allegations.

The federal courts in the United States are organized in a manner that virtually mirrors the state practice, with three tiers of courts: trial courts, courts of appeal, and a supreme court. Although there are a variety of federal trial courts,[44] for criminal purposes, the typical defendant faces trial in one of the ninety-four United States District Courts presided over by a federal judge. For every part of the United States, there is a Federal District Court that has jurisdiction to hear legal cases involving federal law, federal treaties, or the federal Constitution. Included within this jurisdiction is the power to hear cases involving crimes against the United States. Federal district courts follow a method of operation similar to state trial courts, with prosecutors and defense attorneys appearing in court, along with a jury presided over by a judge. The prosecutors, called United States Attorneys, or Assistant United States Attorneys, present the government's case through the use of witnesses, evidence, and other exhibits. Defense attorneys are tasked with challenging the prosecution's case by calling into question the credibility of

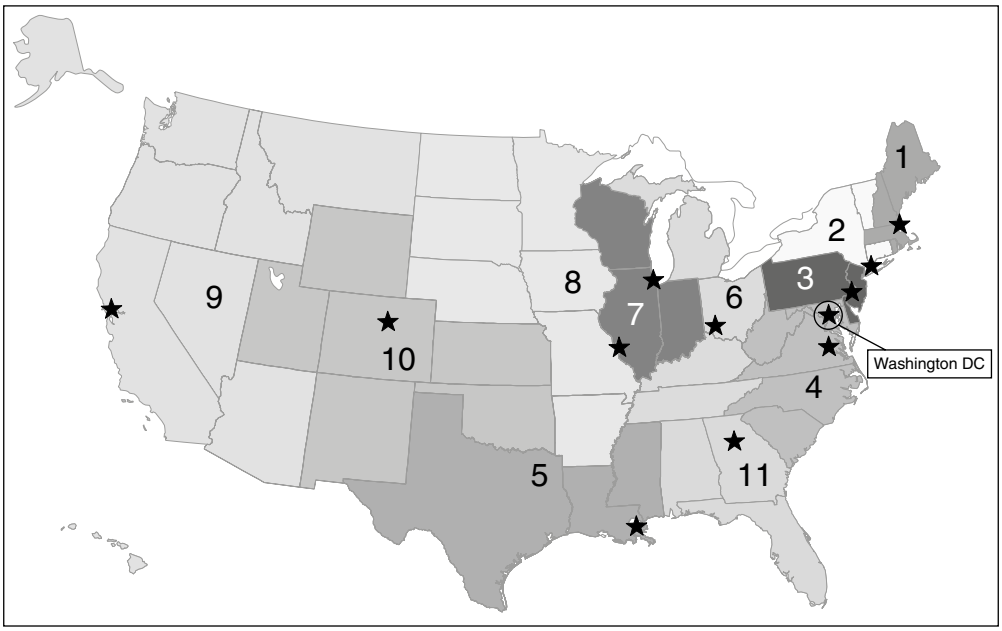

FIGURE 1.3 Federal Circuit Courts of Appeal by Circuit Number. 2021 New book 2021 Here: http://adacourse.org/courtconcepts/circuits.html July 30, 2021.[45]

witnesses and by introducing evidence to counter matters brought to court by the prosecutor. Where a jury has been empanelled, its task is to evaluate and determine the facts and apply them to the law as explained by the federal judge. Following every criminal conviction in a federal court, the defendant has the right to appeal as a matter of law to the first level of federal appellate court, known as the Court of Appeal.

Federal appeals courts are arranged into twelve circuits that cover the entire territory of the United States.

For example, the Court of Appeal for the Sixth Circuit considers appeals from federal district courts from Michigan, Ohio, Kentucky, and Tennessee. Similar geographic considerations cover the remaining eleven circuits so that any person convicted of a federal offense in a particular state may appeal to the appropriate court of appeal following a conviction. Federal circuit courts of appeal do not take new evidence, as a general rule, when they consider criminal appeals. These courts review the trial rulings made by the federal district judge concerning the admission and exclusion of evidence, questions involving the application of federal law, and the overall fairness of the trial. In the courts of appeal, appellate judges generally sit in banks of three to decide criminal and other cases. When the court is faced with an issue of great importance, usually of national concern, a court of appeal may involve all the judges of the court sitting *en banc* to hear the appeal. When the judges sit *en banc*, it means that all the judges from that particular circuit sit together to hear the case. Once a case has been decided by a Court of Appeal, a defendant does not have a direct right to have the Supreme Court of the United States hear the case.

In order for a federal defendant to have the Supreme Court of the United States consider his or her case, the defendant must request that the Supreme Court grant a writ of certiorari, which means that at least four justices have voted to hear the defendant's case. The court may agree to hear a defendant's case where it involves an issue of great national concern and importance, where different federal circuit courts of appeal have decided an issue differently, and where the court may wish to reconsider an old principle or a decision in light of changed circumstances. In the event that the Supreme Court decides to hear a case, the parties will write and present their respective positions in a written form a known as a brief. The court will consider the briefs and entertain oral arguments at the Supreme Court building and eventually render a written decision and opinion. There is no appeal to any higher court on any issue within its jurisdiction. There is the possibility of requesting that the Court reconsider its decision, but success with this approach will be an extreme rarity.

For both the state and federal judicial systems, the three-tiered approach appears to work rather well. In both systems, the trial courts render an initial verdict that normally will withstand an appeal by a defendant. Where significant errors have occurred at the trial court level, every defendant, whether state or federal, has an opportunity to have the alleged error considered by a court that has little or no connection to the original court. For extraordinary cases, the supreme court of a particular state may be willing to consider especially meritorious cases, but where a state supreme court fails to properly interpret the applicable federal constitutional provision, federal law, or federal treaty, an application to the Supreme Court of the United States is the only avenue remaining for redress of grievances.

PART III
Pretrial and Trial Criminal Procedure: An Introduction

11. The Initial Steps Toward Prosecution: Pretrial Processes

When an investigation of a serious case has been conducted by a police department or other law enforcement agency and reaches the stage where sufficient evidence has been gathered that a criminal prosecution is either possible or likely, the focus shifts, to a degree, from the police department to the prosecutor's office. Naturally, an arrest may occur once police have developed probable cause to believe a particular person has committed an offense or offenses. In some cases, a judge may issue an arrest warrant when evidence of probable cause has been judicially presented, especially when the potential arrestee is not readily located.

Typically, members of the prosecutor's office review the evidence presented by law enforcement officials with a view to determining whether a prosecutable case exists. Where a police investigation demonstrates that proof beyond a reasonable doubt may be possible, the prosecution needs to determine whether it is the type of case that should be pursued. Due consideration must be given to the priorities of the prosecutor's office, and the individual prosecutor must take into account the finite resources possessed by the government to determine whether the case should be brought forward to court and vigorously pursued, whether by obtaining an indictment or by filing an information.

Unless a defendant waives the Sixth Amendment right to a grand jury indictment, in a federal prosecution, the prosecutor must initiate a serious criminal case through a grand jury indictment. Federal grand juries must be composed of between sixteen and twenty-three grand jurors, with a foreperson appointed by the court overseeing the grand jury. At least twelve grand jurors must vote to indict or no indictment can be issued.[46] A federal prosecutor presents witnesses in front of the grand jury and asks questions of the witnesses. Grand jurors may ask questions of each witness. The rules of evidence do not apply at grand jury proceedings, and illegally seized evidence may be considered by the grand jurors. No defense attorney can be present even if the potential defendant has been called as a grand jury witness. All federal offenses, other than federal criminal contempt, require that a prosecutor procure an indictment if the offense charged is punishable either by death or imprisonment for longer than a year. The target of a federal prosecution who has not been indicted may choose to waive the requirement of an indictment in open court after having been informed of the nature of the charges that the government intends to bring against that defendant.[47] A federal grand jury indictment and an information must be a plain and tightly written statement of the operative facts that the government thinks constitutes the crime and must be signed by a prosecutor in the United States Attorney's office. It may allege how the defendant

9-210

**[For use with Magistrate Court Rule 6-206
Metropolitan Court Rule 7-206, and
Municipal Court Rule 8-806]**

STATE OF NEW MEXICO
[COUNTY OF_____]
[CITY OF_____]
_____ COURT No. _____

[COUNTY OF _____]
[CITY OF _____]

v.

_____, Defendant

WARRANT FOR ARREST

THE [STATE OF NEW MEXICO] [CITY OF _____]
TO ANY OFFICER AUTHORIZED TO EXECUTE THIS WARRANT[1]:

BASED ON A FINDING OF PROBABLE CAUSE, YOU ARE COMMANDED to arrest the above-named defendant and bring the defendant without unnecessary delay before this court[2]: to answer the charge of *(here state common name and description of offense charged)*: _____
_____
contrary to Section(s) _____ (NMSA 1978) (OF THE MUNICIPAL ORDINANCE OF THIS MUNICIPALITY)

THIS WARRANT MAY BE EXECUTED:
[ ] in any jurisdiction;
[ ] anywhere in this state;
[ ] anywhere in this county;
[ ] anywhere in this city.

The person obtaining this warrant shall cause it to be entered into a law enforcement information system[3]:

[ ] maintained by the state police.
[ ] _____ *(identify other law enforcement information system).*

Date: _____

_____

Judge

FIGURE 1.4 Typical Example of a Warrant that Authorizes an Arrest of a Person. This public domain artwork is documented within the Figure.

committed to the particular crime, but if that information is not known, it is not essential to the indictment or information and may be omitted. The official United States code that references the crime the defendant is believed to have committed must be included within the indictment. The defendant's name need not be mentioned where it is unknown, because a provision has been made within the federal rules that a defendant may be identified by a unique DNA profile[48] even though other identifiers are unknown at the time of indictment.

The Fifth Amendment requirement of a grand jury indictment does not apply to the individual states of the United States; states are free to use their version of a grand

[This artwork is in the public domain.]

9-204

STATE OF NEW MEXICO
COUNTY OF _____
IN THE DISTRICT COURT

STATE OF NEW MEXICO

v. No. _____

Crime: _____

_____, Defendant *(common name of offense)*

GRAND JURY INDICTMENT

THE GRAND JURY CHARGES:

On or about the _____ day of _____, _____, in _____ County, State of New Mexico, the above-named defendant did: *(here state the essential facts)*

_____

_____

_____.

_____

contrary to Section[s] _____ NMSA 1978.

The names of the witnesses upon whose testimony this indictment is based are as follows:

_____

_____

_____

_____

I hereby certify that the foregoing indictment is a _____ Bill.

_____
Foreperson

Dated:_____

APPROVED:_____
District Attorney

FIGURE 1.5 Typical Example of a Grand Jury Indictment Form. It is internally documented as public domain.

jury system or to initiate criminal prosecutions by the use of an information. To initiate a serious criminal case by the use of an information in states that do not require the use of a grand jury, the prosecutor's office writes, in plain English, the operative facts that give rise to the criminal allegation. Among other requirements, the information must state the jurisdiction and the time frame in which the crime is alleged to have been committed and by whom. The statutory violation must be cited along with operative and essential facts that demonstrate probable cause and will allow the accused to be on notice of the charges and facts that allow the preparation of a defense. The prosecutor must sign the document.

9-203
STATE OF NEW MEXICO
COUNTY OF_____
_____ COURT No. _____

STATE OF NEW MEXICO

v.

_____, Defendant

Crime:_____
(common name of offense)

CRIMINAL INFORMATION

The district attorney of _____ County, State of New Mexico, states that on or about the _____ day of _____, _____, in said County and State, the above-named defendant did: *(here state the essential facts)*
_____
_____
_____
contrary to Section[s] _____ NMSA 1978.

The names of the witnesses upon whose testimony this information is based are as follows:
_____
_____
_____.

_____
District Attorney

FIGURE 1.6 Typical Example of a Criminal Information Filed Instead of Using Grand Jury Indictment. It is internally documented as public domain.

Case 2.1 LEADING CASE BRIEF: THE FEDERAL RIGHT TO A GRAND JURY INDICTMENT DOES NOT APPLY TO STATE PRACTICE

Hurtado v. California
Supreme Court of the United States
110 U.S. 516 (1884).

CASE FACTS:

In 1882, the California penal code provided that when evidence disclosed that an offense had been committed and when probable cause existed to believe that a particular person had committed the offense, the district attorney would be required to file an information charging that person with that crime. Since evidence indicated that a Hurtado had committed a capital homicide, a state prosecutor filed an information against defendant Hurtado charging him with the murder of José Stuardo. At the trial, a jury found Hurtado guilty of capital murder, and the trial court sentenced the defendant to death.

Hurtado, through counsel, argued that the verdict and penalty were void because he had a federal constitutional right to be indicted by a grand jury rather than be tried pursuant to an information because the Fourteenth Amendment guaranteed due process of law in state cases. According to Hurtado, due process of law included the right

to a grand jury indictment in his case because the Fifth Amendment right to a grand jury indictment applied to serious state criminal cases. This legal position was universally rejected from the trial court to the Supreme Court of California. The Supreme Court of the United States granted certiorari to consider Hurtado's argument that the right to a grand jury indictment was a requirement of due process under the Fourteenth Amendment.

LEGAL ISSUE:

Under the due process clause of the Fourteenth Amendment, is the right to a grand jury indictment an essential element of a fair system of justice and a fair trial so that an indictment is the only way to properly charge a capital felony in a state case?

THE COURT'S RULING:

A grand jury in a state case is not required by due process. The common law draws its inspiration from many sources, and there are many ways of giving fundamental fairness to a criminal accused that may not necessarily include every procedure previously offered. Were it otherwise, law would be locked in the past with no chance to adapt and adjust to new conditions while still granting fairness to defendants.

Essence of the Court's Rationale:

* * *

[I]t is maintained on behalf of the plaintiff in error [defendant Hurtado] that the phrase "due process of law" is equivalent to "law of the land "as found in the twenty-ninth chapter of Magna Carta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the state; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the states themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed and destroyed by prosecutions founded only upon private malice or popular fury.

* * *

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history . . . There is nothing in Magna Carta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age, and as it was the characteristic principle of the common law

to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

* * *

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of the Magna Carta were incorporated into bills of rights. There were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

* * *

We are to construe this phrase [due process of law] in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that

No person shall be held to answer for capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall he be compelled in any criminal cases to be a witness against himself.

It then immediately adds: "nor be deprived of life, liberty, or property without due process of law." According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is that, in the sense of the Constitution, "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that, if in the adoption of that amendment it had been part of its purpose to

perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative power conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to the law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.

The Fourteenth Amendment [as was said by Mr. Justice Bradley in *Missouri v. Lewis*, 101 U.S. 22–31] does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding.

* * *

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant with the right on his part to the aid of counsel and to the cross examination of the witnesses produced for the prosecution, is not due process of law.

CASE IMPORTANCE:

Due process does not necessarily mean that the exact criminal processes and procedures must be identical in state and federal criminal systems of justice. Fundamental fairness can be granted in many different ways, so there need not be a constitutionally required grand jury procedure in state cases.

While it is a given that police agencies desire the prosecution of cases they have presented to the prosecutor's office, it is possible, if not probable, that the agendas of these two law enforcement functionaries may diverge in approach and priority. Virtually every case possesses some drawback or problem that, when presented in a courtroom, may result in an acquittal or some other disposition. Where a case has strengths, coupled with significant weaknesses, the prosecutor may consider entering into plea negotiations, leading to a guilty plea of a lesser included offense or in some cases a diversion to an alternative type of resolution.

Cases presented to the prosecutor's office may contain a variety of challenges, issues, and pretrial and trial problems that need to be resolved prior to making a decision to pursue a particular case. If a case presents Fourth Amendment search and seizure issues, the prosecutor's office must carefully analyze the legal position and the probable chances

of prevailing in a defendant's pretrial motion to suppress.[49] For some cases, the outcome of a motion to suppress may drive the decision of whether to continue the prosecution or instead drop the case. Where no search and seizure issues appear, there may still be *Miranda*[50] or Fifth Amendment confession[51] issues to be resolved prior to trial, or at least the prosecution must evaluate the probabilities of prevailing when the issues are litigated in pretrial motions to suppress. If the police allegedly have used a lineup defectively[52] or have resorted to alternative identification processes that have created legal problems,[53] definitive prosecutorial decisions may well have to await resolution of the identification issues in a case where the prosecution has been initiated. Some defendants may be in a position to raise strong arguments concerning a Sixth Amendment or a statutory right to a speedy trial.[54] Constitutional Sixth Amendment speedy trial allegations must be taken seriously because the remedy is a dismissal of the case with the inability to bring it at a later time, no matter how much additional investigation may be conducted. In a small number of cases, a defendant may raise the issue of prior jeopardy, a constitutional challenge that should be resolved prior to trial. Collateral double jeopardy issues may exist in complicated cases[55] or where a retrial is being contemplated following a reversal of the conviction upon appeal. Concerns about whether a witness or a defendant may possess some level of immunity from prosecution must be evaluated prior to coming to a conclusion regarding prosecution. Where a case cries out for prosecution but contains significant evidentiary challenges, the prosecutor's office may return to the police agency and request an additional investigatory effort. There may be questions of the defendant's competency at the time of the act and/or at the projected time of the trial. In such a case, the decision to move forward with prosecution may await a report based on a psychiatric examination. In evaluating a case, prosecution witnesses play a crucial role, which the government must consider. Because witnesses possess varying degrees of believability, credibility factors must be addressed when deciding whether to bring the case to trial.

A person who has been arrested pursuant to a warrant issued by a neutral and detached judicial official does not have a right to have a judge reconsider whether to hold the person or to release that individual. Similarly, an arrest following a grand jury indictment, at which time the grand jury actually determined probable cause, does not require that a judicial official immediately review the issue of probable cause. However, where a person has been taken into custody based upon a complaint, a police officer's observation, or a multifaceted law enforcement investigation, then it is the right to have the issue of probable cause determined by a neutral and detached judicial official within a reasonable time, generally considered forty-eight hours.[56]

However, if the hearing involves a determination of issues beyond simply deciding the issue of probable cause, it may be called a preliminary hearing in many jurisdictions. In California, preliminary hearings are for felony cases only, and the court must determine whether a crime has been committed and decide whether probable cause exists to believe that the defendant committed the crime. Since local practice varies so widely, a preliminary hearing not only may determine probable cause but also may deal with and dispose of a larger number of issues. The defendant will be informed of the nature of the charges, if that has not previously occurred. If legal counsel has not been appointed previously, the judge will appoint counsel for the detainee prior to proceeding. The prosecution may be required to put on a prima facie case by calling witnesses who can be

cross-examined by the defendant. A failure to present a prima facie case usually results in a dismissal of the prosecution's case. At some preliminary hearings, the issue of bail may be considered, and the defendant may be required to enter a plea and to offer notice of the intent to use some affirmative defenses. Testimony given at a preliminary hearing is "frozen" or perpetuated so that both the defense and the prosecution are aware of some of the testimony that will be given at trial. If a preliminary hearing follows a grand jury indictment, the issue of probable cause does not arise because that issue has been previously determined by the foot of the grand jury. According to *Coleman v. Alabama*, 399 U.S. 1 (1970), the preliminary hearing is a critical stage of the criminal justice process that requires that the defendant be represented by counsel to insure the defendant's right to a fair trial.

12. Pretrial Motion Hearings: Mandatory and Discretionary

Some constitutional issues must be raised prior to trial or they are deemed to have been waived or will be difficult to raise at a later date. For example, the Fifth Amendment protection against double jeopardy, the right not to be tried twice for the same crime, generally must be raised at the pretrial stage of a criminal prosecution.[57] Since the protection is designed to prevent an improper second trial over the same crime, if it were raised after a second trial, the vice against which this part of the Fifth Amendment was designed to protect will have not prevented a second trial. The Sixth Amendment right to a speedy trial generally falls into the category of a mandatory pretrial motion because one of the factors used to determine whether the right has been violated involves prejudice to the defendant's case.[58] The remedy for a violation of the speedy trial right is dismissal of the case, and no trial will follow. If a defendant does not claim that he has not been given a sufficiently speedy trial, the assumption must be that he has no complaint about the delay and that the delay has not harmed or otherwise prejudiced his or her case on the merits.

Many courts recognize that some motions must be made prior to trial due to their nature, because of a court rule, or by a rule of criminal procedure. A failure to make a mandatory pretrial motion may result in a court's refusal to consider the motion at a later time. Generally an allegation that there exists some defect in the charging instrument, whether it is an indictment, an information, or a citation, constitutes a mandatory pretrial motion that in most cases will be waived if not asserted. A motion that a court lacks jurisdiction or that the charging instrument is defective in that it fails to state an offense may be considered even after the pretrial period in many jurisdictions. Motions to suppress evidence, whether based on an illegal search and seizure, an illegal confession, or other legal ground, must be made prior to trial unless some good cause is shown for the failure to raise the issue during the pretrial stage of the prosecution. Where two or more defendants are being tried together and one of the defendants would prefer a separate trial, a motion to sever the defendants' single trial into separate trials obviously must be offered prior to the time a joint trial starts. If a defendant has been charged with

multiple offenses that the defendant believes could most justly be tried separately, that motion involving a severance of offenses must be made prior to the initiation of the trial that charges both offenses.[59] A motion to require the prosecution to disclose any known statements made by the defendant that are within the prosecution's possession or control must be made prior to trial.[60] In order for a defendant's attorney to inspect and copy documents and other evidence that the prosecutor expects to use at trial, a motion to this effect must be made prior to trial.[61] A defendant's motion for a change of venue (location of the trial) obviously must be made prior to the trial or it generally will be deemed to have been waived.

Discretionary pretrial motions include "any defense, objection, or request that the court can determine without a trial of the general issue."[62] A motion for a continuance may be brought during the pretrial stage or at any moment of the trial that the attorney believes that the interests of justice might demand a continuance. A defendant may wish to raise the issue of bail prior to trial but could, where circumstances permit, make a motion for bail or ask for a reduction of during the trial. In a similar fashion, a prosecutor could make a motion to deny bail prior to trial, to revoke bail during trial due to a change in circumstances, or to raise the bail amount during the trial based on newly discovered facts.

13. Jury and Non-Jury Trials

According to the Sixth Amendment, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." This particular legal right has been found to be binding not only on the federal government but on all state governments as well,[63] but that right may not always entitle a state court defendant to a jury of twelve members. All federal defendants and state criminal defendants, in states that use twelve-person juries, are entitled to unanimous jury verdicts. However, eleven jurors may make a decision where the parties agree that one fewer than twelve may render a decision or when the judge permits eleven to continue for good cause shown. A few states use six-person juries in some criminal cases and juror unanimity is required.[64] In an old case that was contrary to federal practice, in *Apodoca v. Oregon*, 496 U.S. 404 (1972), the Supreme Court approved a non-unanimous state jury verdict where a jury of twelve was being used and where the votes of nine out of twelve jurors were needed for a decision. However, in 2020, in *Ramos v. Louisiana*, ___ U.S. ___, the Supreme Court overruled the use of a non-unanimous verdict and now interprets the Sixth Amendment to require unanimity when a state uses a twelve-person jury.

The Supreme Court approved the use of a six-person jury in *Williams v. Florida*, 399 U.S. 70 (1970), for non-capital state cases, despite the defendant's objection that the Sixth Amendment right to a jury trial that was recognized in *Duncan v. Louisiana*, 391 U.S. 145 (1968), involved a twelve-person jury, the same number as was used in federal criminal trials. Since the *Duncan* decision, state criminal juries have ranged from twelve to five in number, but a five-person jury was rejected by the Supreme Court as not allowing sufficient numbers for proper group deliberation and because there was a

possibility that errors in the verdict could be increased if the jury became too small.[65] The Court noted in *Brown v. Louisiana*, 447 U.S. 323 (1980), that a six-person jury must reach its determinations by a unanimous verdict to meet the requirements of the Sixth Amendment as applied to the states.

To summarize, in all federal criminal prosecutions, where the length of the potential sentence is greater than six months, a defendant possesses the right to a trial by jury under the Sixth Amendment, and the jury will be composed of twelve persons who must reach a verdict based on unanimity. In state criminal prosecutions, jury numbers may range from the traditional twelve to six, with unanimous verdicts required in all jury verdicts. Non-unanimous jury verdicts currently fail to meet the Sixth Amendment jury trial requirement, and no five-person juries are permitted in any criminal case.

Where the prosecution's case is presented to a jury, the jury must perform the usual tasks, including weighing the evidence that the prosecutor presents and the opposing evidence that the defense offers as well as considering the credibility of the witnesses who testify. The jury is not to consider evidence that the judge has ordered stricken from the record or has otherwise deemed inadmissible. Despite the fact that a defendant may have a constitutional right to a trial by jury, many defendants decide to waive this right to a jury trial and have the case decided by a judge or, in some cases, by a three-judge panel. If a defendant takes the option of a trial to a judge, often called a bench trial, the duties placed on the judge increase dramatically. Not only must the judge listen to the evidence and assign weight to the evidence that he or she hears, but the judge must exclude consideration of evidence of which the judge may have full knowledge and the judge has ruled inadmissible. During the trial, the judge must rule on the admissibility or exclusion of evidence, deal with competency of witnesses and of evidence, and make determinations in every case where the attorneys have a conflict. The burden of proof possessed by the parties does not change whether the trial is to a judge or to a jury. However, there are situations when a defendant would rather have a judge, who may be somewhat more "hardened" to rough or inflammatory evidence, make the factual determinations based on the evidence.

In federal criminal trials, where a defendant has the right to a trial by jury by virtue of the length of the possible sentence, the trial will be to a jury unless the defendant waives that right in writing with the consent of the federal prosecutor and the judge.[66] Many states follow similar practice by empanelling a jury unless the defendant prefers a trial to a judge and indicates that preference in writing or in open court with the approval of the judge and the prosecution.[67]

14. The Trial Process From Selection of Jurors to Judgment

Every defendant is entitled to an impartial jury of the state and district where the crime is alleged to have occurred or have been committed. This is a Sixth Amendment right that has been made applicable to the states through the due process clause of the Fourteenth Amendment. In ensuring that all defendants enjoy this right, efforts by the prosecution and defense in conjunction with the judge must be made to eliminate prospective jurors who would be unfair to the defendant or to the prosecution and who might

not follow the law as instructed by the judge. Every defendant has the right to have a trial jury selected from a fair cross-section of the community, not that the jury actually selected will mirror the fair cross-section, but the jury must be selected from a group or an array that includes a fair cross-section of the court's jurisdiction. Neither the defendant's counsel nor the prosecutor may undertake efforts to exclude jurors based on race or gender and perhaps, to a lesser extent, ethnic background or affiliation.[68] In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court reversed a conviction where the prosecutor had excluded some black prospective jurors from serving based solely upon their race and offered a method to contest racially discriminatory efforts to keep African Americans from jury service.

In federal courts, and in many state courts, the trial judge conducts an examination of prospective jurors, called a voir dire, in order to determine the suitability of prospective jurors to hear a criminal case. In many states, the trial attorneys are responsible for conducting the examination of prospective jurors by asking questions that are designed to reveal bias, interest, or prejudice.[69] When the voir dire questioning, whether by the judge or by the attorneys, indicates that a prospective juror cannot be fair and impartial and render a jury vote based solely on the evidence presented in court, a prospective juror or may be excused for cause. An unlimited number of prospective jurors may be excused for bias, interest, or where prejudice appears to exist. In addition to excusing jurors for cause, states and federal courts permit attorneys to exercise peremptory challenges as a way of excusing prospective jurors from jury service when the attorney cannot exclude based on cause but has some other lawful reason to desire that the prospective juror not serve on that case. Peremptory challenges are limited by a court rule or by a formula that depends on the number of defendants or the type of crime that has been charged.

When the prosecution and the defense have exercised all prospective juror challenges based on cause and have exercised as many of their respective peremptory challenges as they desire or have exhausted them, the jury has been determined, and the persons selected will subsequently take their respective posts as jurors.

Following juror oaths, the attorneys for the respective sides are permitted, but not required, to give opening statements, or, as they are often called, opening arguments. Because the prosecutor possesses the burden of proof, the prosecutor initiates the first opening statement. While there are various theories about how to make an opening statement, the most consistent approach seems to involve offering a "road map" of what the prosecutor believes the evidence will prove. This is the first real opportunity for the prosecutor to present his or her theory of the case and to give a preview of the evidence that the prosecutor will introduce for jury consideration.

The opening statement serves as an introduction to each litigant's theory of the case and allows a slight amount of persuasive argument to be injected into the statements. The comments by the respective attorneys may assist the jury in understanding how the case unfolds and allow it to place the events and the evidence in context. In no event may the information contained in either an opening statement or in a later closing statement be considered actual evidence in the case. The attorneys are not under oath, and they do not have firsthand information.

The government's case begins when the prosecutor calls the first witness to give testimony. Unless this witness is a young child or is considered a hostile witness allied

with the defendant, the prosecutor will be required to ask direct questions and will not be permitted to ask leading questions. All evidence directed toward meeting the burden of proof, called proof beyond a reasonable doubt,[70] will come from oral testimony, exhibits and evidence introduced by witnesses, and in some jurisdictions, from a view of the crime scene. Ordinary witnesses, called lay witnesses, will normally present most of the evidence for the prosecution's case; these witnesses are the people who have first-hand information concerning what happened. Police officers who testify as witnesses for the prosecution's case generally testify as lay witnesses but may on some occasions testify as expert witnesses where their education and experience qualify them with specialized knowledge that the average person does not possess. If the proof needed by the prosecution involves matters that are beyond the expertise of ordinary lay witnesses, experts that bring special expertise, knowledge, and talent in the areas of medicine, physics, science, and so on may be brought to the witness stand and qualified as expert witnesses. These expert witnesses are permitted to give opinion evidence based on their proven expertise.

When the prosecution is convinced that sufficient evidence has been presented to equal proof beyond reasonable doubt and has no other witnesses or evidence that the prosecutor would like to introduce, the prosecutor will announce to the judge that the prosecution rests its case.

Following the presentation of the prosecution's case in chief and where the trial judge has failed to affirmatively act on the defense motion for a verdict for acquittal, the defendant's attorney must mount a defense that either demolishes the prosecutor's case or that, at a bare minimum, creates a reasonable doubt in the minds of the jury. It should be noted that with the exception of affirmative defenses, a defendant has no burden of proof in any criminal case and can still prevail without introducing any evidence. The defendant may choose not to testify based on the Fifth Amendment provision against self-incrimination and, during closing arguments, the prosecutor is not permitted to call specific attention to the fact that the defendant has chosen not to testify. The defense counsel may help build reasonable doubt by calling into question some of the elements of proof that the prosecutor offered during the prosecution's case in chief. It may additionally cast doubt on the credibility of some of the prosecution's witnesses. The defense counsel will call its own witnesses on whom he or she will be permitted to conduct questioning based on direct examination. When the defense has presented all of the witnesses that it deems appropriate to a proper defense, the counsel for the defendant will indicate to the judge that the defense has concluded its presentation of evidence and that the defense rests.

Each side may offer rebuttal to the case of the other following initial presentation of evidence and witnesses. The prosecution's presentation following the end of the defense case in chief is called the prosecution's case in rebuttal, and the defense's presentation is called the defense case in rejoinder. Both the prosecution and the defense are permitted to clarify and to rebut evidence offered by the other party during its case in rebuttal or rejoinder. Continuing the process of narrowing the permitted topics, the prosecution and defense may clarify matters addressed by the opposing side during this final phase of introducing evidence, but neither side is generally permitted to introduce new topics that have not been mentioned prior to this point in the trial.

With respect to closing arguments, due to the fact that the prosecution has the burden of proof, the prosecution has the first opportunity to present its final summation,

followed by the defense's closing argument, and finally by prosecution rebuttal.[71] The prosecution once again gets the last word, on the theory that it has the burden of proof. The attorneys for each side generally summarize their respective case presentations in a manner that is most favorable to their respective position while attempting to point out errors, omissions, or other problems presented in the opposing party's case presentation. The prosecutor is generally not permitted to offer his or her opinion of guilt and is prohibited under the Fifth Amendment from commenting on a defendant's failure to take the witness stand where the defendant has exercised his or her Fifth Amendment privilege not to testify. The defense counsel will emphasize the burden of proof that falls to the prosecution and call into question, where appropriate, deficiencies in the proof of a particular element or elements, especially those that have been highly controverted during the trial.

In order to educate the jury on the law of the case and to instruct them how to proceed with its deliberations, the judge offers jury instructions prior to the body retiring to deliberate. A court's jury instructions have the purpose of educating the jury concerning the precise law that applies to the crimes that have been charged and the law that concerns the defenses that have been asserted. In addition to legal principles concerning the criminal charges, other general legal principles such as how to handle presumptions and inferences, the concept of judicial notice, the concept of proof beyond a reasonable doubt, and information concerning how to handle and consider affirmative defenses may be appropriate. Most states have what are called pattern jury instructions that have been approved for use in cases involving specific crimes and situations.[72] Since the manner in which crimes may have been committed may call for jury instructions that deviate from the standard ones, jurisdictions allow prosecutors and defense counsel to propose new or alternative ones that are tailored specifically to fit the case being tried. Following the receipt of the jury instructions, the jury retires to consider the case without any additional evidence presented and must determine the case on only the evidence presented in court.

15. Verdicts, Sentencing Process, and Post-Trial Motions

The jury verdict in federal and state courts must be unanimous when twelve-person juries are utilized. State courts that use six-person juries, similarly, must render unanimous verdicts. A unanimous vote to acquit ends the defendant's case, and that particular cause of action cannot be brought again against the defendant by the same jurisdiction. Naturally, a unanimous vote to convict means that the prosecution has met its burden of proof and the presumption of innocence that once existed has been extinguished. Some states, such as Florida and Georgia, are representative of jurisdictions that operate with six-person juries for some criminal cases. In federal prosecutions where the jury vote is not unanimous and in state courts, where unanimous verdicts are required, a non-unanimous jury vote does not constitute a verdict on the merits and will generally permit a retrial of the cause of action. When the jury fails to render a unanimous vote, it is said to be a hung jury and does not produce a verdict.[73]

Once the jury has rendered a verdict, that decision is turned into a judgment whereby the trial judge sets forth the plea, including the jury's findings or the court's findings on the evidence, the adjudication, and the court's sentence. For example, under the North Dakota Rules of Criminal Procedure, Rule 32(C), "A judgment of conviction must include the plea, the verdict, and the sentence imposed." State and federal courts are under some pressure to render sentences within a reasonable time so that the convicted individual may start serving the sentence and to otherwise remove uncertainty about the direction the sentence will take.

In federal and state courts, presentence investigations are conducted to determine whether a defendant should be sentenced at a particular level, the judge should consider some enhancement to the normal sentence, or the judge should consider a downward departure and give a lesser sentence than would typically be the case. The presentence investigation is a fairly wide-ranging study into the defendant's past criminal record, financial situation, history, characteristics, and any other relevant information.[74] As a general rule, prior to sentencing, a convicted defendant must be given an opportunity to read the presentence report. For example, under the North Dakota rules,[75] prior to imposing sentence, the defense counsel must be given an opportunity to speak on behalf of the defendant, and the defendant has the right to present information that might affect his or her sentence. Similarly, the prosecutor is given an opportunity to make a statement that might have some influence over the sentence that the judge is considering imposing. In an increasing number of jurisdictions, victims of a crime are permitted to have some input at the sentencing proceeding. Under Federal Rule 32(i)(4),[76] the sentencing court must address any victim of the crime under consideration and permit the victim to speak or offer the court any information that the victim chooses to share with the court.

16. Appellate Practice

Every defendant has a statutory or state constitutional right to one appeal and has the right to receive free appellate counsel if the person is unable to afford a private attorney.[77] Typically a defendant must file a notice of appeal (see representative form in the following) within a statutorily defined time or the right of appeal is deemed to have been waived or forfeited. Case law has provided that where a transcript is necessary for a meaningful appeal, the government must provide a transcript at its expense.[78]

An attorney who represents a convicted defendant has a duty to investigate the trial record as well as the entire case and file a brief with the appropriate court of appeals. Proper representation may require that the defendant meet with the appellate attorney, and the appellate attorney must certainly read the transcript of the trial to ascertain what appealable issues exist. The appellate attorney will prepare a brief that argues the law as applied to the facts rather than making any attempt to reargue the facts. As a strong general rule, the facts are not arguable during the appellate process because the jury or the judge has made a determination concerning the existence or non-existence of the contested facts. A decision concerning whether to orally argue the case before a court of appeals may rest with the appellate attorney, and most court rules of appellate practice allow a court of appeal to hear a case based only on the briefs.

Federal Rules of Appellate Procedure Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court.

United States District Court for the District of

_____

File Number _____

_____	)	
Plaintiff,	)	
v.	)	Notice of Appeal
_____	)	
Defendant.	)	

Notice is hereby given that _____, (plaintiffs) (defendants) in the above-named case*, hereby appeal to the United States Court of Appeals for the_____Circuit (from the final judgment) (from an order (describing it)) entered in this action on the_____day of_____, 20____.

/s/

_____

Attorney for _____
Address: _____

_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

*See Rule 3(c) for permissible ways of identifying appellants

FIGURE 1.7 Example of a Notice of Appeal Used in a Federal Court. It is internally documented as public domain.

Where an appellate court rules in the defendant's favor, the possibilities exist that the court will reverse the conviction and remand the case for a new trial. In some contexts, an appellate court will overturn the sentence and will remand the case for a re-sentencing procedure. If there was some substantial defect in which the defendant should never have been brought to trial, the reviewing court may reverse the case and remand to the trial court with orders to dismiss the case with prejudice so that it may not be brought again. The prosecution may appeal the case to a higher court in an attempt to have the trial

verdict and sentence reinstated. As a general rule, only where courts of appeal within one state have decided the same legal principle in two different ways that are inconsistent with each other will state supreme courts typically take a lower court case.

17. State and Federal Habeas Corpus

The petition for the writ of habeas corpus is a request that the person holding the prisoner produce his or her body for the court and explain the legality of continued custody. State and federal prisoners petition courts requesting a grant of habeas corpus because success in this area has the operative effect of possible freedom from incarceration, the grant of a new trial, or some other relief from the present conditions of incarceration. While the request for a writ of habeas corpus is directed at the jailer or warden, the effect is to have the prosecutor's office defend the case against a new attack, which may involve newly discovered evidence. A request that a court grant a writ of habeas corpus requires that all other direct appeal remedies have been exhausted. Unless the defendant has taken every advantage of all possible avenues to have his or her conviction reversed or otherwise adjusted, the writ of habeas corpus in court will not generally be available. In applying for a writ of habeas corpus, the defendant is alleging that he or she is being held in violation of the law or the constitution of the jurisdiction or counter to a United States law, treaty, or the federal Constitution. The opposing party in an action for a writ of habeas corpus is usually the public official who is in charge of custody of the convicted defendant. If the defendant can demonstrate that he or she is being held contrary to law, a court may issue a writ of habeas corpus directing that the individual be either retried or freed from the custody of the jailer or warden.

Federal habeas litigants are free to file in a federal district court for an initial hearing on the habeas corpus petition. However, if success is not forthcoming, an appeal requires that the district judge or the court of appeals issue a certificate of appealability. The gatekeeping feature of the certificate of appealability does not apply to habeas corpus petitions directed to the Supreme Court of the United States because it is free to accept or reject any petitions that it might choose.

18. Summary

English and Western philosophical and political thinkers influenced the American colonists to believe that fundamental fairness should be part of the political landscape when governments dealt with their citizens. This enlightened view of justice survived the American Revolution and found its way into state constitutions that were the part of the basis of political organization under the Articles of Confederation. When intergovernmental relations, trade, and commerce proved a difficult proposition under the Articles of Confederation, delegates responded to a Virginia call to a meeting that eventually resulted in the drafting of the Constitution of the United States. While there were challenges in obtaining ratification of the Constitution, the recommendation that a Bill of Rights be considered by the new government helped sway ratification.

Following the American Civil War, the Congress proposed the Thirteenth, Fourteenth, and Fifteenth Amendments that would outlaw slavery, guarantee due process and equal protection, and regulate the right to vote for citizens. Early litigation the following the adoption of these amendments agitated in the direction of an expansive reading of due process, but the Supreme Court of the United States was not persuaded to take an expansive view and limited its interpretation to the context in which they were adopted. Later litigation resulted in the gradual absorption under the doctrine of selective incorporation of most of the first eight amendments into the due process clause of the Fourteenth Amendment. The constitutional rights originally guaranteed against infringement by the federal government in the Bill of Rights became guaranteed against infringement by state governments.

In applying federal constitutional guarantees in the state criminal justice systems, states must adhere to the minimum guarantees of constitutional rights that have been selectively incorporated into the due process clause of the Fourteenth Amendment. In prosecuting criminal defendants, state prosecutors must recognize federal constitutional decisions, but state criminal procedure may go beyond the minimum federal requirements but may not fall below the federal minimum threshold.

In prosecuting criminal transgressions, the wrongs may be either felonies or misdemeanors and may be initiated through the use of a complaint, an indictment, or an information, depending upon the jurisdiction and the seriousness of the offense. When a prosecutor brings a criminal case, a defendant may have an opportunity to negotiate a plea to the charge or charges. This allows criminal cases to be resolved where no substantial dispute concerning the facts exists while at the same time limiting the appellate process following a guilty plea.

Following a guilty verdict by a judge or jury, a defendant may wish to appeal the verdict or sentence based upon alleged errors that occurred at the trial. Current interpretation of the right to counsel permits every litigant to either hire an attorney or to have an attorney appointed if one is an indigent for the purposes of appeal. As a general rule, the wealth or lack of wealth of a convicted defendant should not be a bar to a meaningful appeal. When all appeals at all levels have been exhausted and where a defendant believes that he or she is still being held contrary to law, the application for a writ of habeas corpus to a state or federal court is always permitted unless the defendant abuses the writ by frivolous or successive applications.

Notes

1. The Charter of Liberties, proclaimed by Henry I of England on the occasion of his ascension to the throne in AD 1100, reduced some prerogatives of the monarch and has been considered a forerunner of the Magna Carta of 1215. The Magna Carta, signed by King John, limited some prerogatives of the British monarch, while it guaranteed rights to various individuals, protecting, among other things, the freedom from unlawful imprisonment. See Section 39, "No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed—nor will we go upon or send upon him—save by the lawful judgment of his peers or by the law of the land."
2. See Magna Carta of 1215.
3. The Age of Enlightenment refers to a period of time, mostly in the 17th and 18th centuries (but with roots much earlier), where philosophers and thinkers applied reason and rationality to many areas of

human thought, particularly in religious and governmental affairs. Rationality, properly applied, could create the ideal state where personal freedom flourished and the tyranny of the divine right of kings no longer existed.

4. The "rights of Englishmen" did not include universal suffrage. Men without sufficient property, women, blacks held as slaves, and free blacks could not vote. The Magna Carta recognized that both free and non-free persons possessed rights against unlawful imprisonments. The Supreme Court of the United States recognized in *Klopfer v. North Carolina*, 386 U.S. 213 (1967), that "the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage." Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, "We will sell to no man, we will not deny or defer to any man either justice or right." The "rights of Englishmen" generally applied to property-holding white men but included significant criminal procedural rights that were designed to create a system of fair trials in the colonies, generally.
5. Patrick Conley and John P. Kaminski, *The Bill of Rights and the States*, 95. Rowman and Littlefield Publishers, Inc., 1988.
6. *Ibid*., 97. Although Massachusetts failed to ratify the Bill of Rights in the early years of the Constitution of the United States, it finally ratified it in 1939, along with Connecticut and Georgia.
7. The term "Englishmen" did not cover every person during most historical periods. It generally referred to males who owned a sufficient amount of property or otherwise enjoyed sufficient status to possess the "rights of Englishmen." In colonial days, the term meant that some colonists enjoyed all the legal rights that a similarly situated person in England would possess.
8. The Constitution of the United States of America, As Amended, P. 27, House of Representatives Document No. 102-188. Government Printing Office (1992).
9. *Ibid*.
10. See *The Slaughter-House Cases*, 83 U.S. 36 (1873).
11. *Ibid*.
12. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).
13. See *Hurtado v. United States*, 410 U.S. 578 (1973).
14. *Ibid*.
15. For example, see *United States v. Chandler*, 403 U.S. 531, 1968 U.S. LEXIS 5291 (1968).
16. The concept of privileges and immunities seem to have been derived from the Constitution at Section 2 of Article 4. See *Slaughter-House Cases*, 83 U.S. 36 (1873).
17. See *Gitlow v. New York*, 268 U.S. 652 (1925).
18. *Barron v. The Mayor and City Council of Baltimore*, 32 U.S. 243, 327 (1833).
19. *Ibid*.
20. 166 U.S. 226 (1897).
21. *Ibid*., 241.
22. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).
23. *Wolf v. Colorado*, 338 U.S. 25, 32 (1949).
24. See *Twining v. New Jersey*, 211 U.S. 78 (1908) and *Adamson v. California*, 332 U.S. 46 (1947).
25. *Malloy v. Hogan*, 378 U.S. 1, 2 (1964).
26. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).
27. Forty-nine states follow the common law system, while the state of Louisiana follows a civil law system based on the Code of Napoleon.
28. Differences include unique names for courts, different subject matter jurisdiction, and alterations in the appellate process. Demonstrative of differences are the fact that many state juvenile courts have quite different procedures, and some states have eliminated an intermediate level of appeal in death penalty cases. Some states have very specialized courts, such as drug courts, where practice and procedure are not consistent with other such courts in different states.
29. The current chart is a revision of the original offered by the Symposium on the 30th Anniversary of the President's Commission and was prepared by the Bureau of Justice Studies in 1997.
30. See *People v. Chacon*, 2005 Cal. App. Unpub. LEXIS 9992 (Ca. 2005). See also *Flakes v. People*, 153 P. 3d 427, 2007 Colo. LEXIS 141 (Colo. 2007) and Colorado Revised Statutes, C.R.S. 19-2-517. Direct filing.

31. "The federal Fifth Amendment right to grand jury indictment does not apply to the states; it is not a component of the due process of law guaranteed by the Fourteenth Amendment." *Ned v. State*, 119 p. 3d 438, 444 (Alaska 2005), citing *Hurtado v. California*, 110 U.S. 516 (1884).
32. See Rule 7, Ohio Rules of Criminal Procedure. Ohio Crim. R. 7 (2007).
33. *Baldwin v. New York*, 399 U.S. 66 at 69, n.6 (1970).
34. 518 U.S. 322, 327 (1996).
35. 489 U.S. 538 (1989).
36. See History of the Federal Parole System, United States Department of Justice, United States Parole Commission. www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf. July 30, 2021.
37. See *Heath v. Alabama*, 474 U.S. 82 (1985).
38. *Ibid*., 89.
39. See *Bartkus v. Illinois*, 359 U.S. 121 (1959). Bartkus was acquitted of federal bank robbery charges and subsequently charged and convicted of state bank robbery charges involving the same physical conduct. The Court found no constitutional difficulty, since the one act (bank robbery) had been a crime against two separate sovereigns.
40. *Ibid*.
41. See *Heath v. Alabama*, 474 U.S. 82 (1985). The dual sovereignty doctrine provides that, when a defendant in a single act violates the "peace and dignity" of two separate sovereigns by breaking the laws of each, he or she has committed two separate and distinct crimes. The crucial determination is whether the two governments that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns. This determination turns on whether the prosecuting entities' powers to undertake criminal prosecutions derive from separate and independent sources. The Court has traditionally held that state power to prosecute for crime is derived from its own inherent sovereignty and not from the federal government.
42. *Ibid*.
43. See Federal Judicial Caseload Statistics 2020. www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020. July 30, 2020.
44. Other federal trial courts include the United States Tax Court, the United States Court of Claims, and military courts that try offenses under the Code of Military Justice.
45. See http://adacourse.org/courtconcepts/circuits.html. July 30, 2021.
46. Rule 6, Federal Rules of Criminal Procedure.
47. Rule 7, Federal Rules of Criminal Procedure.
48. *Ibid*.
49. See *Mapp v. Ohio*, 367 U.S. 643 (1961).
50. See *Miranda v. Arizona,* 384 U.S. 436 (1966).
51. See *United States v. Ruiz,* 536 U.S. 622 (2002), and *Schmerber v. California,* 384 U.S. 757 (1966).
52. See *Gilbert v. California,* 388 U.S. 263 (1967).
53. See *Neil v. Biggers,* 409 U.S. 188 (1972).
54. See *Barker v. Wingo,* 407 U.S. 514 (1972).
55. See *Ashe v. Swenson*, 397 U.S. 436 (1970).
56. See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).
57. See *Taylor v. State*, 381 Md. 602, 624 (2004), where the Court of Appeals rejected a double jeopardy claim made too late. "A reading of our cases makes clear that double jeopardy rights may be waived by failure to raise them in the trial court, and the holdings of these Supreme Court cases are not in conflict with our cases."
58. See *Barker v. Wingo*, 407 U.S. 514 (1972).
59. Rule 12, Federal Rules of Criminal Procedure.
60. Rule 16, North Dakota Rules of Criminal Procedure.
61. *Ibid*.
62. Rule 12(b)(1), North Dakota Rules of Criminal Procedure.
63. See *Duncan v. Louisiana,* 391 U.S. 145, 156 (1968).
64. Rule 23, Federal Rules of Criminal Procedure.
65. See *Ballew v. Georgia*, 435 U.S. 223 (1978).

66. Rule 23, Federal Rules of Criminal Procedure.
67. Rule 23, North Dakota Rules of Criminal Procedure.
68. See *Miller-El v. Cockrell*, 537 U.S. 322 (2003).
69. Rule 24(B), Ohio Rules of Criminal Procedure. See also, Rule 24(a)(2), The North Dakota Rules of Criminal Procedure.
70. See *In re Winship*, 397 U.S. 358 (1970), in which the Court held that the standard of proof beyond a reasonable doubt was required in juvenile cases where a child had been charged with doing an act that would have been a crime if done by an adult. In dicta, routinely followed, the Court noted that the standard was required for adult criminal cases.
71. Rule 29.1, North Dakota Rules of Criminal Procedure. See also, Rule 29.1, Federal Rules of Criminal Procedure.
72. See *California Jury Instructions*.
73. See *Johnson v. Louisiana*, 406 U.S. 356 (1972). Johnson was overturned by *Ramos v. Louisiana* by the Supreme Court in 2021 and Rule 31, Federal Rules of Criminal Procedure.
74. Rule 32(c), Federal Rules of Criminal Procedure.
75. Rule 32(a)(2), North Dakota Rules of Criminal Procedure.
76. Federal Rules of Criminal Procedure.
77. See *Douglas v. California*, 372 U.S. 353 (1963).
78. See *Griffin v. Illinois*, 351 U.S. 12 (1956).

Basic Fourth Amendment Principles and the Exclusionary Rule

2

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Learning Objectives

1. Be able to explain what the exclusionary rule does and how it should be applied.
2. Understand the basis for the exclusionary rule.
3. Develop an understanding of why many courts hold that a government must follow its own rules and know why the exclusionary rule helps promote this goal.
4. Know how the use of the exclusionary rule helps enforce the requirements of the Fourth Amendment.
5. Understand that the exclusionary rule may be applied to other constitutional violations.
6. Be able to explain how derivative evidence may often be excluded under the fruits of the poisonous tree doctrine.
7. Comprehend and be able to explain the major exceptions to the exclusionary rule.
8. Understand that in federal cases, a *Bivens* suit may provide an alternative remedy for some persons wronged by Fourth Amendment search and seizure violations.
9. Be able to articulate the concept of standing and explain why it carries so much importance in exclusionary rule litigation.

Chapter Outline

KEY TERMS

1. *Bivens* remedy
2. Concept of standing
3. Derivative evidence
4. Doctrine of attenuation
5. Exclusionary rule
6. Fourth Amendment
7. Fruit of the poisonous tree doctrine
8. Good faith exception
9. Independent source rule
10. Motion to suppress
11. Rule of inevitable discovery
12. Silver platter doctrine
13. Vicarious standing
14. Writs of assistance

1. Introduction to Remedies for Fourth Amendment Violations

The Constitution of the United States provides for a democratic form of government, details the basic organization of the government, and guarantees a variety of personal rights to individual persons. The federal government must follow the Constitution and judicial interpretations when it interacts with persons within its jurisdiction. Due process is guaranteed to all persons by a clause in the Fifth Amendment that applies to the federal government, while similar guarantees are required to be recognized by state and local governments. Many constitutional concepts have been selectively incorporated through the due process clause of the Fourteenth Amendment and are now applicable to state governments. Law-abiding citizens are to be left alone and treated with fundamental fairness when governmental agents interact with such persons. This concept of fundamental fairness must be accorded to all law-abiding persons and citizens, and even suspected law breakers who are to be apprehended by law-abiding law enforcement agents must be given due process. When the law enforcers transgress a law or constitutional provision in their effort to discover, capture, or prosecute suspected violators of criminal laws, the proper approach to confronting one lawbreaker dealing with another lawbreaker poses some interesting questions concerning the method of adjusting the competing equities. In his dissenting opinion in *Olmstead v. United States*,[1] Justice Brandeis offered a forceful and frequently quoted answer to the proper approach the government should take:

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that

> the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.

In *Mapp v. Ohio*,[2] Justice Clark echoed the thoughts of Justice Brandeis: "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Alternatively, should we just look the other way when law enforcement officials violate the law in an effort to promote a greater good? Or should we wonder how a society maintains its moral leadership when its own agents fail to respect and follow the basic law under which society is organized? Should we allow the wronged party to sue the wrongdoing public official?[3] The current approach involves excluding the evidence illegally obtained in violation of the federal constitution, including its amendments, and, in effect, placing the suspect and the government in the same position, legally and evidentially, that they would have occupied had the police officer not violated the Constitution or a court interpretation of law. The exclusion of illegally seized evidence has some exceptions based on logic, need, and common sense.

2. Violation of the Fourth Amendment and the Exclusion of Evidence

Consistent with present judicial construction of the Fourth Amendment and consistent with the case law interpreting the amendment, evidence that has been illegally seized by either a state or the federal government may be suppressed from prosecutorial introduction in a criminal trial. Suppression from evidence as a remedy for a governmental violation of the Fourth Amendment may seem to be a rather drastic measure, since the accused individual may go free as a result of the blunder of a police officer. In essence, one wrongdoer goes free because another wrongdoer has violated the supreme law of the land. Arguably, to allow the use of evidence that has been illegally seized against a person who had a right of privacy concerning that property would mean that the Fourth Amendment would have little force and almost no effect and would become close to a nullity. In opposition to this theory of exclusion is the thought that the evidence should be admissible against the accused wrongdoer if we will allow the wrongdoer a remedy of suit against the law enforcement official[4] who violated the rights of the accused individual. In the absence of either the exclusion of evidence or the availability of a suit against the offending officer, law enforcement officials might have little incentive to respect the requirements of the Fourth Amendment. The trial exclusion of evidence illegally seized appears to be the Fourth Amendment remedy of choice for the present time.

3. The Fourth Amendment: Implementation Prior to 1914

Prior to 1914, the Fourth Amendment had faced judicial interpretation and scrutiny in several court cases. Among these was the case of *Boyd v. United States*, decided by the United States Supreme Court in 1886, in which the compulsory production of private

papers was in question. Justice Bradley looked to the origin and intent of the Framers of the Fourth Amendment to discern the amendment's meaning and scope.[5] He recalled the lessons of history, which were more recent to him than to us, in which the British government, prior to the American Revolution, had empowered its agents to use general search warrants called writs of assistance. In many of the American colonies, British agents were issued what amounted to blank search warrants that allowed the search of private houses for personal items, personal documents and effects, and other evidence that would be used in court to convict the possessor. The colonists had protested the use of these blanket warrants in a variety of ways but to little or no avail prior to the Revolutionary War. In response to the writs of assistance and other abuses of privacy, the prohibition against unreasonable searches and seizures was grafted into the Constitution in the form of the Bill of Rights so that Americans would not have to fear that the practice of unlimited intrusion into private areas might creep back into national law enforcement practice.

Over the years since 1791, when the Bill of Rights was ratified by the required number of states, federal law enforcement practice has not always complied with what was believed to be dictated by the Fourth Amendment. Initially there existed no particular remedy against federal agents when violations of the Fourth Amendment occurred, except on a case-by-case basis. Where a defendant successfully argued that personal constitutional rights had been violated, he or she might have some modicum of success in having a conviction reversed based on illegal law enforcement activity.[6]

Justice Day, in *Weeks v. United States*, referred to the opinion of Justice Bradley[7] in explaining the original motivation and intent of the Framers of the Fourth Amendment.

> [I]t took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people, among other things, those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under authority of the government, by which there had been invasions of the home and privacy of the citizens, and the seizure of their private papers in support of charges, real or imaginary, made against them. Such practices had also received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies. *See* 2 Watson, Const. 1414 *et seq*. Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle, and not to be invaded by any general authority to search and seize his goods and papers.
>
> *Weeks v. United States*, 232 U.S. 383, 390 (1914)

The Supreme Court in *Boyd v. United States* granted a new trial where the federal government had forced the defendant to provide evidence from his private place of business in the absence of a search warrant. The *Boyd* Court did not fashion a rule of exclusion of evidence illegally seized or procured, but the use of such illegally seized evidence was deemed to create reversible error in Boyd's case. At the time *Boyd* was decided, it appeared that the Court was moving toward developing an exclusion rule that would help enforce the Fourth Amendment, but it was not, at that time, willing to take such a step.

4. The Exclusionary Rule: Enforcing the Fourth Amendment

By 1914, the Court appeared to reconsider the legality of admitting evidence in federal courts where the evidence had been illegally seized. In the case of *Weeks v. United States*, the defendant's personal residence had been entered by local police officers and a United States marshal. Both the police and the federal agent had seized evidence, which they wished to use against Weeks in a criminal gambling case. No warrant was used by any of the law enforcement agents involved in the search for evidence, and Weeks had not been present to grant any consent for the entry. Prior to trial and consistent with the practice at the time, Weeks had requested the return of the documents that the federal government sought to use against him. The motion for the return of the evidence had been denied, and Weeks had been convicted partly based on evidence illegally taken from his residence.

With his appeal properly before the United States Supreme Court, Weeks contended that the Fourth Amendment to the Constitution prohibited the United States marshal from making the seizure and that his conviction should be reversed. After reviewing some of the history that motivated the adoption of the Fourth Amendment and after looking at the conduct of the federal agent, Justice Day, writing for the *Weeks* Court, stated:

> We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; that, having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed.
>
> *Weeks v. United States*, 232 U.S. 383, 398 (1914)

The action of the *Weeks* Court had the effect of telling federal law enforcement agents that if seizures of evidence were to be made in the future, they must be in compliance with the Fourth Amendment or the evidence would not be admitted in federal courts. Consistent with the *Weeks* case, if evidence illegally seized by federal agents managed to be admitted in court against defendants whose rights had been violated, upon appeal, the convictions could be reversed. The ruling applied only to federal law enforcement officials and not to state officials, who were not limited in their conduct by the Fourth Amendment.[8] Interestingly enough, if federal law enforcement officials violated the Fourth Amendment in seizing evidence against a defendant, they could take the evidence to a state prosecutor, who was not limited by the Fourth Amendment, and the evidence could be used for prosecution under state law.[9]

5. Suppression of Illegally Seized Evidence

While the literal language of the Fourth Amendment protects people against unreasonable searches and seizures conducted by governmental agents, once a violation has occurred, there is no way to reverse the wrong. Since the defendant cannot be restored

to the status quo prior to the search, a process that puts the defendant nearly in the same position as he or she would have been but for the illegality would appear to be an appropriate approach. However, since the Fourth Amendment is not self enforcing, and its text fails to provide any remedy for a governmental violation, the remedy of evidentiary exclusion is the proper procedure to pursue. Cases decided prior to 1914 rarely addressed concerns related to a remedy because the evidence illegally seized was frequently excluded on other constitutional grounds.[10]

Where the government has illegally seized evidence, current practice permits the aggrieved party to file a motion to suppress the evidence from introduction in court against that party or person. Usually the wronged party files a pretrial motion to suppress the evidence with a request to have the property returned to the defendant. A hearing is held to determine whether the defendant has a personal legal basis to complain about a violation of Fourth Amendment rights. A judge must make a determination whether, under the circumstances, the government actually violated the constitutional rights of the defendant and decide the remedy to be applied. If the judge agrees with the defendant, the evidence will be ruled inadmissible for use to prove guilt;[11] where the judge believes that no violation occurred, the evidence will be admissible unless excluded by the substantive rules of evidence.

6. Theoretical and Constitutional Basis for the Exclusionary Rule

The philosophy underpinning the exclusionary rule is predicated on the belief that if the courts were to permit the use of illegally seized evidence, they would be condoning, and perhaps even become indirect participants in, Fourth Amendment transgressions. To maintain judicial propriety, courts should not sanction Fourth Amendment illegality by allowing prosecutors to introduce the fruits of illegal searches conducted by police agencies. In addition, when the incentive for law enforcement officials to violate the amendment is removed, future illegal seizures should be deterred and reduced. As Justice O'Connor explained the rationale, "The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits."[12] Although the exclusionary rule may assist an individual defendant's case, the Court has recognized that it is not a personal constitutional right, since it does not redress the injury suffered through the illegal search or seizure and does not place the injured party in the same position as if the illegality had not transpired; the damage to the constitutional right has already occurred.[13]

Although the Fourth Amendment and the exclusionary rule clearly apply to federal criminal practice, the same cannot be said for searches and seizures occurring outside the territorial jurisdiction of the United States. When American agents conduct searches, seizures, and/or arrests in foreign countries, the Fourth Amendment and the exclusionary rule will not prevent the introduction of the evidence against the target in an American courtroom. According to the Court, there is no evidence that the drafters of the Fourth Amendment intended it to have extraterritorial effect or to be applied to foreign nationals or their property when located in foreign territory.[14]

7. Challenge to the Exclusionary Rule: The Silver Platter Doctrine

The Court designed the original federal exclusionary rule to limit federal law enforcement officials. State and local police, however, remained free to search and seize, and prosecutors continued to use such evidence without any federal limitation. As Justice Blackmun noted,

> In *Weeks*, it was held, however, that the Fourth Amendment did not apply to state officers, and, therefore, that material seized unconstitutionally by a state officer could be admitted in a federal criminal proceeding. *United States v. Janis*, 428 U.S. 433, 444.
>
> (1976)

In actual practice, prior to 1960, state officials could conduct searches that would have been considered illegal if carried out by federal officials and then transfer the evidence to federal prosecutors, who did not hesitate to use the evidence. The state officials were serving the evidence on a "silver platter." Such evidence was considered admissible in federal courts, and the exclusionary rule was not applied, since no federal official had violated the Fourth Amendment. At that time, prior to *Mapp v. Ohio*, neither the Fourth Amendment nor the exclusionary rule applied to limit state officials. This practice of evidence transfer, known as the "silver platter doctrine," was in regular use until the Court struck it down. In 1960, prior to *Mapp*, the Supreme Court held that evidence obtained by state law enforcement agents as the result of unreasonable searches and seizures in the absence of the involvement of federal officers must be excluded from evidentiary use against a federal defendant who makes an appropriate objection.[15] At least one state, Washington, permits admission of evidence that has been obtained in another state or jurisdiction, even if the manner of obtaining the evidence would have been illegal under Washington law. There are two requirements: the evidence must have been collected lawfully in the foreign jurisdiction, and the foreign jurisdiction officers must not have acting as agents of the state of Washington.[16]

8. Application of the Exclusionary Rule to State Criminal Procedure

State criminal practice moved to conformity with the federal standard when the *Weeks* exclusionary rule was held to apply to the states in *Mapp v. Ohio* (see Case 3.1).[17] The Court determined that the constitutional guarantees of the Fourth Amendment were incorporated into the Due Process Clause of the Fourteenth Amendment and thus required state criminal procedure to follow the federal model. With a view toward enforcing the Fourth Amendment, the *Mapp* Court thought it necessary to make the *Weeks*-based exclusionary rule applicable against the states. The net effect of *Mapp* was to make state and federal Fourth Amendment practice subject to the same limitations with respect to search and seizure.

Case 2.1 LEADING CASE BRIEF: ILLEGALLY SEIZED EVIDENCE MUST BE EXCLUDED FROM COURT

Mapp v. Ohio
Supreme Court of the United States
367 U.S. 643 (1961).

CASE FACTS:

The appellant, Ms. Mapp, was convicted of knowingly having in her possession and under her control some lewd and lascivious books, pictures, and porno-type photographs. The evidence, which aided in her conviction, was taken by police officers, and as the Ohio Supreme Court admitted, was secured during the execution of an illegal search and seizure.

In the early afternoon of May 23, 1957, three policemen arrived at Ms. Mapp's home and asked to talk to her, but they would not disclose to her the topic of their inquiry while they remained on the street. In reality, the police had information that a person who had been involved in a recent bombing was present in the home.

Ms. Mapp informed the police that she would admit them only if they produced a search warrant that the officers did not have. The officers kept the home under observation for the next three hours.

After more officers arrived several hours later, the police attempted and effectuated a break-in by smashing the glass to a rear door. When the appellant asked to see a search warrant, an officer waved a piece of paper, purporting to be a search warrant. The arrival of Mapp's attorney did nothing to aid the situation since the police would not allow him to enter the home.

The police search covered her dresser, a chest of drawers, a closet, and other areas of her bedroom. Police looked through her photo album and personal papers. The search continued through the rest of the home. A search of the basement contained the obscene materials that were used to obtain the conviction.

Over proper objection to the illegal search, at Ms. Mapp's trial, the prosecution introduced no evidence of a search warrant and the judge permitted the introduction of the illegally seized evidence. Ms. Mapp was convicted.

The Ohio Supreme Court affirmed the conviction with the rationale that the evidence had not been taken by any outrageous process.

LEGAL ISSUE:

Should the guarantees of the Fourth Amendment be incorporated into the Due Process Clause of the Fourteenth Amendment and the federal exclusionary rule of *Weeks v. United States* be extended to prohibit the use of illegally seized evidence in state criminal prosecutions?

THE COURT'S RULING:

A majority of the justices decided that Due Process required that the guarantees of the Fourth Amendment should be recognized as included in the Fourteenth Amendment and that evidence seized illegally should not be used in state courts against a person from whom it was taken. The ruling reversed Mapp's conviction.

ESSENCE OF THE COURT'S RATIONALE:

* * *

I

* * *

[I]n *Weeks v. United States*, (1914) 232 U.S. 383, at pages 391–392, [the Court] stated that:

"The Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws."

Specifically dealing with the use of the evidence unconstitutionally seized, the Court concluded:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

Finally, the Court in that case [*Weeks*] clearly stated that the use of the seized evidence involved "a denial of the constitutional rights of the accused."

* * *

This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words."

* * *

While in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now despite the *Wolf* case, more than half of those since passing upon it . . . have . . . adopted or adhere to the *Weeks* rule. [Citations omitted.] Significantly, among those now following the rule is California, which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provision. . . ." *People v. Cahan*, 1955, 44 Cal.2d 434, 445, 282 P. 2d 905. In connection with this California case, we note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary rule against the States was that "other means of protection" have been afforded the right of privacy (partially protected by the Fourth and Fourteenth Amendments). 338 U.S., at page 30. The experience of California that other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since

Wolf. See *Irvine v. California*, 347 U.S. 128, 137 (1954).

* * *

[The Court incorporated the Fourth Amendment into the Due Process Clause of the Fourteenth Amendment and adopted the exclusionary rule of the *Weeks* case to enforce it.]

* * *

IV

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.

* * *

Having once recognized that the right of privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions by state officers, is therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. . . . Our decision . . . gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

The judgment of the Supreme Court of Ohio is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

CASE IMPORTANCE:

Following the *Mapp* decision, any person whose right to privacy under the Fourth Amendment has been violated by a police official may exclude from court consideration any evidence that has been seized due to the illegality of the officer's conduct if the evidence is to be used against that person. The potential incentive for police to violate the Fourth Amendment has been eliminated.

9. Exclusion of Derivative Evidence

Law enforcement investigations often lead in unusual directions and produce evidence of criminal activity other than that which was originally anticipated. When police follow the path suggested by evidence that has been illegally seized or wrongfully discovered, exploiting that evidence may create admissibility problems for the prosecutor. The Supreme Court expanded the sweep of the exclusionary rule to require suppression of evidence derived from illegally obtained secondary evidence when the prosecutor's plan involved admitting it against one who had an expectation of privacy. As explained by the *Nix* Court:

> The doctrine requiring courts to suppress evidence as the tainted "fruit" of unlawful governmental conduct had its genesis in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); there, the Court held that the exclusionary rule applies not only

> to the illegally obtained evidence itself, but also to other incriminating evidence derived from the primary evidence. *Nix v. Williams*, 467 U.S. 431, 441. (1984)

In *Wong Sun v. United States*,[18] the Court reaffirmed the principle of tainted derivative evidence exclusion when it voted to exclude evidence that law enforcement officials had obtained by exploiting an initial Fourth Amendment violation (see Case 3.2). Officers were led to a secondary evidence location by evidence that originally was illegally discovered. The Court held that the evidence in the second location would never have been discovered "but for" the agent's initial violation of the defendant's rights under the Fourth Amendment. The *Wong Sun* "fruit of the poisonous tree" doctrine permits a defendant to exclude evidence seized from locations where the defendant possessed no constitutional expectation of privacy.

In *Wong Sun*, police illegally entered a defendant's residence in the absence of probable cause and without a warrant of any kind. No incriminating physical evidence surfaced from that original search. However, the defendant gave oral evidence that implicated a second defendant and produced narcotic drugs from the home of the second defendant. The second defendant gave oral evidence and possessed drugs that implicated the first defendant in drug use and possession. Ultimately, the *Wong Sun* Court held that the first defendant could suppress evidence taken from a search of the second defendant's home, since the original illegality at the first defendant's home led to the discovery of the contraband at the second location. At first blush, this may appear to do violence to the Court's oft-repeated principle that Fourth Amendment rights are personal and cannot be asserted vicariously. Upon closer scrutiny, the evidence in *Wong Sun* was discovered by exploiting the original illegal entry to the defendant's home. But for the original illegality, no evidence against the first defendant would have been discovered.

CASE 2.2 LEADING CASE BRIEF: EVIDENCE DERIVATIVE OF ILLEGALLY OBTAINED EVIDENCE MUST BE EXCLUDED

Wong Sun v. United States
Supreme Court of the United States
371 U.S. 471 (1963).

CASE FACTS:

James Toy and Wong Sun, a.k.a. "Sea Dog," were convicted in the Federal District Court for the Northern District of California for the knowing transportation and concealment of illegally imported heroin.

Following several weeks of surveillance of Hom Way, police arrested him and uncovered heroin in his personal possession. Hom Way told the officers that he recently purchased the drug from "Blackie Toy," who lived on Leavenworth Street in San Francisco. Police cruised the thirty-block length of the street until they discovered Oye's Laundry at six in the morning.

After denying entry to plainclothes officers who had appeared and requested possession of their nonexistent laundry, Toy slammed the door and fled to the rear of the laundry/home. The federal

narcotics agents followed Toy into his home against his will and cornered him in his bedroom. Immediately prior to Toy's flight, the officers had identified themselves as federal agents. The bedroom at the rear of the laundry was subjected to a warrantless search, and Toy subjected to a similar search and arrest.

While the search produced no evidence of illegality, Toy promptly denied that he had any narcotics but implicated one "Johnny." Toy dutifully led the officers to the home of Johnny Yee and told the agents that they had smoked heroin the previous night.

A warrantless entry of Johnny Yee's place of residence produced less than an ounce of heroin. Just as Toy was willing to talk, so was Yee. Johnny Yee implicated Toy in heroin possession and Wong Sun as his supplier. A subsequent search of Wong Sun's residence uncovered no additional heroin.

Petitioners James Toy and Johnny Yee were arraigned almost immediately and released the same day. Wong Sun secured his release a day later. Several days later, Toy, Yee, and Wong Sun appeared at the police station and voluntarily submitted to interrogation by agents who prepared a statement summarizing the information obtained from each. Each man offered what amounted to a confession of guilt. Neither Toy nor Wong Sun would sign the statements, but Wong Sun admitted the accuracy of his statement.

At the trial, Johnny Yee, who was to be a government witness, did not testify. The government offered in evidence Toy's initial statements, the heroin found at Yee's home, Toy's unsigned statement, and Wong Sun's unsigned statement. Toy alleged that his initial statements and all the evidence that was derived from the illegal searches should be excluded from evidence due to the Fourth Amendment violation which occurred as his home was illegally entered. The District Court rejected his argument and allowed the admission of the evidence that led to the conviction of Toy and Wong Sun.

The Court of Appeals affirmed and the Supreme Court granted certiorari.

LEGAL ISSUE:

Where evidence has been seized in violation of an individual's rights under the Fourth Amendment, must that evidence and any derivative evidence be excluded from the prosecutor's use for purposes of proving guilt?

THE COURT'S RULING:

Original evidence that has been illegally seized is excludable under the *Mapp* exclusionary rule, and derivative evidence obtained by exploiting illegally seized evidence may be excluded if offered against the person whose constitutional rights were originally violated by governmental agents.

ESSENCE OF THE COURT'S RATIONALE:

* * *

We believe that significant differences between the cases of the two petitioners require separate discussion of each. We shall first consider the case of petitioner Toy.

I

The Court of Appeals found there was neither reasonable grounds nor

probable cause for Toy's arrest. . . . It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion, though the arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which constitutes probable cause—evidence which would "warrant a man of reasonable caution in the belief" that a felony has been committed [citation omitted]—must be measured by the facts of the particular case.

* * *

The threshold question in this case, therefore, is whether the officers could, on the information which impelled them to act, have procured a warrant for the arrest of Toy. We think that no warrant would have issued on evidence then available.

* * *

Thus we conclude that the Court of Appeals' findings that the officers' uninvited entry into Toy's living quarters was unlawful and that the bedroom arrest which followed was likewise unlawful, was fully justified on the evidence. It remains to be seen what consequences flow from this conclusion.

II

It is conceded that Toy's declarations in his bedroom are to be excluded if they are held to be "fruits" of the agents' unlawful action.

* * *

The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman v. United States*, 365 U.S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of "papers and effects." Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. . . .

* * *

The government argues that Toy's statements to the officers in his bedroom, although closely consequent upon the invasion which we hold unlawful, were nevertheless admissible because they resulted from "an intervening independent act of a free will." This contention, however, takes insufficient account of the circumstances. Six or seven officers had broken the door and followed on Toy's heels into the bedroom where his wife and child were sleeping. He had been almost immediately handcuffed and arrested. Under such circumstances it is unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion.

The Government also contends that Toy's declarations should be admissible because they were ostensibly exculpatory, rather than incriminating. There are two answers to this argument. First, the statements soon turned out to be incriminating. . . . Second, when circumstances are shown such as those which induced these declarations, it is immaterial whether the declarations be termed "exculpatory." [Footnote

omitted.] Thus, we find no substantial reason to omit Toy's declarations from the protection of the exclusionary rule.

III

We now consider whether the exclusion of Toy's declarations requires also the exclusion of the narcotics taken from Yee, to which those declarations led the police. The prosecutor candidly told the trial court that "we wouldn't have found those drugs except that Mr. Toy helped us to." . . . We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Maguire, *Evidence of Guilt*, 221 (1959)

We think it clear that the narcotics were "come at by the exploitation of that illegality" and hence that they may not be used against Toy.

IV

It remains only to consider Toy's unsigned statement. We need not decide whether, in light of the fact that Toy was free on his own recognizance when he made the statement, that statement was a fruit of the illegal arrest. [Citation omitted.] Since we have concluded that his declarations in the bedroom and the narcotics surrendered by Yee should not have been admitted in evidence against him, the only proofs remaining to sustain his conviction are his and Wong Sun's unsigned statements. . . .

It is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused.

* * *

The import of our previous holdings is that a co-conspirator's hearsay statements may be admitted against the accused for no purpose whatever, unless made during and in furtherance of the conspiracy. Thus, as to Toy, the only possible source of corroboration is removed and his conviction must be set aside for lack of competent evidence to support it.

V

[The Court found that Wong Sun's statement could not be used to corroborate Toy's police statement. Toy's statement could not corroborate Wong Sun's statement because neither statement was made during the existence of their drug conspiracy. The only corroboration of the drug conspiracy that could be used against Wong Sun was the heroin at Toy's place and Yee's words.]

We therefore hold that petitioner Wong Sun is also entitled to a new trial. [Jimmy Toy received a new trial because there remained no admissible evidence against him.]

CASE IMPORTANCE:

By excluding evidence that is derivative of original Fourth Amendment illegality, the Court ensured greater respect for the Fourth Amendment and has removed most additional incentive to conduct illegal searches and seizures, because once an original illegality has occurred, downstream evidence is tainted and not useable to prove guilt.

The result of expanding the *Mapp* holding in *Wong Sun* to exclude derivative evidence from use in court to prove guilt served to enhance respect for the Fourth Amendment by removing more of the incentive to conduct illegal searches and seizures. Following *Wong Sun*, both evidence illegally seized and evidence discovered by virtue of exploiting information learned from an illegal entry will not be acceptable in court if offered against one whose rights were initially violated.

10. Major Exceptions to the Exclusionary Rule

Although supportive of defendant rights, the "fruit of the poisonous tree" doctrine derived from *Wong Sun v. United States*[19] has not seen complete favor with subsequent justices on the Supreme Court. Over the years since *Wong Sun*, the Court has recognized three legal theories that limit the exclusionary effect. The independent source rule of *Segura v. United States*[20] and of *Murray v. United States*,[21] the rule of inevitable discovery demonstrated by *Nix v. Williams*,[22] and the doctrine of attenuation described in *Wong Sun* all permit prosecutorial use of evidence illegally seized. In these exceptional situations, the justices of the Supreme Court believed strict application of the exclusionary rule would not have significantly altered the conduct or practice of law enforcement officials because the deterrent effect on police operations was viewed as marginal or nonexistent. Where there is an absence of, or a limited, deterrent effect, the rationale of the exclusionary rule is not enhanced, and courts generally refuse to suppress the evidence.

11. Exclusionary Rule Exception: The Independent Source Rule

In cases where police have run afoul of the Fourth Amendment but where an alternative or parallel, but legal, method of discovery of evidence exists, courts generally do not exclude the evidence.[23] The independent source rule allows trial court introduction of evidence obtained or discovered during, or as a consequence of, an illegal search and seizure, so long as the evidence was later obtained independently from proper law enforcement activity untainted by the initial illegality. In *Murray v. United States*,[24] law enforcement officials conducted an illegal search that produced evidence of criminal activities. While federal narcotics officers conducted surveillance on a warehouse that was believed to be the site of significant drug activity, they observed Murray and others driving vehicles into, and later out of, the warehouse. When the vehicles and the target, Murray, later left, the agents peered into the warehouse and observed a tractor-trailer rig with a large dark container inside. Several agents illegally forced their way into the warehouse and observed, in plain view, numerous burlap-wrapped bales. Although subsequent illegal searches of the vehicles revealed quantities of marijuana, the officers left the warehouse without disturbing the contents and did not return until they possessed a search warrant.

In the *Murray* case, evidence sufficient to prove probable cause to search existed prior to the illegal entry and illegal search and came from lawful sources. Since the

illegally obtained information was not used as part of the foundation for probable cause and was not included on the affidavit for a search warrant, the Supreme Court approved the subsequent warrant-based search that resulted in various drug seizures and did not invalidate the warrant based on Fourth Amendment grounds. In this case, the Court approved the execution of the search warrant because the basis for the probable cause on the warrant came from an independent and lawful source, untainted by the officer's violation of Murray's Fourth Amendment rights.

In an earlier case prior to *Murray, Segura v. United States*,[25] the Supreme Court approved the admissibility of evidence derived from an independent source. *Segura* involved police officers who entered a private apartment and conducted a protective sweep following an arrest of one of the occupants. No warrant or other exception allowed the entry into the premises. In the process of conducting the sweep, the officers observed, in plain view, various drug paraphernalia. Two officers remained in the apartment awaiting a warrant being procured by others, but, because of various delays, the search warrant was not issued until some nineteen hours after the initial incursion.

In executing the search warrant, the agents discovered additional drugs and records of narcotics transactions. These items were seized, together with those observed during the security check. The trial court suppressed all the evidence, and the court of appeals held that the evidence discovered in plain view on the initial entry must be suppressed, but the evidence seized during the execution of the warrant-based search should have been admitted. The court of appeals agreed with the federal trial court that the initial warrantless entry and the limited security sweep were not justified by exigent circumstances and were therefore illegal.

The Supreme Court of the United States reversed on the theory that some of the drug evidence would have eventually been seized in a lawful manner. The *Segura* Court held the opinion that the drugs and other items not observed during the initial entry but first discovered by the agents the day after the first entry, under an admittedly valid search warrant, should have been admitted because an independent source for probable cause existed. According to Chief Justice Burger:

> None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry, and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged. *Segura* at 814.
>
> (1984)

So long as sufficient untainted evidence supports the existence of probable cause, warrants obtained in situations where the government has committed illegal activities will not result in the fruits of the searches being suppressed. In essence, where the evidence observed during an initial illegal search has not been used to produce probable cause to issue a warrant, and separate information proves that probable cause can be established by an independent source untainted by any illegality, courts generally uphold

the validity of warrants so issued. The independent source rule may be applied where police possess two avenues or sources of obtaining evidence, one of which is illegal and the other legal. Where the two avenues are not connected, the evidence may be deemed to have an independent source and should be ruled admissible. Therefore, there is no reason to exclude evidence that has a lawful and independent source because law enforcement officials followed a lawful method of discovery.

12. Exclusionary Rule Exception: The Rule of Inevitable Discovery

The Supreme Court and many state courts have recognized an additional exception to the *Mapp* exclusionary rule and the *Wong Sun* "fruits of the poisonous tree" doctrine, called the "rule of inevitable discovery." The rule of inevitable discovery doctrine asks whether the exclusionary rule should render inadmissible the product or result of an illegal search when the same evidence would have been discovered by lawful means at some point later in time in any event. This rule can be applied in Fourth Amendment contexts as well as in other cases involving constitutional violations. Under this theory, where law enforcement officers find evidence through illegal means but would have discovered the same evidence through legal means, the evidence should not be excluded from use at trial. In a situation involving a clear case of inevitable discovery, the police would have lawfully obtained the evidence if no illegality had taken place, and to exclude the evidence would place the police and prosecution in a worse position than if no Fourth Amendment transgression occurred.

In a *Miranda* case, the Supreme Court recognized the rule of inevitable discovery as an exception to the exclusionary rule. In *Nix v. Williams*, 467 U.S. 431 (1984), information needed to find a murder victim's body was given to police by virtue of a violation of the *Miranda* principles. Probable cause to arrest Williams existed, and police in a different jurisdiction took him into custody. He consulted with an attorney prior to being transported back to the jurisdiction where the homicide had occurred. Police were supposed to respect Williams' desire not to talk with police, and if the police had, they would not interrogate him. While Williams was being transported back to the original jurisdiction, other police officers had initiated a search for the victim's body by placing farmland in a grid pattern, searching and clearing each grid before advancing to the next parcel. The offender had placed the victim's body within one of the grids that police had yet to search. At the same time, by violating the principles of *Miranda* and the agreement with the defense attorney, the transporting officers managed to have Williams tell them the location of the body after they told him that the dead girl's parents deserved to be able to give her a Christian burial. Normally, such evidence would be excluded from court use as a *Miranda* violation if the officer's speech was considered interrogation. The Supreme Court found that the officer's speech constituted the "functional equivalent" of interrogation but did not suppress the defendant's incriminating revelations because the girl's body would have been inevitably discovered anyway. Under the circumstances of the ground search, police or other searchers would have quickly discovered the victim's

body due to the grid search plan under way. To use the theory of inevitable discovery as an exception to the rule of exclusion, the government must show that the contested evidence actually would have been discovered within a reasonable time. According to the Court in *Nix v. Williams*, 467 U.S. 431 (1984), "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial" and should be admitted against a defendant. Although the *Nix* decision focused on a violation of the Sixth Amendment right to counsel and the related violation of the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), the principle of inevitable discovery is fairly applicable whenever government agents obtain evidence in violation of the defendant's constitutional rights that has a second and lawful source involving inevitable discovery.

In a clear demonstration of actual practice of the rule of inevitable discovery, federal and state law enforcement agencies, including the Drug Enforcement Agency (DEA), focused on a female drug courier and her male friend, a known drug dealer. In this case,[26] police and the DEA agents knew that a drug delivery was to occur at a particular time and location due to wiretaps, observations, and isolating their respective apartments. When a drug delivery was initiated by the female courier, Massachusetts State Police officers intercepted her and stopped her vehicle, arrested her on a driver's license violation, and seized her heroin, and police and DEA agents surrounded the known drug destination where the defendant was located. When a gunshot came through the apartment door, police eventually warrantlessly entered the apartment, arrested the male defendant, and conducted a protective sweep of the apartment.[27] Officers noticed what appeared to be significant drugs as well as some firearms on the premises. Officers may have been a bit rough on the contents of the apartment. After obtaining a search warrant, the federal police searched the apartment the next day and seized large amounts of recreational pharmaceuticals. In a motion to suppress, the defendant contended that probable cause to initially enter the apartment was lacking and no protective sweep[28] should have been conducted. He alleged that the information found in the protective sweep should not have been used as a basis to procure the search warrant because there was no reason for the sweep. The government contended that, based on prior investigation facts, there was probable cause to search before any of the events or the sweep occurred at the apartment and that the warrant-based search of the apartment would have lawfully revealed the drugs and firearms in any event. The reviewing court approved the sweep but noted that some of the sweep may have gone beyond the level of search permitted under the protective sweep doctrine. According to the reviewing court, if any of the evidence was observed improperly during the sweep, the same evidence would have inevitably been discovered during the day-later warrant-based apartment search. The court of appeals approved the admission of the drug and gun evidence against the defendant based on the rule of inevitable discovery.

Another example of the rule of inevitable discovery demonstrates that evidence that would have been obtained eventually and lawfully should be admitted as an exception to the exclusionary rule even if the Fourth Amendment had been violated. In a Kentucky case,[29] the defendant's motor vehicle stopped because it had no operating rear lights and no license plate light. In speaking with the driver, the officer determined that his driver's license was under suspension. The officer found that the odor of alcohol came from the

car and that the subject might be under the influence of alcohol. The officer called for the assistance of a police unit trained to detect a driver's blood alcohol concentration, but no evidence of alcohol impairment was found. In thinking that the driver might be under the influence of drugs, a drug-trained dog was called to the scene and arrived before the alcohol testing was concluded. The dog alerted to the vehicle, and officers discovered small amounts of marijuana and cocaine in the center console, as well as drug paraphernalia. An argument could be made that the motorist was detained longer than necessary to process the traffic stop and that any later search was illegal. However, the reviewing court noted that the motorist would not have been permitted to drive away because of the lack of a driver's license. Therefore, the drugs would have been lawfully discovered in any event by the use of the dog or from an inventory search after his vehicle had been towed. According to the reviewing court, the defendant's "lack of a valid license prevented him from driving the vehicle away from the scene. Therefore, the K-9 unit's discovery of the contraband within Olmeda's truck was inevitable, regardless of whether the investigation into Olmeda's sobriety was appropriate."[30]

13. Exclusionary Rule Exception: The Doctrine of Attenuation

Another aspect of *Wong Sun v. United States* involved the doctrine of attenuation, which seemed to have its genesis in the case of *Nardone v. United States*.[31] Under this doctrine, where evidence has been illegally seized, the prosecution may argue that although the evidence was obtained in violation of the Constitution, it has been "purged" of its taint because sufficient time and/or events have transpired since the search or discovery. As the Court explained in *United States v. Crews:*

> In the typical "fruit of the poisonous tree" case, however, the challenged evidence was acquired by the police after some initial Fourth Amendment violation, and the question before the court is whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the "taint" imposed upon that evidence by the original illegality. 445 U.S. 463, 471.
>
> (1980)

In *Wong Sun*, two of the defendants returned following pretrial release to attempt to make a plea bargain with the police.[32] Several days had passed since the illegal searches and seizures; thus, the defendants had had sufficient time to make an independent assessment concerning their legal situation and the merits of confessing to the police. Wong Sun had been released on his own recognizance subsequent to his arraignment and had returned to speak with police voluntarily several days later to make a confession. The *Wong Sun* Court held that the obtaining of the confession evidence was sufficiently separated (attenuated) from the illegality of the original police conduct as not to have been prompted or intimately influenced by the earlier illegal search and was, therefore, not excludable on Fourth Amendment grounds.[33]

In a later Supreme Court decision, *Utah v. Strieff*,[34] the Court cited the doctrine of attenuation in approving the use of evidence seized following an initial illegal stop. In this case, an officer observed the defendant leaving a suspected drug house, but he did not know how long the subject had been in the house or anything more about the subject when he seized him without having just cause under the stop and frisk standard. The officer obtained the subject's identification and relayed the information to a police dispatcher, who indicated that the subject had an outstanding warrant. A search incident to arrest revealed illegal recreational drugs and drug paraphernalia on his person. The Supreme Court of the United States determined that the discovery of the valid warrant constituted a sufficient intervening event that broke the casual chain that existed between the defendant's unlawful stop and the officer's discovery of drug-related evidence on his person. In rejecting the defendant's arguments, Justice Thomas, writing for the Court,[35] noted that the close proximity of the drug discovery to the illegal seizure would point toward suppression. On the other side of the argument, he cited the fact that the officer had information about the suspected drug house, so that a person leaving would have some suspicion and it was observed that the officer's illegal action was not considered outrageous or flagrant. The Court considered that the discovery of the warrant and the obtaining of the drug evidence was sufficiently attenuated or separated from the original illegality that the doctrine of attenuation should apply, and the evidence was fully admissible.

In a state case[36] that had a different result from *Utah v. Strieff* but had some similarities, an officer encountered a man he knew from prior personal interactions and who had been rumored in police circles to possess drugs. The officer had absolutely no objective facts to cite when he stopped him and patted him down on a public street. The officer felt an object that he believed was marijuana, and he reached inside the subject's pants pocket and retrieved it. The reviewing court held that the marijuana should have been suppressed because there was no separation or attenuation between the initial illegal stop of the subject and the discovery of the marijuana.

In order for the doctrine of attenuation to permit illegally obtained evidence to be introduced, a strong event or situation or a sufficient separation of time and intervening events must have occurred that has a great force and effect to break the causation chain that originally existed between the government's illegal conduct and the defendant's act of offering of incriminating evidence.

14. Exclusionary Rule Exception: The Good Faith Exception

Where police officers act in objective good faith in following the directives of a warrant, the Court has recognized the desirability of an exception to the application of the exclusionary rule. In the companion cases of *United States v. Leon*[37] and *Massachusetts v. Sheppard*,[38] the Court adopted the "good faith" exception to the exclusionary rule. The two cases involved errors made by judges in issuing legally defective search warrants wherein the mistakes were not readily apparent to police officers. Proper procedure had been followed by the officers, who were not in a position to question the legality of the warrants issued by the judicial officials. In both cases, the officers executing the warrants acted in

objective good faith. Since the purpose of the exclusionary rule was to deter illegal police conduct and not to alter judicial behavior, where police act in "good faith," the exclusionary rule cannot have its deterrent effect. In situations where the rationale of the rule is not enhanced, the reason for the remedy of exclusion disappears, and the evidence should be admitted to court. Secondarily, the Court noted that there was no evidence to suggest that judges or magistrates ignore or attempt to subvert the Fourth Amendment. The Court could perceive no basis for believing that evidence excluded pursuant to a defective warrant would have a significant deterrent effect on judicial officials. In essence, the Court held that since the exclusionary rule was originally designed to alter police conduct, courts should not use it to punish errors of judges and magistrates.

As a general rule, courts that follow the good-faith exception to the exclusionary rule do not apply it where the magistrate or judge who issued the search warrant was misled by the police officers who made the warrant application, where the judge abandoned the judicial function and clearly failed to follow the law, where the recitation of probable cause warranted no reasonable belief in probable cause, and where the warrant appeared so facially deficient that no reasonable officer could presume it was valid.[39] A federal court of appeals upheld a trial court determination that applied the good-faith exception to the exclusionary rule where the court concluded that police officers had operated in good faith. In making an investigation of a crack lab, police had conducted surveillance of a crack producer, pulled his trash from a multifamily apartment, found cocaine residue in the trash, and talked to persons who stated that the subject was "cooking up" quantities of crack. In addition, police investigated the subject's prior criminal history, which showed earlier drug convictions. The defendant contended that the officer involved in the task force should have known of the deficiencies in the affidavit, since he had been so instrumental in procuring the warrant. The trash pulls were not clearly linked to the defendant, and some of the information was stale, but the court concluded that, even though probable cause did not exist, police reliance on the warrant was objectively reasonable because the affidavit was not so lacking in indicators of probable cause that it would suggest that the officer's belief in the validity of the warrant was unreasonable. The court of appeals affirmed the trial court decision allowing the admission of the evidence; it noted that two confidential sources were used and independently corroborated, and the detective tried to obtain sufficient evidence to produce current probable cause to search. The court of appeals held that a reasonable officer would have believed that when the judge issued the particular search warrant under these facts, it was a valid warrant.[40]

In a slightly different type of case, the good-faith exception has been applied to permit property forfeiture where real property had been used to grow marijuana.[41] Under the law as it existed, police appropriately scanned the defendant's home with an infrared scanner and discovered a distinctive heat pattern consistent with cannabis cultivation. The officers used this information to procure a search warrant, the execution of which revealed a marijuana horticulture operation within the home. Subsequent to the search, the Supreme Court decided *Kyllo v. United States*, 533 U.S. 27 (2001), which held that thermal scanning of a private home by police without a warrant constituted an unreasonable search. Since the original search had been reasonably believed to be legal but was later declared illegal under the Fourth Amendment in *Kyllo*, the police could not have anticipated how the Supreme Court would rule. Civil forfeiture of the drug house to the federal government

was approved since the evidence of drug manufacturing was seized in good faith and could be used to support forfeiture.[42] In an Internet child pornography case,[43] a federal judge issued a warrant that allowed federal officers to use software to search remote servers and computers outside of the judge's jurisdiction. The federal rules of criminal procedure as they existed at the time did not allow the judge to issue such a broad warrant, but the officers were unaware of the technical flaw in the search warrant that the judge signed. When the case reached the appellate level, the defendant contended that the evidence of child pornography should have been suppressed, but the Court of Appeals found that the exclusionary rule, designed to influence police behavior, would not be applied under circumstances where a judge made the error and the police had acted in objective good faith in reliance on the warrant when they executed it. Suppression in this case would not have influenced future police behavior, so suppression was not appropriate.[44]

15. Limitations on the Exclusionary Rule: Parole Revocation Hearings

Not all legal proceedings are treated the same where the use of evidence illegally seized under the Fourth Amendment is involved because the exclusionary rule does not generally extend to proceedings other than criminal trials. In parole and probation revocation hearings, no new crimes are adjudicated; only administrative determinations of violations of conditional release are involved. In parole revocation hearings, the rule of exclusion has no application because its use would be incompatible with such hearings because of their traditionally non-adversarial posture. Additionally, since the application of the rule of exclusion would produce only marginal or only incremental extra deterrence on law enforcement officials, it does not prohibit the introduction of illegally seized evidence in all criminal proceedings or against every person in every legal situation.[45] In *Pennsylvania v. Scott*,[46] the Supreme Court held that evidence of weapons possession that had been seized from the parolee's home by parole officers who conducted a warrantless raid could be properly used in a parole revocation proceeding. The search of the home followed receipt of information which indicated that Scott had been in violation of conditions of his parole. During a parole revocation hearing, Scott complained that his rights had been violated by a warrantless search of his home, and he objected to the introduction of weapon evidence taken from his home on the theory that the search transgressed Fourth Amendment requirements. In rejecting Scott's complaint, Justice Thomas noted that the exclusionary rule was not mandated by the Constitution and that it should be applied only where the deterrence benefits outweighed the costs to society that the rule exacted when applied.[47] According to Justice Thomas, parole revocation hearings did not meet the test for applying the rule. As he noted in *Scott:*

> The deterrence benefits of the exclusionary rule would not outweigh these costs. As the Supreme Court of Pennsylvania recognized, application of the exclusionary rule to parole revocation proceedings would have little deterrent effect upon an officer who is unaware that the subject of his search is a parolee. In that situation, the officer will likely be searching for evidence of criminal conduct with an eye toward the introduction of the evidence at a criminal trial. The likelihood that illegally obtained

> evidence will be excluded from trial provides deterrence against Fourth Amendment violations, and the remote possibility that the subject is a parolee and that the evidence may be admitted at a parole revocation proceeding surely has little, if any, effect on the officer's incentives.
>
> 524 U.S. 357, 367 (1998)

Justice Thomas's opinion reflected the philosophy of refusing to apply the exclusionary rule where its deterrent effects would appear to be negligible or nonexistent. Minimal deterrent effect on officer conduct should exist in any case where the searched individual was not known by the law enforcement agent to be a parolee. The officer would most likely follow the Fourth Amendment, since he or she would want to produce a prosecutable case. In the *Scott* parole revocation situation, however, the parole officers searched the residence of Scott with full knowledge that there was no warrant and probably believed that he could make no official complaint. The sole deterrent effect in *Scott* would come from compliance with the rules under which parole officers operated.

In a recent application of *Scott*,[48] a federal prisoner appealed the revocation of his supervised release, because he was found in violation of Alabama law for his possession of marijuana, being a felon in possession of a firearm, and possession of drug paraphernalia. In the context of his revocation proceeding, he filed a motion to suppress the evidence seized during a routine traffic stop that resulted in his arrest because he said the traffic stop was illegal, as well as the search and seizure that followed. The reviewing court approved the application by the federal district court of the principles of *Pennsylvania v. Scott* that the exclusionary rule is not to be applied in such proceedings, even if there has been a Fourth Amendment violation. The court of appeals approved of the district court's reference to *Scott* when the district court noted that "[t]he Supreme Court has not extended the exclusionary rule to proceedings outside the criminal trial context."[49] The district court also observed that the probability that illegally seized evidence would be excluded from a defendant's criminal trial serves as a sufficient deterrence to law enforcement officers violating the Fourth Amendment.

16. Limitations on the Exclusionary Rule: Other Contexts

The Supreme Court has held that the exclusionary rule does not have to be applied in situations where its deterrent value would have little or no significant effect. As Justice O'Connor stated, "Where the rule's deterrent effect is likely to be marginal, or where its application offends other values central to our system of constitutional governance or the judicial process, we have declined to extend the rule to that context."[50] The application of the exclusionary rule is excused where a police officer reasonably and in good faith relied on the validity of a search warrant when the warrant was later ruled invalid for reasons unrelated to law enforcement.[51] Courts do not have to apply the rule when a defendant attempts to assert a third party's Fourth Amendment rights in an effort to exclude evidence that did not violate the defendant's personal constitutional rights.[52] Similarly, when the statute under which the officer acted was later declared unconstitutional, the officer had been acting in objective good faith, and the evidence is generally not excluded.[53] In *Illinois*

v. Krull,[54] police searched a business location pursuant to a state statute that purported to allow such warrantless searches, but the statute was later declared unconstitutional in that it ran afoul of the Fourth Amendment's warrant clause. The police had acted in objective good faith because they had no way to know that there was a constitutional infirmity with the statute under which they performed their duties. According to the Supreme Court of the United States, the evidence should have been admitted at the trial court.

Consistent with rationale of *Krull*, in a Maine traffic fatality case, a police officer ordered an emergency medical technician to perform a blood draw on one of the involved drivers, because the state law then provided in the case of vehicle fatalities that a blood sample must be taken from the drivers without regard to the use of a warrant or probable cause. This type of statute ordering or allowing a warrantless blood draw was later determined by the Supreme Court to be illegal in *Birchfield v. North Dakota*, 579 U.S. 438 (2016), because it violates the Fourth Amendment due to the lack of a probable cause warrant. Subsequent to *Birchfield*, a warrantless blood draw is considered a violation of the Fourth Amendment that would normally have its evidence excluded due to the illegality. In this particular case, in 2016, even though the Birchfield case was decided in 2013, the officer had no reason to believe that the state law was unconstitutional because there was no ruling by the top court in Maine that indicated that the statute had constitutional issues. Therefore, the police officer was operating in objective good faith because no police officer could have been expected to know or to predict how the supreme court of his state might rule in a future case. The Supreme Court of Maine determined that the evidence was properly admitted against the drinking driver.

Except for coerced confessions, a prosecutor in a criminal case may often use evidence illegally obtained to impeach a defendant without inviting the application of the exclusionary rule,[55] when a defendant has taken the stand and given testimony that is clearly inconsistent with what is known from the illegally seized evidence. This exception to evidence exclusion operates whether the violation has involved the Fourth Amendment,[56] *Miranda* warnings,[57] or many other constitutional violations. As Justice Brennan phrased the principle, "The impeachment exception to the exclusionary rule permits the prosecution in a criminal proceeding to introduce illegally obtained evidence to impeach the defendant's own testimony."[58] In a similar vein, the Fourth Amendment's exclusionary rule does not mandate suppression of evidence seized in the absence of probable cause where the erroneous finding of probable cause resulted from clerical errors of court employees.[59] The Court rejected an invitation to apply the Fourth Amendment and its exclusionary rule in a manner that would exclude grand jury consideration of testimony based on illegally seized evidence.[60]

17. Alternative Remedies to Fourth Amendment Violations: The *Bivens* Civil Suit

Under circumstances when federal police officers have conducted an alleged illegal search and/or unlawful arrest of an individual or property and that person is to be tried for a criminal offense, the exclusionary rule offers a remedy that attempts to put the aggrieved individual in the same or a similar situation as he or she would have occupied

had the illegal search not occurred. As a general rule, the prosecution loses the ability to use the evidence that was illegally discovered and may not use any evidence found incident to an unlawful arrest. However, the exclusionary rule offers no remedy to an individual who has allegedly been a victim of an illegal search and/or seizure or arrest but who never becomes a criminal defendant. Since there is no criminal case to be tried, the evidence, if any, will not be used against the wronged person, and the aggrieved individual must look to other avenues for redress of the constitutional violation of his or her rights. As was noted by John Marshall in *Marbury v. Madison*, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[61] And one could add that such protection may consist of redress in the form of a legal remedy when the law has been broken.

In *Bivens v. Six Unknown Named Agents*,[62] employees of the Federal Bureau of Narcotics illegally entered Bivens' apartment without a warrant, in the absence of probable cause, and without the use of any recognized exception under the Fourth Amendment. The federal officers arrested Bivens for alleged narcotics violations that were without foundation. The agents manacled Bivens in front of his wife and children, threatened to arrest the entire family, and completely searched the apartment. Apparently, no evidence of criminal wrongdoing was discovered. Federal agents took Bivens to the federal courthouse in Brooklyn, where he was illegally interrogated, booked, and subjected to a strip search of his person. When no criminal case had been brought against him for a period of time, Bivens brought suit for civil damages in federal court, alleging that the illegal search and seizure caused him mental suffering, humiliation, and embarrassment. The legal difficulty with Mr. Bivens' suit was that federal law did not give him a clear cause of action against the agents. Ultimately this case reached the Supreme Court of United States, which judicially created a cause of action that allowed the suit to proceed. According to Justice Brennan, part of the rationale for allowing a suit against the officers for damages for legal wrongs was not an unusual theory.

> That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.
>
> *Bivens* at 395

Following the *Bivens* case,[63] individuals against whom federal agents have conducted illegal searches and seizures possess a remedy in federal court to sue for damages based on the violation of the Fourth Amendment where the government's conduct has been outrageous and contrary to established federal law. Thus, where the exclusionary rule offers no legal remedy for alleged federal government misconduct, a direct suit against the officers may be the only remedy available. In one case,[64] a federal prisoner attempted to sue various employees of the Federal Bureau of Prisons in their official capacities. The Court of Appeal approved the prejudicial dismissal of the *Bivens* suit on the theory that the individual officers could be subject to a suit under the *Bivens* theory but that they could not be sued in their official capacities because the United States had sovereign immunity with respect to the *Bivens* claims. In 2020, in *Hernandez v. Mesa*,[65]

the parents of a child who was killed by a Border Patrol agent were prevented from successfully bringing a *Bivens* suit. The case arose after a border agent fired his weapon into Mexico at juvenile assailants, taking the life of an alleged rock-throwing child. The parents' attempt at a *Bivens* action alleging outrageous conduct by a government agent was prevented due to the fact that the Supreme Court refused to allow the suit to go forward because the Court refused to expand the *Bivens*-type suit. The Court had concerns involving the likely effect on foreign relations and because such a suit would create a risk of undermining the border security of the United States. In addition, Congress had precluded claims for injury that occurred on foreign soil. It is clear that *Bivens* suits can prove complicated to bring and even more difficult to win on the merits.

18. Limits to Use of the Exclusionary Rule: The Concept of Standing

In order to suppress evidence that has been illegally seized using the exclusionary rule, a litigant who wishes to have a judge exclude evidence seized in violation of the Fourth Amendment or other constitutional provision must demonstrate that the government has violated his or her personal expectation of privacy recognized under the Fourth Amendment or based on some other constitutional provision. As Justice Kennedy explained the concept, "Fourth Amendment rights are personal, and when a person objects to the search of a place and invokes the exclusionary rule, he or she must have the requisite connection to that place."[66] In another case, the Supreme Court noted, "It has long been the rule that a defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that his Fourth Amendment rights were violated by the challenged search or seizure."[67] In a situation where the defendant is not able to demonstrate that his or her rights were violated by a government, it is said that the defendant lacks standing to litigate the issue. Additionally, it is generally clear that no one may attempt to use the exclusionary rule to exclude evidence that the prosecution wants to introduce against a third party whose rights have not been violated.

The right of privacy sufficient to prove standing may be demonstrated by proof that the defendant had a possessory interest in the searched property, that the accused was legally occupying the premises, or that proof of possession of the seized evidence was crucial to proof of guilt. Only where the government seeks to use the evidence against the one asserting the privacy right does that individual have standing to suppress the evidence. The government must have seized the evidence from a place where the defendant personally had a right to privacy which society generally recognizes as reasonable.

Having standing does not ensure suppression of the evidence, however; it only allows that individual the opportunity to file a motion to suppress and to argue that the evidence should be excluded based on a violation of the Fourth Amendment. Assuming proof of standing can successfully be given, a trial court will permit a defendant to argue that his personal Fourth Amendment rights were violated, but the right to argue does not ensure success in suppressing the evidence.

In a leading case involving standing, *Rakas v. Illinois*,[68] the Court held that a mere guest riding in a passenger car had no expectation of privacy in the automobile, since he

did not assert that he was either an owner or a lessee of the vehicle (see Case 3.3). Since Rakas lacked a sufficient connection to the automobile, the trial court properly refused to entertain the merits of his motion to suppress on the theory that he lacked standing. The one individual who could have demonstrated standing would have been the owner, but the owner would have possessed standing to suppress evidence *only* if he or she were accused of criminal activities. The owner of the car could not attempt to suppress evidence sought to be used against a third person when the third person possessed no expectation of privacy in the motor vehicle, since Fourth Amendment rights are personal and cannot be asserted vicariously.

The *Rakas* case called into serious question the rule of automatic standing from *Jones v. United States*.[69] Under *Jones*, standing was considered automatic where the defendant had been charged with a crime involving drug possession or was legitimately on the premises (an apartment). Jones had received permission for a few days to reside the apartment of his friend, the lessee of the apartment. After officers used a warrant to search the apartment and found drugs, Jones filed a motion to suppress the evidence. The Supreme Court found that Jones was an "aggrieved person" whose rights had potentially been violated and, thus, he had standing to contest the legality of the search of his friend's apartment. Since Jones was "legitimately on the premises," he had automatic standing to contest the search. However, in *United States v. Salvucci*,[70] the Court overruled the rule of automatic standing in *Jones* by deciding that something more than "legitimately on the premises" was required to demonstrate standing. The *Salvucci* Court noted that the reason for automatic standing had ceased to exist[71] because, in the period between *Jones* and *Salvucci*, the Court had determined that a defendant could admit possession for Fourth Amendment purposes during a suppression of evidence hearing and not have that admission of possession used against him or her at a later trial for possession of the article in the event that the motion to suppress the evidence failed.[72] According to the *Rakas* Court, a prosecutor could claim that a defendant possessed the seized article criminally but did not have a sufficient possessory interest in the article to have been subjected to any Fourth Amendment violation involving the item.

Case 2.3 LEADING CASE BRIEF: DEFENDANT MUST HAVE STANDING TO SUPPRESS ILLEGALLY SEIZED EVIDENCE

Rakas v. Illinois
Supreme Court of the United States
439 U.S. 128 (1978).

CASE FACTS:

Rakas and King were convicted of armed robbery of clothing store employees. A police description of the getaway automobile alerted other officers to the fact of the robbery and escape of the alleged felons. After the automobile driven by a girlfriend and carrying Rakas as a passenger had been stopped, the subsequent search of the car revealed a box of shells in the glove box and a sawed-off rifle under the sear. Neither Rakas nor his co-defendant, King, owned the automobile, and neither ever asserted that he owned the rifle or shells seized.

The trial court refused to consider the motion to suppress the evidence seized from the car on the ground that Rakas was merely a guest passenger in the automobile of a friend and lacked legal standing to contest the constitutionality of the search because no constitutional right of his had been possibly violated. The basis for the conclusion that Rakas had asserted no Fourth Amendment expectation of privacy in the vehicle directly related to his lack of declared ownership or possession of the car, rifle, or shells.

The trial court admitted the evidence from the car against Rakas, and both he and King were convicted. The Appellate Court of Illinois affirmed the conviction. The Illinois Supreme Court refused to hear the case, and the Supreme Court granted certiorari.

LEGAL ISSUE:

Where an automobile search has been conducted and the accused made no claim to ownership or possession of the auto or the incriminating evidence within, does such a person have standing under the Fourth Amendment to contest the legality of the search?

THE COURT'S RULING:

The justices determined that neither Rakas nor King had a right that had been violated. In order to have standing under the Fourth Amendment, a person must have experienced a legally recognized deprivation of a protected right. To have an expectation of privacy, a person must own or have a right to possess the property that was subject to or the location of the alleged illegal search and seizure. In the absence of ownership or possession, no constitutional wrong could have occurred.

ESSENCE OF THE COURT'S RATIONALE:

* * *

II

Petitioners first urge us to relax or broaden the rule of standing enunciated in *Jones v. United States*, 362 U.S. 257 (1960), so that any criminal defendant at whom a search was "directed" would have standing to contest the legality of that search and object to the admission at trial of evidence obtained as a result of the search. Alternatively petitioners argue that they have standing to object to the search under *Jones* because they were "legitimately on [the] premises" at the time of the search.

The concept of standing discussed in *Jones* focuses on whether the person seeking to challenge the legality of a search as a basis for suppressing evidence was himself the "victim" of the search and seizure. *Id*., at 261. Adoption of the so-called "target" theory advanced by petitioners would, in effect, permit a defendant to assert that a violation of the Fourth Amendment rights of a third party entitled him to have evidence suppressed at his trial.

* * *

A

We decline to extend the rule of standing in Fourth Amendment cases in the manner suggested by petitioners. As we stated in *Alderman v. United*

States, 394 U.S. 165, 174 (1969), "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." [Citations omitted.] A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantee of the Fourth Amendment, *United States v. Calandra*, 414 U.S. 338, 347 (1974), it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections.

* * *

C

Here, petitioners who were passengers occupying a car which they neither owned nor leased, seek to analogize their position to that of the defendant in *Jones v. United States*. In *Jones*, petitioner was present at the time of the search of an apartment which was owned by a friend. The friend had given Jones permission to use the apartment and a key to it, with which Jones had admitted himself on the day of the search. He had a suit and shirt at the apartment and had slept there "maybe the night," but his home was elsewhere. At the time of the search, Jones was the only occupant of the apartment because the lessee was away for a period of several days. Under these circumstances, this Court stated that while one wrongfully on the premises could not move to suppress evidence obtained as a result of searching them, "anyone legitimately on premises where a search occurs may challenge its legality." Petitioners argue that their occupancy of the automobile in question was comparable to that of Jones in the apartment and that they therefore have standing to contest the legality of the search—or as we have rephrased the inquiry, that they, like Jones, had their Fourth Amendment rights violated by the search.

* * *

We think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into the place.

* * *

D

Judged by the foregoing analysis, petitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. And as we have previously indicated, the fact that they were "legitimately on [the] premises" in the sense that they were in the car with the permission of its owner is not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched. It is unnecessary for us to decide here whether the same expectations of privacy are warranted in a car as would be justified in a dwelling place in analogous circumstances. We have on numerous occasions pointed out that

cars are not to be treated identically with houses or apartments for Fourth Amendment purposes. [Citations omitted.] But here petitioners' claim is one which would fail even in an analogous situation in a dwelling place, since they made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. Like the trunk of an automobile, these are areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy.

* * *

III

The Illinois courts were therefore correct in concluding that it was unnecessary to decide whether the search of the car might have violated the rights secured to someone else by the Fourth and Fourteenth Amendments to the United States Constitution. Since it did not violate any rights of these petitioners, their judgment of conviction is affirmed.

CASE IMPORTANCE:

The rules concerning standing require that a defendant alleging a Fourth Amendment illegal search and/or seizure demonstrate that his or her constitutional rights were personally violated. A guest staying in a home has a stronger argument for standing than does a person who neither owns nor leases a motor vehicle and was only a passenger within the vehicle.

When there is some concern that a vehicle stop was not lawful, a driver and any passenger may have standing to contend that the stop violated the Fourth Amendment rights of both persons. Mr. Rakas did not contest the legality of the vehicle stop, which was a seizure of the car in which he was riding. Most likely the reason that he did not argue the validity of the stop was because, by all accounts, it was a lawful stop. In a slight refinement of standing to contest a vehicle stop by a passenger, in *Brendlin v. California*, 551 U.S. 249 (2007), an officer stopped a car in which Brendlin was riding as a passenger for no objective reason merely because the officer wanted to check its registration papers.[73] There was no belief that the automobile was being operated illegally or otherwise offended any law. At some point during the stop, the officer determined that Brendlin was a parole violator and arrested him. A search incident to arrest revealed methamphetamine paraphernalia and other evidence that resulted in charges against Brendlin for manufacturing methamphetamine. Brendlin appeared to be in a similar situation that was faced by Rakas in his case. However, Brendlin argued that his person had been illegally seized when the car was illegally stopped for no reason, but the trial court refused to suppress the evidence because it ruled that Brendlin had not been stopped merely because the police stopped the car and its driver. The California court of appeal reversed on the theory that Brendlin had been stopped and could argue about the legality of the stop. The Supreme Court of California reversed the lower court and held that suppression of the evidence was not required because a passenger is not

seized when the driver is stopped. The Supreme Court of the United States disagreed with the top California court and reversed the case once again, holding that Brendlin had standing to contest the legality of the stop of the car. The Supreme Court held that when a driver is stopped, the passenger is also seized because police would not likely allow a passenger to walk away from the car without asking the passenger some questions, especially if the officers believed that the passenger and the driver might be involved in some common enterprise. A passenger would be seized because no reasonable person in his position would believe that he was free to terminate the encounter and walk away. As the *Brendlin* Court observed

> Brendlin was seized from the moment Simeroth's car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest. It will be for the state courts to consider in the first instance whether suppression turns on any other issue.[74]

Prior cases have held that while a passenger riding in a motor vehicle may not have standing to argue about a search of the vehicle, the passenger does have standing to challenge the legality of the stop and seizure of that vehicle and his or her person.[75] Therefore, Brendlin, or someone similarly situated, has standing to argue that he was illegally stopped, seized, and personally searched by police. However, he still would not have standing under the Fourth Amendment as interpreted by the *Rakas v. Illinois* case to contest or argue that the search of the car's interior was illegal unless he owned it or leased it.

In a federal case[76] out of Minnesota that involved standing related to real property and to two vehicles, a defendant had a friend walk from another individual's assigned apartment garage while carrying a duffel bag suspected to contain drugs. Police had been informed that the defendant was a drug trafficker and had arguable probable cause to search the defendant's vehicle. The friend left the assigned garage, in which a Ranger Rover vehicle had been parked, and placed the duffel bag in the defendant's vehicle. After police tried to stop the defendant's vehicle, he led police on a high-speed chase and eventually had a crash. The defendant then fled on foot from the vehicle before police corralled him. A subsequent search of the defendant's vehicle revealed fifty-two pounds of methamphetamine in the trunk and four pounds more inside the passenger cabin. After the apartment garage and the Range Rover vehicle were searched pursuant to warrants, the defendant complained that all the searches were illegal under the Fourth Amendment. The federal district court rejected the defendant's contentions, because he had no dominion and control over the apartment garage and had no connection to the Range Rover sufficient to give him standing under the Fourth Amendment. Under *Rakas*, since he did not own or lease either the Range Rover or the garage and because he did not have any possessory interest either the apartment garage or the Range Rover motor vehicle, he had no standing to contest the searches. Additionally, when his personal motor vehicle crashed, he abandoned it and ran on foot. The general rule is that no one has any expectation of privacy or standing concerning property that one has abandoned. In this case, the federal court did not permit the defendant to argue that his motor vehicle had been searched illegally, due to his lack of standing, and all the evidence was admissible against him when the case went to trial.

Standing to argue concerning an alleged illegal search and seizure requires a significant connection to the property, at least as far as residential property is concerned. In *Minnesota v. Olson*,[77] the Supreme Court recognized the defendant's Fourth Amendment expectation of privacy and standing where Olson often stayed in part of a duplex but actually lived elsewhere. In the process of investigating a homicide, police surrounded the duplex when Olson was believed to be hiding within the structure. Without seeking permission to enter and with weapons drawn, officers illegally entered the duplex and discovered Olson hiding in a closet. Following his arrest, he made incriminating statements. The Supreme Court recognized that a person can have a legitimate expectation of privacy in the home of another so long as the person has a right to be on the premises and exhibits other indications that he or she expects privacy. *Olson* was different from the *Jones* case, referenced previously, because Olson did not have a key and had never been left alone in the duplex, while the guest in *Jones* had a key and was staying in the apartment while the regular renter was away. The Supreme Court held that Olson did have an expectation of privacy because the Court recognized that to hold that

> an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.[78]

Thus, Olson had standing to argue that the police entered the duplex where he was hiding by violating his personal Fourth Amendment rights. Having standing does not guarantee that a defendant will win a motion to suppress evidence, only that the defendant can have his or her day in court to argue the merits of the search and seizure that occurred.

Rental property generally carries an expectation of privacy sufficient to create standing. For example, motel and hotel guests generally have expectations of privacy in the rooms that they have rented from the commercial host. Since society and courts generally recognize this privacy, a renter of a motel room would have standing to contest a police search and seizure that occurred in his or her hotel or motel room, according to settled law based on an a old case that has never been overruled.[79] However, in the case of common shared areas in apartment buildings such as coin-laundry rooms that are often open to all residents, there may be no expectation of privacy. In one case in the District of Columbia,[80] a federal judge held that an apartment renter possessed no expectation of privacy in his apartment's common laundry room. The usual practice allowed all renters to use the room, and the door was often propped open, so anyone could enter, including police officers. When the renter encountered police who saw his light-colored powdered drug stash in a plastic bag on his person, they arrested him and searched incident to the arrest. The court held that he did not have any standing to argue that his expectation of privacy in the common laundry room existed.

19. Vicarious Standing Not Permitted

Following the *Salvucci* decision, where the Supreme Court overruled the rule of automatic standing in *Jones* by deciding that something more than legitimately being on the premises of a home or apartment was required for standing, a person who wishes to suppress evidence alleged to have been illegally seized must detail precisely how his or her personal Fourth Amendment rights have been violated. Generally, a defendant must be able to demonstrate a significant proprietary or possessory interest in the property in order to demonstrate sufficient standing. A person has no standing to suppress evidence where a third party's premises have been illegally searched, since that person could have possessed no legitimate expectation of privacy at a third party's home.

However, even where a proprietary or significant possessory interest has not been proven, permission to use a room may prove sufficient to enable a defendant to successfully demonstrate standing, as was noted in *Minnesota v. Olson*,[81] where the legitimate occupier of an apartment did not pay rent or have a key, but the Court decided that he possessed standing to argue the merits of the case. However, when the connection to an apartment seems merely to be of a commercial nature or an arranged accommodation with the lessee, standing to argue search and seizure issues may not exist.

The Court distinguished *Olson* from a different case, *Minnesota v. Carter*,[82] where the defendants were legitimately on the premises with the consent of the lessee but had not stayed a night and did not plan an overnight visit. In the *Carter* case, the defendants were "cutting up" and bagging cocaine in a private apartment when, pursuant to an informant's tip, a police officer observed them by looking through parted curtains and saw the occupants dividing up white powder into smaller bags. While police sought a search warrant, Carter and his associates left the premises in a car. Police officers, who had probable cause from, among other data, peering through the windows of the dwelling, stopped the vehicle. When Mr. Carter and his associate exited, police observed a black zippered pouch and a firearm. Police arrested Carter, his business associate, and another individual and also conducted a warrantless search of the apartment. The results of the search revealed cocaine powder residue and plastic baggies used to package the cocaine.

Prior to their state trial, Carter and the other defendants filed a motion to suppress all evidence obtained from the later search of the apartment and the automobile, as well as to suppress several incriminating statements made by defendants to police following their arrest. The legal theory offered by the defendants' attorney contended that the initial police observation of their drug activities through the curtain was an unreasonable search in violation of the Fourth Amendment and that all evidence obtained directly or derivatively as a result of this search was inadmissible as fruit of the poisonous tree. The trial court held that the police officer had not conducted an illegal search in connection with Carter and his accomplices by looking in the window and that since the two defendants were not overnight social guests, they had no standing to complain about a search and seizure within the apartment. When the case reached the Supreme Court of Minnesota, it reversed the lower court and held that Carter and the others had standing under the Fourth Amendment because they had a legitimate expectation of privacy, which the officer violated. Pursuant to the prosecutor's request, the Supreme Court of the United States agreed to hear Minnesota's appeal.

In an opinion written by Chief Justice Rehnquist, the Court reversed the opinion of the Supreme Court of Minnesota because it had followed a legal theory that had been obsolete for twenty years. Chief Justice Rehnquist noted that an overnight guest in a house may have a Fourth Amendment expectation of privacy but that a person legitimately on the premises for a brief time for commercial purposes does not enjoy the same expectation of privacy. According to Rehnquist, while the apartment was a dwelling place for the usual occupant, it was, for Carter and his drug-selling conspirator, simply a place to do business, which would not support a legitimate expectation of privacy under the Fourth Amendment,[83] and Carter and some of the defendants lacked any standing to argue a Fourth Amendment search issue. The occupant of the apartment would have standing by virtue of lawfully living on the premises, but the occupier could not help Carter, since there is no vicarious standing to allow the renter to suppress evidence for other individuals who were on the premises when the office looked inside.[84]

Thus, in *Olson*, the Court upheld the existence of a Fourth Amendment expectation of privacy because the defendant not only was legitimately on the premises but also had permission to spend the night, which gave him what society recognizes as some level of privacy as a social guest. In Carter's case, the defendant and his associates were merely using the premises of the occupant for commercial purposes for a brief time. Such activity was deemed quite different from being an overnight social guest in a friend's home; because of this difference, according to Chief Justice Rehnquist, Carter and his companion had no standing to even argue about a violation of privacy under the Fourth Amendment.

In addition to legitimate expectations of privacy, aggrieved parties may allege standing due to the relationship between them and the seized property. The attempt to create standing does not frequently bring success, as demonstrated by *United States v. Padilla*,[85] where members of a criminal conspiracy involved in drug trafficking attempted to allege that they had an expectation of privacy by virtue of being managers in the criminal enterprise. Law enforcement officials had seized an automobile involved in the transportation of illegal drugs at a time when the leaders of the operation were not present with the vehicle. The drug kingpins' attempt to create or allege standing where they had rented the vehicle but transferred it to other associates failed under the Fourth Amendment when they could demonstrate no personal expectation of privacy that had been violated by federal officials. In a similar and more recent case,[86] the defendant was driving a rental car and was the only person inside when it was stopped. Police arrested the defendant on an outstanding warrant and conducted a search of the motor vehicle. Since the defendant was not an authorized driver, either by the contract renter or by the rental company, he had no standing to contest the search of the car that revealed cocaine and heroin, and the drugs were properly admitted against him in court.

20. Summary

Fourth Amendment violations, as well as other constitutional illegalities, that result in illegally seized evidence may permit the person against whom the evidence is sought to be used to have it suppressed. The individual wishing to exclude the evidence from trial must be the person whose constitutional rights have been violated, and he or she

cannot suppress illegally seized evidence from use against other persons. While most evidence that is the subject of suppression is alleged to have been illegally seized by virtue of a Fourth Amendment violation, similar rules of exclusion apply to other violations of the Constitution that produce evidence. The theory of the exclusionary rule indicates that by removing the law enforcement incentive to violate the United States Constitution, and the Fourth Amendment in particular, federal and state officials will be less likely to transgress the dictates of Constitutional and statutory law because such conduct produces no prosecution benefit. In situations where the exclusionary rule does not have substantial effects of deterring law enforcement conduct, the rule is less likely to be applied. The good-faith exception, the rule of inevitable discovery, the rule of attenuation, the independent source rule, and the concept of standing are all examples of situations in which police conduct would not have been altered; for that reason, the exclusionary rule is generally not applied so as to exclude evidence from trial.

REVIEW EXERCISES AND QUESTIONS

1. For what reasons did the Supreme Court of the United States create the exclusionary rule under the Fourth Amendment?
2. Does the use of the Fourth Amendment's exclusionary rule put the government or police in a worse position or the same position as the prosecution would have been without the exclusionary rule?
3. How does the exclusionary rule help enforce the Fourth Amendment? Explain.
4. What was the "silver platter" doctrine?
5. Evidence that has been discovered by exploiting an original Fourth Amendment violation may be excluded from use at court to prove guilt. How does this derivative evidence exclusion operate?
6. What are three major exceptions to the exclusionary rule where it is not applied to exclude evidence? Explain each one.
7. Explain why every defendant who wishes to suppress evidence generally must prove the concept of standing.
8. Consider the case where a person armed with a concealed handgun was sitting in the rear seat of an automobile when police stopped the vehicle, erroneously believing that it was stolen. The vehicle had been reported stolen earlier, but the police computer properly had been updated to show that the car was no longer in the "stolen" category. The person in the back seat was removed from the vehicle and frisked, revealing the concealed handgun. Does the person in the rear seat with the handgun have the legal ability to argue that the car, owned by another, was improperly stopped due to faulty police data? Should he be able to suppress evidence of his illegal concealed weapon? See *United States v. Anderson*, 2007 U.S. Dist. LEXIS 45137 (N.D. Ohio 2007).
9. What is a *Bivens* suit? Explain how it can be a remedy for a federal violation of the Fourth Amendment.
10. The Supreme Court generally refuses to allow what is called

vicarious standing. What is vicarious standing, and why is the exclusionary rule not used in cases where someone alleges a violation of the Fourth Amendment from such a position?

1. How Would You Decide?

In the Supreme Court of the United States.

In the Commonwealth of Pennsylvania, state police stopped a rental car driven by one Terrence Byrd for a possible traffic infraction. Mr. Byrd was not the person who rented the car and was not listed as an authorized driver. A friend of his rented of the car in her name and immediately transferred possession to Mr. Byrd, who placed some of his personal belongings and forty-nine bricks of heroin in the trunk. The rental agreement indicated that if an unauthorized driver operated the vehicle, the insurance would not be valid, but the contract did not address whether a non-listed driver could have a possessory interest in the car. Once the officer recognized that Mr. Byrd had prior drug and weapons convictions, and after Byrd admitted that there was a marijuana blunt in the car, officers conducted a vehicle search and found the heroin bricks and some body armor. The officers felt that since Byrd was not an authorized driver, that meant that he had no expectation of privacy in the motor vehicle.

Officers turned the case over to federal authorities, who determined to prosecute Byrd for his alleged crimes. Both the federal district court and the Court of Appeals, Third Circuit, held that Byrd lacked an expectation of privacy in the car and therefore had no standing to contest the vehicle search or evidence seizures. Prior cases indicated that legitimately being on the premises, by itself, was insufficient to grant an expectation of privacy and standing, but in this situation, the defendant had not stolen the car and did have permission to use it from the one who rented it in New Jersey. In privacy interests, when one has the right to exclude others from being on the premises, that points toward an expectation of privacy, and Byrd had the ability to prevent other people from entering the car, since he was in sole control. The government cited an older case, *Rakas v. Illinois*, 439 U.S. 128 (1978), where the court had indicated that if one were a passenger in a car and did not own or lease it, the passenger had no expectation of privacy in the car itself. But Byrd was a sole occupant/driver, so he felt his case was different and he should be in a better position regarding the Fourth Amendment than a car thief, who would have no expectation of privacy. An older case, *Minnesota v. Carter*, 525 U.S. 83 (1998), held that merely being lawfully on the premises was not alone sufficient to create an expectation of privacy and standing. The federal district court and the Court of Appeals for the Third Circuit found against Mr. Byrd. He appealed to the Supreme Court, which agreed to hear his case.

How would you rule concerning whether a contractually unauthorized driver in complete control of a car should have an expectation of privacy and standing under the Fourth Amendment when the car had been rented by a different person who was not present?

The Court's Holding:

[The Supreme Court of the United States granted certiorari to address a conflict between Courts of Appeals over whether an unauthorized driver has any reasonable

expectation of privacy in a rental car. The court reaffirmed that there is a diminished expectation of privacy in automobiles, which allows officers to search with probable cause even in the absence of a warrant. It also noted that being legitimately on the premises might be a factor pointing toward an expectation of privacy, but that factor alone would generally be insufficient under the Fourth Amendment to grant standing.]

Justice Kennedy delivered the opinion of the Court.

* * *

Although the Court has not set forth a single metric or exhaustive list of considerations to resolve the circumstances in which a person can be said to have a reasonable expectation of privacy, it has explained that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas*, 439 U. S., at 144, n. 12, 99 S. Ct. 421, 58 L. Ed. 2d 387. The two concepts in cases like this one are often linked. "One of the main rights attaching to property is the right to exclude others," and, in the main, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." Ibid. (citing 2 W. Blackstone, Commentaries on the Laws of England, ch. 1). This general property-based concept guides resolution of this case.

* * *

Here, the Government contends that drivers who are not listed on rental agreements always lack an expectation of privacy in the automobile based on the rental company's lack of authorization alone. This per se rule rests on too restrictive a view of the Fourth Amendment's protections. Byrd, by contrast, contends that the sole occupant of a rental car always has an expectation of privacy in it based on mere possession and control. There is more to recommend Byrd's proposed rule than the Government's; but, without qualification, it would include within its ambit thieves and others who, not least because of their lack of any property-based justification, would not have a reasonable expectation of privacy.

* * *

[The Court noted that the lower courts misread what the contract provisions indicated.]

Putting the Government's misreading of the contract aside, there may be countless innocuous reasons why an unauthorized driver might get behind the wheel of a rental car and drive it—perhaps the renter is drowsy or inebriated and the two think it safer for the friend to drive them to their destination. True, this constitutes a breach of the rental agreement, and perhaps a serious one, but the Government fails to explain what bearing this breach of contract, standing alone, has on expectations of privacy in the car. Stated in different terms, for Fourth Amendment purposes there is no meaningful difference between the authorized-driver provision and the other provisions the Government agrees do not eliminate an expectation of privacy, all of which concern risk allocation between

private parties—violators might pay additional fees, lose insurance coverage, or assume liability for damage resulting from the breach. But that risk allocation has little to do with whether one would have a reasonable expectation of privacy in the rental car if, for example, he or she otherwise has lawful possession of and control over the car.

* * *

The central inquiry at this point turns on the concept of lawful possession, and this is where an important qualification of Byrd's proposed rule comes into play. *Rakas* [*v. Illinois*] makes clear that " 'wrongful' presence at the scene of a search would not enable a defendant to object to the legality of the search." 439 U. S., at 141, n. 9, 99 S. Ct. 421, 58 L. Ed. 2d 387. "A burglar plying his trade in a summer cabin during the off season," for example, "may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'" Id., at 143, n. 12, 99 S. Ct. 421, 58 L. Ed. 2d 387. Likewise, "a person present in a stolen automobile at the time of the search may [not] object to the lawfulness of the search of the automobile." Id., at 141, n. 9, 99 S. Ct. 421, 58 L. Ed. 2d 387. No matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car.

* * *

Though new, the fact pattern here continues a well-traveled path in this Court's Fourth Amendment jurisprudence. Those cases support the proposition, and the Court now holds, that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy. [He would have standing to argue Fourth Amendment issues, as a general rule.] The Court leaves for remand two of the Government's arguments: that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief; and that probable cause justified the search in any event. The Court of Appeals has discretion as to the order in which these questions are best addressed.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

See *Byrd v. United States*, ___ U.S. ___, 138 S.Ct. 1518, 200 L.Ed.2d 805, 2018 U.S. LEXIS 2803 (2018).

2. How Would You Decide?

In the Supreme Court of Pennsylvania.

A Pennsylvania trial court ordered suppression of a firearm seized by police from another person's car that the government wanted to introduce against the defendant, Millner. The defendant contended that the police lacked probable cause to conduct a search of the defendant's person and should not have conducted a search of the automobile in which police found the gun. Police contend that they saw Millner put the gun in the back of someone else's car. The trial court also ordered suppression of drugs taken

from Millner's person because it believed that a limited frisk might have been proper, and the complete search of Millner's person violated his Fourth Amendment rights. The Commonwealth did not contest the suppression of the drugs taken from Millner's person but argued that Millner had no standing to complain about the gun search in the vehicle of another. The Commonwealth's uncontradicted evidence demonstrated that the vehicle was registered to someone else and that no key, papers, or other identification were found which would have indicated that Millner had any interest in the car. The suppression court found that the police searched the car without a warrant, and because the defendant had no obligation to inform police that it was or was not his car, the pistol should be suppressed from the trial. Therefore, the trial court ordered suppression of the gun found in the car of another, and the Commonwealth appealed.

How would you rule on the defendant's contention that the gun found in the car of another person during a warrantless police search should not be introduced against him because police searched the car illegally?

The Court's Holding:

Pennsylvania's top court believed that the Commonwealth contended correctly that no evidence in the lower court showed that Millner had any reasonable expectation of privacy in the car where police recovered the 9-millimeter pistol. Partly because Millner never claimed ownership of the car or of the pistol, the Supreme Court observed that appellee Millner

> produced no evidence that he owned the vehicle, nor did he produce evidence which remotely suggested that he had any other connection to the vehicle which could form the basis for so much as a subjective expectation of privacy. In addition, there was nothing in the Commonwealth's evidence upon which appellee could rely to prove that he had an expectation of privacy in the Cadillac in question. The police testimony established that nothing was found in the vehicle, on appellee's person, or through a record search, to suggest any lawful connection to the car. Finally, the fact that police testified to seeing appellee put the firearm in the vehicle—a fact appellee denied—alone does not establish both a subjective and reasonable expectation of privacy in a vehicle to which he had no other legitimate connection.[87]

In addressing the standing issue under the Fourth Amendment and Pennsylvania's companion constitutional section, the Supreme Court of Pennsylvania noted

> In short, appellee failed to establish a subjective expectation of privacy in this particular vehicle, much less one that society would accept as reasonable, such that the warrantless police entry implicated his own personal privacy rights. In such a circumstance, there was no need for the Commonwealth to establish the lawfulness of the police entry into the vehicle and the seizure of the firearm, and there was no basis upon which the lower courts could properly order its suppression.[88]

Based on these findings, the Supreme Court of Pennsylvania remanded the case to the trial court to admit the pistol against the defendant-appellee Millner at his eventual trial. See *Commonwealth v. Millner*, 585 Pa. 237, 888 A.2d 680 (2005).

Notes

1. 277 U.S. 438, 485 (1928).
2. 367 U.S. 643, 659 (1961).
3. See *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971), where the Court created a civil cause of action against federal employees who acted illegally in searching an apartment.
4. See Chief Justice Berger's dissent in *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 421 (1971), where he proposed a variety of remedies for Fourth Amendment violations while allowing the use of the illegally seized evidence against the person whose rights had been violated.
5. *Boyd v. United States,* 116 U.S. 616, 625 (1886).
6. See *Boyd v. United States,* 116 U.S. 616 (1886).
7. *Boyd* at 625, 626.
8. The Fourth Amendment was originally intended by its Framers and adopters to limit the federal government and was not designed to have any application so as to affect state law enforcement practice. The Fourth Amendment was incorporated into the Due Process Clause of the Fourteenth Amendment in *Mapp v. Ohio,* 367 U.S. 643 (1961).
9. This assumes that the evidence illegally seized by federal agents under the Fourth Amendment would tend to support a violation of state law.
10. See *Boyd v. United States,* 116 U.S. 616 (1886).
11. Illegally obtained evidence may be used for impeachment purposes where the defendant takes the witness stand and offers evidence contradictory to known but illegally seized evidence. In *Walder v. United States,* 347 U.S. 62 (1954), heroin had been illegally seized from the defendant, who denied that he ever had possession of or sold drugs. The *Walder* Court approved the use for impeachment purposes of the evidence seized illegally in violation of the defendant's Fourth Amendment rights. Similarly, in *Harris v. New York,* 401 U.S. 222 (1971), the Court approved the use of a statement illegally taken in violation of *Miranda* principles to be used to impeach a defendant who told a story different from the version offered in violation of *Miranda*.
12. *Oregon v. Elstad,* 470 U.S. 298 (1985).
13. *Withrow v. Williams,* 507 U.S. 680, 686 (1993).
14. See *United States v. Verdugo-Urquidez,* 494 U.S. 259 (1990).
15. *Elkins v. United States,* 364 U.S. 206 (1960).
16. *State v. Martinez*, 2 Wn. App. 2d 55, 64, 408 P. 3d 721, 728 (2018). See also *State v. Vance*, 9 Wn. App. 3d 357, 444 P. 3d 1214, 2019 Wash. App. LEXIS 1724 (2019).
17. 367 U.S. 643 (1961).
18. 371 U.S. 471 (1963).
19. *Id*.
20. 468 U.S. 796 (1984).
21. 487 U.S. 533 (1988).
22. 467 U.S. 431 (1984).
23. See *Silverthorne Lumber Co., Inc. v. United States,* 251 U.S. 385 (1920).
24. 487 U.S. 533 (1988).
25. 468 U.S. 796 (1984).
26. *United States v. Soto-Peguero*, 978 F.3d. 13, 2020 U.S. App. LEXIS 32885 (2020).
27. It could be argued here that there existed exigent circumstances for the officers to enter a location from which gunfire had been initiated and could observe evidence when they were lawfully in the defendant's apartment.
28. See *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276, 1990 U.S. LEXIS 1176 (1990). (Court approved of officers, in a cursory manner, sweeping the basement of a home which they had lawfully entered to dispel any reasonable danger that other persons on the premises might pose to the officers.)
29. See *Olmeda v. Commonwealth*, 601 S.W.3d 183, 2020 Ky. App. LEXIS 40 (2020).
30. *Id*. at 187.

31. 308 U.S. 338 (1939).
32. They seemed unaware that they should have been discussing a plea bargain with the prosecutor rather than the police.
33. The *Wong Sun* Court did exclude Toy's confession because of evidentiary reasons unrelated to the Fourth Amendment attenuation issue in the case. The doctrine of attenuation would permit the admission of Toy's confession, but the rule that a confession must be corroborated by some other evidence cannot be met because the only other evidence to corroborate Toy's confession was the heroin, which had been excluded. 371 U.S. 471 (1963).
34. 579 U.S. 232___, 136 S.Ct. 2056, 195 L.Ed.2d 400, 2016 U.S. LEXIS 3926 (2016).
35. *Id*. at 2064.
36. *State v. Taylor*, 2020 Kan. App. Unpub. LEXIS 730 (2020).
37. 468 U.S. 897 (1984).
38. 468 U.S. 981 (1984).
39. *United States v. Martin,* 297 F.3d 1308, 1313 (2002).
40. *United States v. Robinson,* 2003 U.S. App. LEXIS 13770 (2003).
41. *United States v. Real Property located at 15324 County Highway E*., 332 F.3d 1070, 2003 U.S. App. LEXIS 12261 (7th Cir. 2003).
42. *Id*. at 1076.
43. *United States v. Moorehead*, 912 F.3d 963, 2019 U.S. App. 639 (6th Cir. 2019).
44. *Id*. at 967.
45. The exclusionary rule is not applied in situations involving trial witness impeachment, grand jury proceedings, or deportation proceedings, as well as parole and probation revocation hearings.
46. 524 U.S. 357, 118 S.Ct. 2014, 141 L.Ed.2d 344, 1998 U.S. LEXIS 4037 (1998).
47. *Scott* at 363.
48. *United States v. Hill*, 946 F.3d 1239, 2020 U.S. App. LEXIS 51 (11th Cir. 2020).
49. *Id*. at 1242.
50. *Duckworth v. Eagan,* 492 U.S. 195, 208 (1989).
51. *United States v. Leon,* 468 U.S. 897, 920–922 (1984).
52. *Alderman v. United States,* 394 U.S. 165, 174–175 (1969).
53. 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed2d 364, 1987 U.S. LEXIS 1061 (1987).
54. *Id*.
55. *Walder v. United States,* 347 U.S. 62, 65 (1954). A similar principle allows the impeachment of statements taken in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966).
56. See *United States v. Havens*, 446 U.S. 620 (1980) and *James v. Illinois*, 493 U.S. 307 (1990).
57. See *Harris v. New York*, 401 U.S. 222 (1971).
58. *James v. Illinois,* 493 U.S. 307, 308–309 (1990).
59. In *Arizona v. Evans,* 514 U.S. 1 (1995), a police officer conducted a search following an arrest when the arrest involved "bad" probable cause due to the failure of a clerk to properly remove a warrant notice from a computer system used by police.
60. *United States v. Calandra,* 414 U.S. 338, 349 (1974).
61. 5 U.S. 137, 163, 2 L.Ed. 60, 69, 1803 U.S. LEXIS 353 (1803).
62. 403 U.S. 388 (1971).
63. In *Correctional Services Corporation v. Malesko,* 534 U.S. 61 (2001), the Court refused to extend *Bivens* to cover the conduct of a private halfway house contractor who was running the facility for the federal government. Essentially, there were other remedies for the inmate, and a suit would not deter federal officers in their conduct. In addition, the Court noted that it had extended the reach and rationale of *Bivens* on two occasions. In both cases, the Court extended the *Bivens* rationale to provide a cause of action against individual governmental officers who had allegedly acted unconstitutionally. In *Carlson v. Green,* 446 U.S. 14 (1980), the Court permitted the survivor of a deceased federal prisoner to maintain a civil damage suit against federal officers due to unconstitutional conduct, and it allowed a suit where there was no alternative remedy at law for a congressional employee who had allegedly been the victim of discrimination by a United States congressman in *Davis v. Passman,* 442 U.S. 228 (1971).
64. See *Webb v. Desan, Warden*, 2007 U.S. App. LEXIS 24005 (3rd Cir. 2007).

65. ___ U.S. ___, 206 L.Ed.2d 29, 2020 U.S. LEXIS 1361 (2020). (Agent Mesa contended that children were pelting him with rocks at the time he was engaged in his official duties on the United States side of the Mexican border.)
66. *Minnesota v. Carter,* 525 U.S. 83, 100 (1998), Justice Kennedy, concurring.
67. *United States v. Padilla,* 508 U.S. 77 (1993).
68. 439 U.S. 128 (1978).
69. 362 U.S. 257 (1960).
70. 448 U.S. 83 (1980).
71. At the time of *Jones v. United States*, 362 U.S. 257 (1960), if a person admitted possession for purposes of filing a motion to suppress in federal court and lost the motion, the individual was deemed to have admitted possessing the object that was the subject of the suppression hearing. This same result could occur in state courts after *Mapp v. Ohio*, 367 U.S. 643 (1961). The criticism was that a prosecutor should not be permitted to allege that a defendant possessed an object criminally while at the same time arguing that he or she did not possess the object for the purpose of claiming the constitutional protections of the Fourth Amendment. This problem was eliminated by the Court's decision in *Simmons v. United States*, 390 U.S. 377 (1968).
72. See *Simmons v. United States,* 390 U.S. 377 (1968).
73. This type of justification for a traffic stop is presently illegal and runs contrary to *Delaware v. Prouse*, 440 U.S. 648 (1979), where the Supreme Court held that a police officer may not lawfully stop a motor vehicle in the absence of reasonable suspicion that criminal activity may be afoot and cannot stop a vehicle merely to check a driver's license, insurance card, or vehicle registration.
74. *Brendlin v. California*, 127 S.Ct. 2400 (2007).
75. *United States v. Mosley*, 454 F.3d 249, 253 (3d Cir. 2006).
76. See *United States v. Espinoza-Reynosa*, 2020 U.S. Dist. LEXIS 34427 (D. Minn. 2020).
77. 495 U.S. 91 (1990).
78. *Ibid*.
79. See *Stoner v. California,* 376 U.S. 483 (1964).
80. See *United States v. Leake*, 2020 U.S. Dist. LEXIS 112934 (D.D.C. 2020).
81. 495 U.S. 91 (1990).
82. 525 U.S. 83 (1998).
83. According to Chief Justice Rehnquist, the purely commercial nature of the transaction, the relatively short period of time on the premises, and the lack of any previous connection between Carter and his friend and the householder all lead us to conclude that Carter's situation is closer to that of one simply permitted on the premises. The Court held that any search that may have occurred did not violate their Fourth Amendment rights. 525 U.S. 83, 91 (1998).
84. *Steagald v. United States*, 451 U.S. 204, 219, 101 S.Ct. 1642, 1651, 68 L.Ed2d 38, 50, 1981 U.S. LEXIS 89 (1981). Similarly, vicarious standing does not exist in the context of a Fifth Amendment privilege where a prosecution witness waived his self-incrimination protections and testified against a defendant. The accused lacked any legal standing to either assert the privilege on behalf of the witness or to claim it on behalf of the witness to prevent the witness from incriminating himself. See *State v. Gaston*, 201 Conn. App. 276, 2020 Conn. App. LEXIS 330 (2020).
85. 508 U.S. 77 (1993).
86. *United States v. Thomas*, 447 F3d. 1191, 2006 U.S. App. LEXIS 12178 (9th Cir. 2006).
87. *Commonwealth v. Millner*, 585 Pa. 237, 257, 888 A.2d 680, 692, 2005 Pa. LEXIS 3059 (2005).
88. *Id*. at 258, 692.

The Concept of Stop and Frisk

3

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Learning Objectives

1. Understand the concept of a stop and frisk and be able to explain the legal rationale of allowing stops and frisks on a lower standard than probable cause to search.
2. Comprehend the *Terry v. Ohio* legal standard that regulates every stop and frisk and give a clear example of a valid stop and frisk.
3. Be able to explain why a stop and frisk may be beneficial to law enforcement officers.
4. Recognize why every lawful stop may not allow a frisk of the individual and be able to generate a hypothetical situation where a stop is lawful but a frisk would be illegal.
5. Evaluate the significance of unexplained flight from a police officer and explain why an officer may have the legal right to stop a fleeing person under such circumstances.
6. Trace the evolution of the stop and frisk concept from its beginning involving brief stops of people to stops of motor vehicles to the development of the drug courier and other profiles.
7. Articulate the "check list" that traces the steps that an officer should follow under the *Terry* standard prior to conducting a "pat-down" search.
8. Describe a hypothetical fact pattern that might suggest that the plain feel doctrine would have application to permit a deeper search than a mere frisk.
9. Explain how the stop and frisk concept evolved beyond its original beginning involving reasonable suspicion to encounters with persons for whom police have no individualized suspicion.

Chapter Outline

KEY TERMS

1. Drug courier profile
2. Frisk
3. Limitations on scope
4. Plain feel doctrine
5. Reasonable basis to suspect
6. Reasonable suspicion
7. Scope of frisk
8. Stop
9. Stop and identify
10. Time limitations on detention
11. Unexplained flight
12. Weapons frisk of automobile

1. Introduction to Stop and Frisk

The Fourth Amendment[1] and related case law regulate when a law enforcement official may briefly detain a person whose conduct may deserve some attention but which may not rise to the level of probable cause to arrest or to search but may be unclear upon the officer's initial observation. Historically, a person's encounter with a criminal justice official and brief questioning involve the Fourth Amendment at any time when the subject is not free to walk away. The case law appears to recognize three types of police-citizen contact. The first situation involves the officer merely exchanging pleasantries with a person, with neither one being under any obligation to converse with the other and each free to go on his or her way. Since no seizure has occurred, the Fourth Amendment has no application to the encounter. In a second situation, where the facts suggest that the officer has an obligation to make some investigation of conduct that could be criminal, a stop and (where the facts indicate some reasonable fear that the individual may be armed) a frisk may be appropriate. In this situation, the jurisprudence of the Fourth Amendment regulates the conduct of an officer who has momentarily made a seizure of a person. The third situation involves an arrest in which the individual comes under the total physical control of the officer following the development of probable cause to arrest.

2. Stop and Frisk: The *Terry* Legal Standard

As a legal concept, the stop and frisk doctrine constitutes the least intrusive search that an officer may be permitted to make of a person for whom the officer has a reasonable basis to suspect criminality. The stop allows a cursory and limited investigation sufficient to determine whether additional steps are appropriate. The frisk, when allowed, permits a police officer to determine whether a person poses a danger to the officer or to other persons by discerning whether the individual is armed with some sort of weapon.

The concept involves several steps, each one dependent on the outcome of the prior step, until the person may be initially searched in a limited fashion by a pat-down of the outer garments. As a general rule, the officer must possess a reasonable suspicion that a person may be armed. This suspicion must be an objectively reasonable one judged by the surrounding facts and circumstances. This reasonable suspicion may be negated by an objectively credible explanation offered by the person for his or her "unusual conduct." A stop, based on reasonable suspicion, and sometimes a later frisk, involves situations that do not certainly appear criminal but that deserve some further scrutiny by law enforcement to determine whether criminality exists.

The Fourth Amendment prohibition against unreasonable searches and seizures, as incorporated into the Fourteenth Amendment's Due Process Clause, has been determined to regulate the brief police-citizen encounters in stop and frisk situations; see *Terry v. Ohio*, 392 U.S. 1 (1968) (see Case 3.1). When a police officer restrains an individual from walking away, a Fourth Amendment seizure has occurred, and, to be lawful, the manner of seizure, its duration, and any subsequent search must be "reasonable." The police officer does not need traditional probable cause for arrest in order to briefly detain a suspicious person, merely a reasonable suspicion that criminal activity might be afoot. The Supreme Court of the United States held that this limited seizure of the person does not require a warrant and that, similarly, where reasonable, a limited search does not necessitate a warrant.

The officer who observes unusual conduct, which suggests that criminal activity may be happening or has just occurred, may detain the person involved and inquire into what he or she has observed. If the explanation does not resolve the concern, and if the officer has reason to fear that the person may be armed, it is permissible to make a pat-down of the individual's outer clothing. According to *Terry* and its progeny, the officer is permitted to look for weapons by searching the outer garments of the detainee. If no "weapon-like lump" is discovered and no other evidence of criminality comes to the knowledge of the officer, the individual must be allowed to continue to his or her destination.

Case 3.1 LEADING CASE BRIEF: STOPS OF SUSPICIOUS INDIVIDUALS CAN BE BASED ON LESS THAN PROBABLE CAUSE

Terry v. Ohio
Supreme Court of the United States
392 U.S. 1 (1968).

CASE FACTS:

While on routine, non-uniformed patrol, detective Martin McFadden of the Cleveland Police Department observed two men acting in a strange fashion. One of the men under McFadden's view repeatedly walked partway down one block, peered in a store window, walked a bit further, returned to look in the window a second time, and then retraced his steps to confer with the unknown subject. The second man repeated the conduct of the first and then returned for a conference. This conduct repeated several times until a third man joined them. When the third man left the company

of the first two men, they repeated their unusual conduct. Detective McFadden observed all of this activity to the point that it aroused his suspicions.

Officer McFadden, based on his thirty-five years as a police detective, believed that the men were "casing a job, a stick-up" and that the conduct warranted further investigation. When the third man rejoined the first two, McFadden approached the three men, made his identity known to the men, and asked them for their names. When the three mumbled inaudible replies, McFadden grabbed Terry and spun him around so that McFadden could view Chilton and the other man while he conducted a limited search of Terry's outer garments.

The pat-down search revealed to McFadden the fact that Terry possessed a pistol in an inside pocket of an overcoat. Prior to removing Terry's overcoat, McFadden patted only the outer garments and did not reach inside until he felt the "weapon-like" lump. He ordered all three men inside the nearest store, where a further pat-down of the three produced one more weapon.

After he had been charged with carrying a concealed weapon and prior to a trial on the merits, Terry filed a motion to suppress the evidence uncovered by McFadden. He alleged that Officer McFadden had no probable cause for arrest and, therefore, the search of his person exceeded the bounds permitted by the Fourth Amendment as applied to the states. The trial court agreed with Terry that probable cause for arrest did not exist but held the opinion that Detective McFadden had the right to pat down the men for his own protection. The trial court held that, under the circumstances, such conduct was reasonable under the Fourth Amendment and refused to suppress the weapon evidence from trial.

Subsequent to the trial court's denial of Terry's pretrial motion to suppress the revolver, Terry elected a bench trial, and he was convicted. The Court of Appeals affirmed and the Supreme Court of Ohio dismissed their appeal on the ground that it involved no "substantial constitutional question." The Supreme Court of the United States granted Terry's petition for certiorari.

LEGAL ISSUE:

Where a police officer has observed unusual conduct which leads him to reasonably conclude that criminal activity might be afoot or has occurred and that the person with whom he is dealing may be armed and dangerous, and where, during the course of the encounter, he identified himself as an officer, and where his fear for his safety remains, may the officer conduct a limited pat-down of the subject's outer clothing in order to discover weapons?

THE COURT'S RULING:

The Supreme Court balanced the need for an officer to determine whether a suspicious person might be armed against the Fourth Amendment expectation of privacy and decided that a pat-down of outer garments of a subject may be appropriate where objective facts are present.

ESSENCE OF THE COURT'S RATIONALE:

Unquestionably petitioner was entitled to the protection of the Fourth

Amendment as he walked down the streets in Cleveland. The question is whether in all the circumstances of this on-the-street encounter, his right to personal security was violated by an unreasonable search and seizure.

We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court. . . .

On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. For this purpose it is urged that distinctions should be made between a "stop" and an "arrest" (or a "seizure" of a person), and between a "frisk" and a "search." Thus, it is argued, the police should be allowed to "stop" a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion that the person may be armed, the police should have the power to "frisk" him for weapons. If the "stop" and the "frisk" give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal "arrest," and a full incident "search" of the person. This scene is justified in part upon the notion that a "stop" and a "frisk" amount to a mere "minor inconvenience and petty indignity," which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer's suspicion.

On the other side the argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment. It is contended with some force that there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest. The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution. Acquiescence by the court in the compulsion inherent in the field interrogation practices at issue here, it is urged, would constitute an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in "the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369 (1948). This, it is argued, can only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities.

* * *

In this case there can be no question, then, that Officer McFadden "seized" petitioner and subjected him to a "search" of his clothing. We must decide whether at that point it was reasonable for Officer McFadden to have interfered

with petitioner's personal security as he did. And in determining whether the seizure and search were "unreasonable" our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

* * *

The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade. . . [the third gentleman's] person beyond the outer surfaces of his clothes, since he discovered nothing in his pat down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.

* * *

We conclude that the revolver seized from Terry was properly admitted in evidence against him. At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe the petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous; where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries; and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may be properly introduced in evidence against the person from whom they were taken.

Affirmed.

CASE IMPORTANCE:

Consistent with the Fourth Amendment, police officers may stop

suspicious persons and ask brief questions, and if suspicions remain that a person might be armed, police may conduct limited warrantless searches. The result keeps police officers more secure and protects the public and the rights of individuals by without violating the Constitution.

Prior to *Terry v. Ohio*, police routinely conducted brief investigative encounters with citizens where police observed facts indicating suspicious circumstances. The location of the subject in a high-crime area late at night,[2] the experience of the police officer,[3] attempts at flight upon sight of the officer,[4] and acting strangely[5] are all factors that may be used by an officer to conclude that a brief investigation is warranted. Some of these unusual situations prove readily explainable by the persons involved, but other police-citizen encounters dictate additional scrutiny. A brief conversation and sometimes a limited search of the person may dispel any legitimate curiosity, while other *Terry* searches produce evidence sufficient for probable cause for arrest. Out of the Court's decision in *Terry* emerged definite and generally clear guidelines for the conduct of stop and frisk searches. Following *Terry*, courts have adapted the stop and frisk rationale to situations involving automobiles and airport detentions.

3. Facts Indicating Unusual Conduct

The *Terry* Court held that wherever and whenever an officer observes unusual conduct that, in light of the officer's experience, leads him or her to reasonably conclude, based upon articulated facts, that criminal activity might be afoot, the officer is permitted to lawfully stop the person and make an inquiry. A reasonable level of force may be used to effectuate the stop if the individual proves resistant. If not in uniform, the law enforcement officer must convey to the subject that the person conducting the stop is a police officer. The subject may be questioned briefly concerning the unusual conduct; if the explanation proves unreasonable, and where the officer reasonably believes the person is armed and dangerous, he or she may conduct a limited search of the outer clothing. This search is intended to protect the officer and those in the immediate vicinity from danger or harm.

Chief Justice Warren, writing for the majority, stated the Court's essential holding in *Terry:*

> We merely hold today that, where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where, in the course of investigating this behavior, he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.
>
> 392 U.S. 1, 30

The *Terry* Court determined that a stop and frisk can be legitimately conducted on less evidence than would be required for probable cause for arrest or for a traditional search of a house or motor vehicle. Consistent with the reasonableness requirement of the Fourth Amendment, the search is restricted to tactics designed to discover weapons. Even though a stop and frisk requires only "reasonable suspicion" as its justification, in situations where the pat-down reveals a lump or bulge that could reasonably be construed as a weapon, the officer may reach inside the clothing. While some lumps within clothing do not lend themselves to quick determination, others clearly cannot be construed as weapons or contraband.

In a refinement of *Terry*, in *Minnesota v. Dickerson*, 508 U.S. 366 (1993), the Court held that a police officer cannot manipulate an object (crack cocaine) from outside a suspect's pants pocket to discern the identity of the pocket's contents. In *Dickerson*, the officer never entertained the thought that the lump was a weapon and did not immediately recognize it as rock cocaine. As a general rule, where the protective search goes beyond what is necessary to determine whether the suspect is armed, the search cannot be valid under *Terry*, and its fruits should be suppressed.[6] Once an officer intrudes into a pocket, an object may clearly not be a weapon and the officer should not remove it, unless its feel clearly indicates criminality.

In a case that was consistent logically with *Minnesota v. Dickerson*, in *People v. White*,[7] a Chicago police officer heard someone yell profanity as he rode past a Chicago Transit Authority station and when he looked up at the platform, he observed the defendant staring at him. Two officers approached the defendant to question him about his behavior, and the defendant refused to engage the officer verbally or to remove his hands from his pockets. Given the officer's experience, they might have possessed a reasonable belief that the defendant was possibly armed. One officer initiated a protective pat-down of the defendant. During this operation, the officer felt an object that could have been the barrel of a gun in the defendant's pocket, so he reached into the defendant's pocket and wrapped his hand around the object and quickly pulled it from the pocket. The officer determined that it was a pill bottle and not a weapon. In holding that the pat-down exceeded the scope of a *Terry* frisk, the reviewing court determined that the moment the officer's hand entered into the pocket and wrapped around a plastic pill bottle, no reasonable officer would have thought it was the barrel of the gun, and if he thought it was the barrel of the gun, he would have removed it more carefully, instead of hastily pulling it out. The only reason, the officer should remove the pill bottle was if its incriminating nature became immediately apparent, based on the plain feel of the object. Here the officer felt the plastic pill bottle and knew it was not a gun, nor was it clearly contraband, and he should not have removed it. The reviewing court held that the illegal drugs in the bottle should have been suppressed from use as evidence and reversed the lower court.

In a companion case to *Terry, Sibron v. New York*,[8] where the facts were held not to be sufficient to allow a frisk, the Court held that evidence obtained from the frisk had been obtained in violation of the Fourth Amendment and should have been suppressed. In *Sibron*, which had facts possessing some similarity to those in *Terry*, a uniformed police officer observed Sibron from four o'clock in the afternoon until midnight. Sibron was observed conversing with known narcotic addicts during the period, but the officer

did not observe any transfer or sale of drugs involving Sibron or see anything approaching illegality.

Late in the evening, Sibron entered a restaurant. The officer observed Sibron speak with three more known addicts inside the restaurant. Once again, nothing was overheard, and nothing was seen to pass between Sibron and the addicts. Sibron sat down and ordered pie and coffee, and, as he was eating, the officer approached him and told him to come outside. Once outside, the officer said to Sibron, "You know what I am after." According to the officer, Sibron "mumbled something and reached into his pocket." At the same time the officer put his hand into the same pocket, and together they removed several glassine envelopes containing heroin. At no time did the officer state that he was fearful of Mr. Sibron or believed that Sibron might be armed and dangerous.

When Sibron's case reached the Supreme Court of the United States, Sibron prevailed with his contention that the officer's search of his person was unreasonable under the circumstances. The distinction between the *Terry* case and Sibron's situation turns on the issue of whether the officer could have developed a reasonable basis to suspect Sibron of criminal activity and to have concluded that Sibron might be armed and dangerous. No evidence pointed to any reasonable suspicion of criminal activity by Sibron, there existed no reason to believe that he was armed, and the officer never suggested that he feared Sibron. Therefore, the search by the officer was illegal under the Fourth Amendment, and the evidence of heroin possession should have been suppressed from his trial.

In order to conduct a valid *Terry* stop, the officer must possess objective and articulable facts that create a reasonable basis to suspect criminal activity in the mind of the officer. These facts may be derived from the officer's personal observation, from informant information, from a dispatcher's message, or from a combination of sources. In *Terry v. Ohio*, the police detective observed two men apparently "casing" a store by repeatedly walking past the store window and conferring with each other. This conduct demanded some inquiry by the detective and allowed him to briefly stop the two men for questioning. Personal observation of furtive and evasive behavior by a passenger following a routine traffic stop or when a person attempts to avoid officers can create a reasonable basis to suspect criminal behavior. According to the federal Fifth Circuit,[9] a *Terry* frisk was appropriate when the officers arrived at a known drug house, where they had made prior arrests, to serve an arrest warrant for a female and a male exited a car parked in the driveway. In meeting the *Terry* standard, the court noted that the subject became evasive as soon as he observed the police when he walked to the rear of the high-crime-area home.

However, a lawful traffic stop, without more, does not allow a frisk of the driver or other occupants since there would be no reason to suspect that anyone was armed and/or dangerous.[10] Evidence found after an unlawful frisk will be suppressed. A police officer may also obtain information from an informant, and a *Terry*-type stop may occur in a motor vehicle, as happened in *Adams v. Williams*, 407 U.S. 143 (1972), where the officer received the information from a reliable informant[11] that a man was armed, selling drugs, and sitting in an automobile late at night. The officer located the car and indicated that the occupant step outside, but the subject rolled down the window instead. The non-compliance by the driver, along with the validation of the person's presence in the

high-crime area and the suggestion that the car's occupant was armed gave rise to unusual conduct that met the *Terry* standard of reasonable basis to suspect criminal activity.

Information giving rise to "reasonable basis to suspect" may come from more than one source. In *Alabama v. White*, 496 U.S. 325 (1990) (Case 3.2), the Court approved the stop of a moving automobile on the stop and frisk rationale where the police obtained some information from an anonymous informant and verified some of the information by personal observation. The anonymous caller predicted what a conduct a person living in an apartment building would pursue upon leaving the apartment and indicated what car the individual would be driving. A prediction that the driver would head to a local motel to sell drugs seemed to be true when the apartment dweller entered the described car and drove toward the motel where the drug deal was to be consummated. The telephone tip coupled with the officers' verification of some of the facts along with the occurrence of the predicted behavior proved sufficient to meet the *Terry* standard and to justify a brief motor vehicle stop and inquiry by police. Thus, the stop and frisk standard of proof may be met by virtue of information supplied by an informant alone or may be combined with personal observations of the officer to reach the proper level of proof.

Facts indicating unusual conduct must be objectively present prior to conducting a *Terry*-type stop of a person or a motor vehicle or such a seizure violates the Fourth Amendment. In *Delaware v. Prouse*, 440 U.S. 648 (1979), an officer made a traffic stop where the officer testified that he "had observed neither traffic or equipment violations nor any suspicious activity, and that he made the stop only in order to check the driver's license and registration."[12] The officer lacked any objective evidence that pointed toward the suspected criminality of any of the car's occupants, and, prior to the stop, the officer lacked any knowledge that met the standard of reasonable basis to suspect that criminal activity might be occurring. Despite the fact that the officer discovered marijuana in plain view inside the car, initially, there was no reason to stop the vehicle and to speak with the driver or passenger. The Supreme Court affirmed the granting of Prouse's motion to suppress the evidence. In a later case, the Court reaffirmed that automobiles cannot be stopped unless the *Terry* minimal standard has been satisfied or the higher standard of probable cause exists.[13]

Case 3.2 LEADING CASE BRIEF: *TERRY* STANDARD CAN BE MET BY INFORMANT AND CAN APPLY TO AUTOMOBILE STOPS

Alabama v. White
Supreme Court of the United States
496 U.S. 325 (1990).

CASE FACTS:

Officers in the Montgomery [Alabama] Police Department received an anonymous telephone tip that respondent Vanessa White would be leaving a named apartment building at a particular time in a uniquely described vehicle which had a broken right taillight lens. Further, the caller said that Ms. White would be going to Dobey's Motel and that she would be in possession of an ounce of cocaine. Two officers immediately proceeded to the apartment building, saw a vehicle matching the caller's

description, observed White as she left the building and entered the vehicle, and followed her along the most direct route to the motel. Although the police did not observe Ms. White take anything from the apartment to her vehicle, they decided to stop her vehicle just short of the motel. Corporal Davis asked respondent to step to the rear of her car, where he informed her that she had been stopped because she was suspected of carrying cocaine in the vehicle. He asked if they could look for cocaine, and Ms. White indicated her consent. The officers found a locked brown attaché case in the car and, upon request, respondent provided the combination to the lock. The officers found marijuana in the attaché case and placed respondent under arrest. In a search incident to arrest, cocaine was found in her purse.

The prosecution charged Ms. White with possession of marijuana and cocaine. The trial court rejected her motion to suppress evidence, and she pled guilty, reserving the right to appeal the legality of the stop and search of her automobile and the search incident to arrest.

The Court of Criminal Appeals of Alabama reversed her conviction on possession charges, holding that the trial court should have suppressed the marijuana and cocaine because the officers did not have the reasonable suspicion necessary under *Terry v. Ohio*, 392 U.S. 1 (1968), to justify the investigatory stop of the vehicle. The Supreme Court of Alabama denied the government's petition for certiorari. The Supreme Court of the United States granted certiorari to the State of Alabama.

LEGAL ISSUE:

May an anonymous telephone tip alleging criminal activity, when substantially corroborated by observations by police officers, produce "reasonable basis to suspect criminal activity" sufficient to make an investigatory stop of a person in a moving motor vehicle?

THE COURT'S RULING:

An anonymous telephone tip that police are able to partially corroborate will produce sufficient evidence to allow a *Terry*-type automobile stop for a brief inquiry but will not, without more information, rise to the level of probable cause to arrest or to search.

ESSENCE OF THE COURT'S RATIONALE:

[The Supreme Court in] *Adams v. Williams*, 407 U.S. 143 (1972), sustained a *Terry* stop and frisk [of a motorist in a parked automobile] undertaken on the basis of a tip given in person by a known informant, who had provided information in the past. We concluded that, while the unverified tip may have been insufficient to support an arrest or search warrant, the information carried sufficient "indicia of reliability" to justify a forcible stop. We did not address the issue of anonymous tips in *Adams*, except to say that "[t]his is a stronger case than obtains in the case of an anonymous telephone tip," *id*., at 146.

[Similarly, the Court in] *Illinois v. Gates*, 462 U.S. 213 (1983), dealt with an anonymous tip in the probable cause context. The Court there abandoned the "two-pronged test" of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v.*

United States, 393 U.S. 410 (1969), in favor of a "totality of circumstances" approach to determining whether an informant's tip establishes probable cause. *Gates* made clear, however, that those factors that had been considered critical under *Aguilar* and *Spinelli*—an informant's "veracity," "reliability," and "basis of knowledge"—remain "highly relevant in determining the value of his report." 462 U.S., at 230. These factors are also relevant in the reasonable suspicion context, although allowance must be made in applying them for the lesser showing required to meet that standard.

The opinion in *Gates* recognized that an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is "by hypothesis largely unknown, and unknowable."

* * *

As there was in *Gates*, however, in this case there is more than the tip itself. The tip was not as detailed, and the corroboration was not as complete, as in *Gates*, but the required degree of suspicion was likewise not as high.

* * *

Reasonable suspicion [required under *Terry*] is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. . . . Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable. . . . Contrary to the court below, we conclude that when the officers stopped respondent, the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion that respondent was engaged in criminal activity and that the investigative stop therefore did not violate the Fourth Amendment.

It is true that not every detail mentioned by the tipster was verified, such as the name of the woman leaving the building or the precise apartment from which she left; but the officers did corroborate that a woman left the 235 building and got into the particular vehicle that was described by the caller. With respect to the time of departure predicted by the informant, Corporal Davis testified that the caller gave a particular time when the woman would be leaving, but he did not state what the time was. He did testify that, after the call, he and his partner proceeded to the Lynwood Terrace Apartments to put the 235 building under surveillance. Given the fact that the officers proceeded to the indicated address immediately after the call and that respondent emerged not too long thereafter, it appears from the record before us that respondent's departure from the building was within the time frame predicted by the caller. [The Court felt that the prediction of

her destination was sufficiently corroborated by her act of driving toward the described motel.]

* * *

The Court's opinion in *Gates* gave credit to the proposition that because an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity. [*Illinois v. Gates*] 462 U.S., at 244. Thus, it is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations made by the caller.

* * *

When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.

Although it is a close case, we conclude that under the totality of circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car. We therefore reverse the judgment of the Court of Criminal Appeals of Alabama and remand for further proceedings not inconsistent with this opinion.

So ordered.

CASE IMPORTANCE:

The reasoning in this case allows police to stop individuals, whether on foot or while driving automobiles, when an informant has given some information that does not rise to the level of probable cause to search or to arrest but where sufficient suspicion of criminal activity has been raised by a person who has special information, partially verified by police, that is not generally available to everyone.

In a recent Supreme Court decision[14] that was held to meet the *Terry* standard of reasonable suspicion, a police officer who had been following a motor vehicle ran a routine license plate check. When the information revealed that the owner of the truck had a suspended license, the officer initiated a vehicle stop, which confirmed his suspicions that the owner was the driver who was not permitted to operate a vehicle. Over the defendant's objections that merely seeing a moving vehicle owned by a person who had a suspended license did not rise to the level of individualized suspicion under *Terry*, the Supreme Court held that the officer did not rely exclusively on probabilities. He knew that the license plate was linked to a truck matching the observed vehicle and that the registered owner of the vehicle had a revoked license. Based on these minimal facts, he used common sense to form a reasonable suspicion that a specific individual was potentially engaged in specific criminal activity—driving with a revoked license.[15]

The Court noted that when an officer lacks information that negates an inference that the owner was the driver of the vehicle, such a stop was reasonable under the *Terry* standard.

Merely leaving a home for which an anonymous tip indicated drug sale activity, without more, does not rise to the level of a reasonable basis to suspect that the subject possesses drugs.[16] The officer had observed numerous people enter and quickly leave the home, but he had not observed the subject enter and only saw him leave. The officer's decision to initiate the stop was mistaken, and a *Terry* stop under such circumstances was not lawful, according to the Supreme Court of the United States.[17] In a Maryland case,[18] while cruising in an unmarked car, officers noticed a man standing on the street who looked at them and had a bulge in his pants that could be a gun. A pat-down revealed a firearm, but the reviewing court held that the officers did not have a reasonable basis to suspect criminal activity. In a different situation,[19] an anonymous informant on a 911 call led Philadelphia officers to respond to a report that a Hispanic man wearing a gray shirt, gray pants, and bucket hat had been pointing a gun at juveniles. As officers approached and verified the appearance of the individual, the subject was requested, nor ordered, to remove his hands from his pants, revealing a pistol grip protruding from his pocket. The reviewing court held that the man was not seized at the moment he was requested to remove his hands because any compliance would have been voluntary; the seizure came after the gun was revealed. The court noted that a seizure occurs when, "by means of physical force or a show of authority, [a person's] freedom of movement is restrained."[20] Additionally, the court of appeals held that there existed reasonable basis to suspect criminal activity, so a *Terry*-type seizure would have been appropriate.

4. Subject Must Be Aware of Officer's Status

The *Terry* standard requires that the person being stopped know that the person with whom he or she is dealing is a law enforcement officer. In most situations, the identity will be readily apparent by virtue of the officer's uniform. However, as in the original *Terry* case, the detective was in plain clothes and needed to identify himself as a police officer. Once the individual has knowledge that the person is a police officer, submission to authority should be a reasonable approach rather than flight, which could be understandable if the person were not known to be an officer. The person stopped has no duty to submit to alleged authority if he or she possesses no reasonable knowledge of the status of the officer.

5. Flight Upon Seeing an Officer as Unusual Conduct

Mere flight upon seeing a police officer, without more, may not give rise to the observation or conclusion of unusual conduct that might be indicative of crime. However, flight upon sight *plus* other factors may give an officer the sufficient level of reasonable suspicion necessary for a *Terry* stop. In *Michigan v. Chesternut*, 486 U.S. 567 (1988), while observing the approach of a police car on routine patrol, Chesternut began to run in the opposite direction. The police followed him around a street corner in the police car "to see where he was going." After catching up with him and driving alongside him for a short distance, police officers observed him discarding a number of packets

from his right-hand pocket. Believing that the packets contained drugs, one police officer alighted from the cruiser, examined them, and concluded that they contained narcotics. Chesternut was not seized before he began throwing the packets away, but the officer arrested Chesternut after inspecting the packets that appeared to contain drugs. According to the Court, any determination concerning whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account "'all of the circumstances surrounding the incident'" in each individual case. Thus, flight, plus questionable conduct once Chesternut observed the police presence, permitted the officer to make a stop under the *Terry* standard.

Flight alone would not be sufficiently suspicious, but almost any added factor seems to meet the *Terry* standard. In *Illinois v. Wardlow*, 528 U.S. 119 (2000), the subject initiated flight upon seeing a caravan of police cars converging on a Chicago street in an area known for heavy drug trafficking. He was holding an opaque plastic shopping bag and, upon spotting the police, began to run away. Officers caught the subject and discovered a revolver during a stop and pat-down of his person and plastic bag. Ultimately, the Supreme Court upheld the stop of the suspect under *Terry*, since the otherwise innocent flight upon seeing the police was accompanied by another factor: being in a high drug crime area. The *Wardlow* Court noted "the determination of reasonable suspicion must be based on common sense judgments and inferences about human behavior."[21] In essence, flight alone probably would not be sufficient to conduct a stop of a person, but where it is accompanied by almost any other action of a suspicious nature, an officer may make a lawful *Terry* stop of the person without running afoul of the Fourth Amendment.

State courts have generally followed the *Wardlow* rationale in permitting stops and frisks where unexplained flight has occurred. In an Illinois state prosecution,[22] police encountered a large crowd near midnight making noise, and when they attempted to disperse it, one man ran from police. As the subject ran away from one set of officers and toward another group of officers, he looked over his shoulder at other police who were closer to the crowd while he clutched something on his side near his front waistband. When he ignored a request to halt, officers tackled him. The state appellate court approved this *Terry*-type stop and subsequent frisk that revealed the defendant's illegal possession of a 9-millimeter handgun because the circumstances indicated a reasonable suspicion of criminality. In a different Illinois case prosecuted in federal court,[23] a police dispatcher had sent officers to a residence in Chicago on a report that three men were selling drugs in front of a house. As the officers neared the location, they observed a group of adults in a park playground who were wearing clothing described by the dispatcher. As the police approached the group, one of the men, who was not wearing the described clothing, but who had a visible bulge in his pocket, separated himself from others and seated himself on a park bench facing away from the officers. Thinking this was somewhat unusual, an officer went to investigate and asked the subject to stand, but the subject stood and ran. Upon corralling the individual, a frisk revealed a loaded revolver. Since the clothing of the defendant did not match, this stop might have been improper but for the unprovoked, headlong flight from the officer in a high-crime area by a man with a large bulge in his pocket. Here, the totality of the circumstances told a different story. The court held that the defendant's seizure was lawfully consistent with the *Terry* standard under the circumstances.[24]

6. Officer Must Have Reason to Believe That the Person May Be Armed and Dangerous

While a stop under the *Terry* standard may be appropriate, a subsequent frisk is not a foregone conclusion, unless the circumstances faced by the officer give rise to suspicion that the person with whom he is dealing may be armed and dangerous. A situation where a robbery may be under way (*Terry*) would give rise to the conclusion that the perpetrator might be armed, whereas a person who has passed an airport security checkpoint prior to boarding could not reasonably be believed to be armed. See *Florida v. Royer*, 460 U.S. 491 (1983). In *Michigan v. Long*, 463 U.S. 1032 (1983), the Court held that the *Terry* rationale does not restrict a pat-down search of the person of a detained suspect even when the detainee is under the control of the officer and could not gain access to a weapon. Officers had also observed a knife resting of the floorboard of the vehicle. The *Long* Court concluded it was reasonable under *Terry* to allow officers to conduct an area search of the passenger compartment of a vehicle to uncover weapons, as long as the officers possessed an articulable and objectively reasonable belief that the suspect was potentially dangerous. In a slightly different situation, *People v. Reyes*, 651 N.Y.S.2d 431 (1996), pursuant to a specific citizen complaint, an officer conducted a pat-down of a person who had a gun. The officer approached and noticed a bulge in the person's front coat pocket, tapped the bulge, felt something hard and, believing that it was a gun, properly pulled out a package of drugs. Similarly, a police officer may order the driver of a lawfully stopped car to exit the car and submit to a pat-down if there exists a reasonable suspicion that the driver may be armed and dangerous. See *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). Consistent with *Mimms*, an officer may order passengers from a stopped vehicle and perform a pat-down upon reasonable suspicion that they may be armed and dangerous. See *Maryland v. Wilson*, 519 U.S. 408 (1997). In contrast, when a passenger in a car stopped for a moving violation was compliant with the officer prior to a frisk and presented no weapon-like bulge on his visible clothing, a frisk for weapons was held to be unreasonable.[25] There was not an articulable basis to suspect criminal activity or that the passenger was armed. The reviewing court held that the firearm discovered during the illegal frisk should have been suppressed.

As a general rule, the officer's fear that the person may be armed and dangerous must be a reasonable one under the circumstances. In *United States v. Curry*, 965 F.3d 313 (4th Cir. 2020), police officers were patrolling an area near public housing in Richmond, Virginia, when they heard a series of gunshots near their position. Within less than a minute, the officers were on the general scene and observed five to eight men walking away from the apartment complex in an open field. The officers had also received a radio dispatch that gunfire had come from the apartment complex area, but they did not receive a description of any suspect. The officers approached the group, including Mr. Curry, and saw that he had a cell phone in his left hand, while his other hand was visible. He made no furtive gestures, and he did not walk at a fast pace away from the officers. Upon a command to stop, Curry stood completely still before he pointed in the directions where the shots had occurred and told officers that he was

looking for his nephew. The officers requested that Curry lift his shirt, which he did, and was asked a second time to lift his shirt, which he also complied, but the officer never got a good view and believed that Curry was not being compliant. Since the officer could not get a visual check for any bulge because of what the officer deemed noncompliance, he restrained Mr. Curry's arms and patted him down to reveal a firearm. The federal district court held that the seizure of Curry did not constitute a lawful *Terry*-type stop, because the officers possessed no reasonable, articulable suspicion of criminal activity particularized to Curry at the time of the subject's seizure and had no reason to believe that he was armed. Also, the district court rejected the prosecution's contention that Curry's seizure was justified under an exigent circumstances theory based on shots fired. Ultimately, the federal appeals court upheld the trial court suppression decision because the initial seizure of Curry was not based on any reasonable suspicion as required by *Terry v. Ohio*.

The reality of the reasonable belief that an individual may be armed and dangerous has a rather low threshold; thus, only rarely is evidence suppressed due to an unreasonable fear that the person may be armed and dangerous. In *Michigan v. Summers*, 452 U.S. 692 (1981), the Court approved the detention of a man who was leaving a home that was the subject of a warrant-based search. The Court based its rationale on whether it was reasonable to detain someone who had a connection with the home and who might have been involved in the suspected criminality within the home. According to the Court, three police interests were furthered by the detention: preventing flight in the event incriminating evidence was found, minimizing risk of harm to the officers, and facilitating an orderly search through cooperation of the occupants. Note that in *Summers*, there was barely any thought that the individual might have been armed, yet the detention gained Court approval. However, Summers had a greater and more significant connection to the house being searched than a bar patron who merely happened to be on the premises when a lawful search of tavern occurred.[26]

Demonstrative of how minimal the fear may be that a subject may be armed was the case of one of the conspirators involved in the first New York World Trade Center bombing. In *United States v. El-Gabrowny*, S.D.N.Y., 825 F. Supp. 38 (1993), the court denied a motion to suppress evidence obtained by officers in a pat-down search of one of the defendants who was present during the execution of a search warrant.[27] Officers were executing the warrant authorizing a search of the defendant's apartment when he approached them with his hands in his pockets. One officer removed the defendant's hands from the pockets and proceeded with a pat-down search. The officer discovered and removed a yellow envelope that was folded and fastened with rubber bands. It proved to contain forged and altered passports and birth certificates. The court held that the search was reasonable to ensure the officers' safety despite the absence of any fear that the packet was a weapon.

As appears from the case law, courts take different approaches concerning when a situation appears to indicate that criminality might be afoot and the subjects involved may be armed and dangerous. Predicting the outcome of a particular set of circumstances under the stop and frisk doctrine can prove to be a risky proposition due to the varying interpretations courts have given to substantially similar situations.

7. Investigation Must Not Dispel the Fear That the Subject May Be Armed and Dangerous

Although the original *Terry* case held that, prior to conducting a pat-down, the officer must have a reasonable belief that the subject was armed and dangerous, many court cases construing this requirement have not been as demanding as the original case. In fact, the person on whom police would like to conduct a pat-down need not be personally believed to be armed; it is only necessary that an individual in a similar position might be armed. As mentioned earlier, in *Michigan v. Summers*, 452 U.S. 692 (1981), the Court approved a seizure of a man for whom no reason existed to believe that he was armed; he merely had connections to a home that was being searched pursuant to a warrant.

Suspicion of drug trafficking allows police to stop automobiles and trucks for brief investigations where there exists reason to suspect criminal activity but where there is no individualized suspicion that the person may be armed and dangerous. See *United States v. Sharpe*, 470 U.S. 675 (1985). In *Sharpe*, a Drug Enforcement Administration officer followed a visibly overloaded pickup truck with a camper shell that appeared to be traveling in tandem with a car. The truck was so overloaded that it did not sway or move up or down when encountering bumps in the road. The agent followed the vehicles for twenty miles and made the determination to make a *Terry* investigatory stop in concert with local police. The DEA agent walked to the rear of the truck, where he smelled marijuana, and opened the rear of the camper, which revealed bales of the drug. The Supreme Court believed that the *Terry* standard for a stop had been met. As the Court stated in footnote 3 of *Sharpe:*

> Agent Cooke had observed the vehicles traveling in tandem for 20 miles in an area near the coast known to be frequented by drug traffickers. Cooke testified that pickup trucks with camper shells were often used to transport large quantities of marihuana. Savage's pickup truck appeared to be heavily loaded, and the windows of the camper were covered with a quilted bed-sheet material, rather than curtains. Finally, both vehicles took evasive actions and started speeding as soon as Officer Thrasher began following them in his marked car. Perhaps none of these facts, standing alone, would give rise to a reasonable suspicion; but taken together as appraised by an experienced law enforcement officer, they provided clear justification to stop the vehicles and pursue a limited investigation.

While the Supreme Court appeared to have little difficulty in making a decision in *Sharpe* and approving the stop and frisk of the truck, the officer in the field must put the discrete facts together to determine whether the *Terry* standard has been met and whether additional information may be required prior to making a stop.

8. Frisk May Not Always Allow Additional Search

Judicial clarifications on stop and frisks where courts disagree with law enforcement officials are rather limited when compared with decisions approving police pat-downs. In *Sibron v. New York*, 392 U.S. 40 (1968), a companion case to *Terry* noted earlier in

this chapter, the Court held that reasonable basis to suspect was not reached where an officer watched a suspected drug user talk to several other known addicts over a period of several hours, did not see anything given to him, and did not overhear any conversation that would indicate criminality. Similarly, a pat-down of a bar patron for weapons during the execution of a search warrant for the premises and the owner was held as improper, since no individualized suspicion existed that a particular patron or anyone was armed.[28] Some searches conducted following a lawful *Terry* stop may exceed permissible bounds. A Florida court of appeal held that an officer had no authority to look inside a box of cigarettes taken from a frisked participant at a fight scene. Since the officer had no reason to suspect that a knife or gun was hidden inside the cigarette box, the court held that looking inside the cigarette box exceeded the scope of searches permissible under the Fourth Amendment.[29]

Because a stop may not justify a frisk, and a frisk may not justify a more intrusive search, a police officer must possess the proper quantum of evidence prior to proceeding to the next step under the *Terry* rationale. Demonstrative of this principle, an Alabama police officer involved in a warrant-based search of a suspected drug house stopped a person who approached the officer during the search and indicated that she lived at the house being searched.[30] One officer noticed that the subject seemed nervous and asked her to put her hands on a car so that the woman could be frisked for weapons. The officer patted her outer clothing, felt a soft bulge in her front pocket, and reached inside the clothing to remove a quantity of methamphetamine. The officer patted and squeezed the bulge and felt it "smush." In this case, the reviewing court held that the pat-down was appropriate under the circumstances, but the squeezing was an additional search that went beyond the scope of a weapons search under *Terry v. Ohio*.[31] In its opinion, the Supreme Court of Alabama noted that officers are not permitted to squeeze or otherwise manipulate the clothing of a frisk subject to find contraband that the officer knows cannot reasonably construed to be a weapon. Based on the facts in the record, the methamphetamine was illegally seized, and evidence of it should have been suppressed.

In a slightly different context, a Florida court overturned a conviction based on a failed stop and frisk.[32] The police initiated the encounter when a bicyclist, in an area known for narcotics dealing, leaned toward the interior of an automobile and reached inside. No exchange was observed, but the officer recognized the bicyclist as a purchaser of drugs on prior occasions. Police attempted to stop the bicyclist, who initiated flight from the officers. Ultimately, the officers caught him after a short foot chase. Opening his hand, they found a baggie containing a trace of cocaine. The Florida Court of Appeals reversed the conviction of the defendant on the basis that the initial detention was not valid. According to the court:

> A stop is not warranted solely upon an officer's observation of a black male in a high-crime district leaning into the window of a white man's car stopped in the middle of the street who walks away upon seeing an officer approach. *Winters v. State*, 578 So.2d 5 (Fla. 2d DCA 1991). Nor is a stop warranted where the defendant engages in such activity while in the presence of known drug dealers. [Citations omitted.] Thus, the fact that the appellant had merely been present at other drug transactions does not raise the basis for the officers' suspicion to the level required for detention under the stop and frisk law.[33]

While not all courts would follow the logic as applied to the facts in the foregoing cases, the rationale points out that police officers need to be aware that the facts necessary to justify the initial stop must be more than a mere hunch, that not all stops will mature into pat-down searches, and that even fewer will allow a deeper search once the officer is reasonably satisfied that the individual is not armed.

9. *Terry* Stops Under a Drug Courier Profile

If a person fits a "drug courier profile," under the *Terry* rationale, a brief stop of the person and a brief investigation have been held to be appropriate. In *Florida v. Royer*, 460 U.S. 491 (1983) (see Case 3.3), the defendant, an airline passenger, attracted the attention of drug enforcement agents because of his appearance, mannerisms, luggage, and actions and by the purchase of a one-way airline ticket—all hallmarks of the drug courier profile. The agents properly detained him to ask questions but exceeded the length of time that was considered reasonable under the circumstances. Similarly, in *United States v. Sokolow*, 490 U.S. 1 (1989), the defendant met the drug courier profile by paying cash for a plane ticket from Hawaii to Florida, traveling under a name that did not match his phone number, stayed in a drug source city for less than forty-eight hours, appeared nervous during the trip, and had no checked luggage. When met at the Honolulu airport by police, the defendant and his girlfriend were briefly detained so that a drug-sniffing dog could check their carry-on luggage. Two warrants were later issued to search both bags to which the dog alerted. Ultimately, this stop and frisk sniff of the bags by the dog was held to be appropriate, and the conviction was reinstated by the Supreme Court of the United States.

Case 3.3 LEADING CASE BRIEF: THE DRUG COURIER PROFILE IS AN ACCEPTABLE *TERRY* STANDARD; UNREASONABLE DETENTIONS PRODUCE EXCLUDABLE EVIDENCE

Florida v. Royer
Supreme Court of the United States
460 U.S. 491 (1983).

CASE FACTS:

After purchasing a one-way airline ticket to New York City at Miami International Airport under an assumed name and checking his two suitcases bearing identification tags with the same assumed name, Mark Royer went to the concourse leading to the airline boarding area. Unknown to Royer, two detectives used a "drug courier profile" to isolate Royer from other passengers planning to travel to New York. The detectives asked to see his airline ticket and some identification. The ticket bore the name of one "Holt" and not Royer. After listening to Royer offer a brief explanation, they suggested that Royer accompany them to a small room. At this point the detectives told Mr. Royer that they suspected that he was transporting contraband drugs.

Royer's airline ticket, boarding pass, and driver's license remained in

the possession of the detectives. Royer appeared to voluntarily walk with the officers to the room. One of the detectives used his luggage claim checks to obtain Royer's luggage.

When asked if he would give consent to a search of the luggage, Royer did not verbally agree, but offered a key and unlocked one suitcase that he did not open. One detective opened that suitcase, revealing a quantity of marijuana. When asked if the detectives could open the second suitcase, Royer explained it was all right with him if they opened it. One of the detectives forcibly opened the second item of luggage, disclosing more marijuana. Approximately fifteen minutes had elapsed from the time the detectives initially stopped Royer until his arrest upon the discovery of the contraband.

Prior to his trial for possession of marijuana, Royer filed a motion to suppress the marijuana, alleging that the officers detained him too long under the stop and frisk theory. He pled no contest to the drug possession charge while reserving his right to appeal the denial of his Fourth Amendment claim.

The Florida District Court of Appeal held that Royer had been involuntarily confined within the small room without probable cause and that the involuntary detention had exceeded the limited time of restraint permitted by *Terry v. Ohio*. The United States Supreme Court granted certiorari.

LEGAL ISSUE:

Where government officials detain an airline passenger for fifteen minutes, remove him with his ticket and identification to an interrogation room, and retrieve his luggage from an airline on the basis that he fits a "drug courier profile," does such conduct exceed the time limits of a permissible scope of a stop under the stop and frisk doctrine?

THE COURT'S RULING:

Under the stop and frisk doctrine, a stop must be brief and last only as long as necessary to resolve the suspicion. If officers continue a stop of a person beyond the time that is considered reasonable under the circumstances, evidence seized as a result cannot be admitted at trial to prove guilt.

ESSENCE OF THE COURT'S RATIONALE:

* * *

II

Some preliminary observations are in order. First, it is unquestioned that, without a warrant to search Royer's luggage and in the absence of probable cause and exigent circumstances, the validity of the search depended on Royer's purported consent. . . .

Second, law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. *Terry v. Ohio*, 392 U.S. at 31, 32–33. . . . He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not,

without more, furnish those grounds. *United States v. Mendenhall*, supra, at 556 (opinion of Stewart, J.). If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.

Third, it is also clear that not all seizures of the person must be justified by probable cause to arrest for a crime. Prior to *Terry v. Ohio, supra*, any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause. *Dunaway v. New York, supra*, at 207–209. Terry created a limited exception to this general rule: certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime.

Fourth, *Terry* and its progeny nevertheless created only limited exceptions to the general rule that seizures of the person require probable cause to arrest. Detentions may be "investigative," yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest.

III

The State proffers three reasons for holding that when Royer consented to the search of his luggage, he was not being illegally detained. First, it is submitted that the entire encounter was consensual and hence Royer was not being held against his will at all. We find this submission untenable. Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment. . . .

Second, the State submits that if Royer was seized, there existed reasonable, articulated suspicion to justify a temporary detention and that the limits of a *Terry*-type stop were never exceeded. We agree with the State that when the officers discovered that Royer was traveling under an assumed name, this fact, and the facts already known to the officers—paying cash for a one-way ticket, the mode of checking the two bags, and Royer's appearance and conduct in general—were adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention. . . . We have concluded, however, that at the time Royer produced the key to his suitcase, the detention to which he was then subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity.

* * *

What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions. The officers had Royer's ticket, they had his identification, and they had seized his luggage. Royer was never informed that he was free to board his plane if he so chose, and he reasonably believed that he was being detained. At least as of that moment, any consensual aspects of the encounter had evaporated, and we cannot fault the Florida Court of Appeal for concluding that *Terry v. Ohio* and the cases following it did not justify the restraint to which Royer was then subjected. As a practical matter, Royer was under arrest. Consistent with this conclusion, the State conceded in the Florida courts that Royer would not have been free to leave the interrogation room had he asked to do so.

* * *

Because we affirm the Florida Court of Appeal's conclusion that Royer was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search. The judgment of the Florida Court of Appeal is accordingly

Affirmed.

CASE IMPORTANCE:

The Court recognized that under a "drug courier profile," seemingly random facts could be analyzed to meet the reasonable suspicion standard for a stop and frisk. When the duration of a stop and frisk exceeds what is reasonable, any evidence produced must be excluded from use in a criminal trial.

Under a drug courier profile theory of stop and frisk, a person may be detained on less than probable cause for a brief inquiry and investigations, but the curtailment of his or her liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized may be engaged in criminal activity. Some courts have questioned the concept of a drug courier profile by noting that the behaviors observed by police must still meet the objective standard of indicating a reasonable basis to suspect criminal activity before detaining a suspicious person.[34]

The principle allows a brief encounter due to the drug courier profile or a similar criminal profile but does not permit a lengthy detention of the person or his or her property unless probable cause for arrest or search of the luggage quickly matures. In a Texas case[35] involving purchases of precursor materials to manufacture methamphetamine, a computer program indicated that an Oklahoma couple were, on more than one occasion, traveling to Texas to purchase pseudoephedrine at several Texas drug stores. This drug is an ingredient in making methamphetamine. On their Texas trip at issue, they visited one pharmacy, and later they were observed by a second officer at a second drug store in the same Texas town. They also visited a Home Depot and a Wal-Mart, which both sell items like liquid heat and peroxide needed in making methamphetamine. As they began

driving back to Oklahoma, an officer stopped their vehicle due to a traffic violation and based on a conduct profile that persons making methamphetamine in Oklahoma might follow. At the traffic stop, the defendant answered in the affirmative when asked if he used meth and he admitted that he had in his possession at least one substance to manufacture methamphetamine. The defendant also admitted to purchasing pseudoephedrine, a legal over-the-counter medicine. The Texas courts ultimately held that there was "reasonable basis to suspect criminal activity" based on a profile of methamphetamine manufacturers from Oklahoma who would make "pill runs" to Texas. The reviewing court noted that the drug manufacturing profile might not be sufficient in itself, but that the police, collectively, had observed and knew of their specific conduct of pseudoephedrine purchases on the relevant trip to Texas and knew from the computer program that they had made similar purchases of pseudoephedrine during prior trips to Texas.[36] The reviewing court cited *Terry v. Ohio* in noting that police may stop and briefly detain individuals suspected of criminal activity on less than probable cause. The conduct in this case indicated that a drug manufacturing profile was sufficient to give officers a reasonable basis to suspect that criminal activity was occurring.

In an older case, *United States v. Place*, 462 U.S. 696 (1983), police officers believed that Place met the drug courier profile and sought additional information from him. Following Place's brief initial encounter with the law enforcement officers at New York's La Guardia Airport, officers requested permission to search his luggage. When Place refused to grant consent, the officers removed his luggage to a secure area to await a search warrant. The agents then took the luggage to Kennedy Airport, where a trained narcotics dog reacted positively to one of the suitcases, thus giving probable cause to search. At this point, ninety minutes had elapsed since the seizure of the luggage. When the search warrant arrived, police executed it, revealing cocaine that was later admitted at his trial. A federal court of appeal reversed and the Supreme Court affirmed. The Court approved of the seizure of the luggage but found the length of the seizure was unreasonable under *Terry v. Ohio* and that the cocaine should have been excluded from evidence. The lesson of *Place* allows police to follow a drug courier profile while making brief stops to gain additional information, but the detention must be both brief and reasonable. If the brief initial encounter does not resolve the officer's suspicions, but no additional evidence quickly surfaces, the subject must be allowed to continue his or her journey with the luggage and other possessions.

10. The Plain Feel Doctrine

Under *Terry v. Ohio*, when there is a reasonable suspicion that the subject may be armed and dangerous, the officer may conduct a pat-down of the outer clothing. When conducting such a lawful *Terry* frisk, an officer may feel objects that, while not likely to be weapons, may be clearly indicative of criminal activity that requires some additional police action. The Supreme Court in *Minnesota v. Dickerson*, 508 U.S. 366 (1993), expanded the scope of a *Terry* stop and frisk by permitting the officer to reach inside the clothing of a detainee if the officer reasonably believed, by the initial feel of the object, that it constituted seizable material. In *Dickerson*, the subject had been properly detained

on suspicion of drug possession. The pat-down conducted by an officer revealed a small lump in his pants pocket that could not be reasonably construed as a weapon. However, the officer made the determination that it was crack cocaine wrapped in cellophane after he manipulated the object between his thumb and index finger. According to the Court in *Dickerson*, the officer went beyond the allowable search permitted by *Terry*, and the evidence should have been suppressed. The officer's pat-down would have been permissible had the officer merely felt an object whose criminal identity was readily apparent. When the officer manipulated the object within the detainee's pants, such activity constitute a greater or more expansive search than allowed by *Terry*. However, *Dickerson* recognized a new area of seizable property under *Terry* that did not exist previously and allows an officer to seize non-threatening contraband items if their character is readily apparent due to the touch of the officer.

Many state courts have followed *Dickerson* in allowing officers to extend the scope of a search when an object's identity has been discovered during a pat-down. The plain feel cases often turn on slight differences or interpretations of the fact patterns and officer testimony. In an Ohio case that applied *Dickerson*,[37] when a woman had been stopped for a traffic offense, the officer asked her to step out of the car to ascertain her possible level of impairment. He noted that as a matter of routine,[38] he was going to pat her down and asked her to remove everything from her pockets, but she did not remove everything. When he conducted the frisk, he felt a small folded piece of paper no bigger than a gum wrapper in her pants pocket, and he removed it since he thought that it could contain drugs. There was no manipulation, and the officer did not know initially what it contained. Upon examination of the paper, the officer discovered illegal recreational drugs that the trial court admitted in evidence. The defendant appealed, arguing that the frisk was illegal and the search of her pockets could not be upheld on the plain feel doctrine. The Ohio court of appeals reversed her drug conviction on the ground that, although an officer may in some circumstances pat down for weapons under *Terry*, the plain feel doctrine requires that the officer may seize an object only when its criminality is readily apparent when discovered during a pat-down. Here, the reviewing court held that no officer of reasonable caution would have been warranted in believing that a folded piece of paper felt during a pat-down contained contraband, under the totality of the circumstances. In a similar situation,[39] the Supreme Court of Alabama reversed a drug possession conviction where a police officer had frisked a female subject who arrived on the scene of an ongoing warrant-based home search. The detective patted down the subject and found a small bulge in her pants pocket that could not have been a weapon. However, out of curiosity, the officer "smushed" or manipulated the bulge to determine that it the object was "crunchy," which was consistent with her knowledge of how methamphetamine felt. The top Alabama court agreed with the defendant because the nature of methamphetamine could not have been immediately apparent to the detective during her pat-down of the defendant.

Other courts have taken a different approach concerning the plain feel doctrine when determining whether an officer has been able to feel contraband by a pat-down of the outer clothing. The split of authority permits some courts to approve the entry into pockets of clothing where the officer testified merely that the identity was immediately apparent to the officer. Other jurisdictions will not accept the officer's bare conclusion.

In a Pennsylvania case, *Commonwealth v. Green*,[40] a police officer stopped a motor vehicle, which was known to be driven by a drug defendant, who was out on bail. An informant indicated the defendant was again selling drugs from a different motor vehicle. After the vehicle stop, the defendant driver proved contentious and noncompliant, so the officer placed him in handcuffs prior to conducting a frisk of the outer clothing. The officer testified that in frisking the pants pocket area of the subject, he could feel the outline of a Ziploc bag filled with what was immediately apparent to the officer was a rock-like substance, consistent with crack cocaine. The officer did not conduct any extra manipulation of the pocket other than the pat-down prior to retrieving it. Following the logic of *Minnesota v. Dickerson*, the Pennsylvania reviewing court upheld the admission of the crack cocaine, because it felt that the discovery under the plain feel doctrine was consistent with federal and Commonwealth case law

11. Expansion of Stops Beyond the Genesis of *Terry v. Ohio*

The Supreme Court of the United States and other courts began to approve stops in situations where there was no belief that the individual person was armed or dangerous. Courts have approved short seizures of luggage where police have reasonable basis to suspect that criminal activity might be ongoing. Where police seize luggage on less than probable cause, the limitation concerning the length of the detention of the personal articles has been construed to follow the same standards as the stop of a person. See *Florida v. Royer*, 460 U.S. 491 (1983) (Case 3.3). In such a situation, the initial stop and subsequent seizure must actually be of a temporary nature and exist no longer than reasonably necessary to effectuate the purpose. Where the seizure extends longer than reasonably required, the seizure may be declared unreasonable and the evidence suppressed.[41]

The Court extended the stop and frisk rationale to cover the situation where police lawfully detained an automobile under circumstances where they had an articulate fear that the occupant might obtain a weapon while the subject returned to his car to search for his car registration. See *Michigan v. Long*, 463 U.S. 1032 (1983). In this case, two police officers noticed a vehicle driving erratically at a rapid rate of speed in a rural area late at night. After the officers saw the car go off the road and crash into a ditch, they stopped to investigate. Long, the driver, met the officers at the rear of the car and seemed to be under the influence of some intoxicant. When Long began walking toward the open door of the car to obtain the vehicle's documents, the officers followed him and saw a hunting knife on the floorboard of the driver's side of the car. The officers then subjected him to a pat-down search, which revealed no weapons, but in plain view, one of the officers noticed a baggie of marijuana protruding from under the armrest of the seat. The officers also conducted a limited weapons search of the interior of the auto. The *Long* Court approved this "*Terry* pat-down" of the passenger compartment because there existed a reasonable suspicion that the driver might gain immediate control of a weapon.

Brief seizures on less than the *Terry* standard have been approved by the Supreme Court of the United States. In *Illinois v. Lidster*, 540 U.S. 419 (2004), the court approved

of the use of a highway checkpoint that had been set up to gather information about a recent hit-and-run fatality on that very road for which there were no known witnesses. Police were hoping to ask motorists traveling through the area if they had observed any aspect of the prior event when they encountered the defendant, who was under the influence of alcohol, at the roadblock. He was directed to a secondary area and arrested. His constitutional objection was that stop of his vehicle at the roadblock was unreasonable because there was no individualized suspicion directed toward him. The Court noted that the stop seeking information was not an event that was attempting to identify a driver's criminality but was a reasonable approach to trying to resolve a crime that had resulted in the death of a person. The police limited their checkpoint to fit important criminal investigatory needs that did not focus on a particular person and was primarily dedicated to obtaining crucial information. Under such circumstances, the Supreme Court found that the stop of the defendant was reasonable, given the goals offered by the police.

However, not every encounter between a police officer and an individual gives the officer the right to detain and/or frisk. In an older case, *Kolender v. Lawson*, 461 U.S. 352 (1983), police stopped and arrested a person who had no identification. The individual was walking alone and did not appear about to commit a crime. Pursuant to a California statute, any person who loiters or wanders about the streets must identify him or herself to police upon request and account for his or her presence, even in the absence of any reasonable basis to suspect criminal activity. A failure to make a "credible and reliable" identification when asked to "stop and identify" could result in an arrest for violating the statute. The Supreme Court of the United States determined that the law was unconstitutionally vague on its face within the meaning of the Due Process Clause of the Fourteenth Amendment. Thus, a person is not subject to stop, arrest, or search for merely walking or loitering without appropriate identification; some reasonable basis to suspect individual criminal activity must be demonstrably present in order to justify a stop and perhaps a frisk. Similarly, an officer may not stop a motor vehicle for which there is no reasonable basis to suspect that the driver is committing any type of criminal activity. In a case that is still good law, *Delaware v. Prouse*, 440 U.S. 648 (1979), the court disapproved a stop of Prouse's automobile for no reason. The officer had randomly decided to stop the car to check the vehicle's registration and had no individualized reasonable suspicion of criminal activity or of a traffic offense. The officer discovered marijuana in plain view on the floor of the vehicle. This practice of arbitrary vehicle stops ran afoul of the Fourth Amendment and the *Terry* line of cases requiring individualized suspicion of criminal activity prior to making a stop of a person or of a person in a vehicle.[42]

In what appears to be an expansion of the *Terry* rationale, where reasonable basis to suspect criminal activity exists, an officer may make an arrest where a subject refused to offer identification if state law requires that a person identify him or herself. In a Nevada case,[43] police received a phone call reporting that a man was engaged in an assault on a woman inside a red and silver pick-up truck on a particular road. When a dispatched officer arrived on the scene, he observed the truck with a man outside talking to a woman sitting inside the truck. Vehicle tire skid marks appeared in the gravel leading up to the parked pick-up truck, indicating an abrupt stop. After informing the subject that the he was investigating a report of a fight or disturbance and observing that the pickup truck's driver appeared to be intoxicated, he asked the man to identify himself with a driver's

license or other written identification. The driver refused eleven times to offer identification. The officer arrested the subject because the officer concluded that the refusal to identify during a *Terry*-type stop demonstrated a willful violation of Nevada law. The Supreme Court upheld the validity of the arrest by holding that a state law requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures. The Court viewed the request for identification as reasonable, and it noted, "The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop."[44] Although the original *Terry* case did not deal with the requirement of identification, a state is free to make it a requirement where there is reasonable basis to suspect an individual of criminal activity.

12. Summary

The Fourth Amendment permits seizures of persons on less than probable cause for the purpose of briefly investigating human behavior that might be criminal. A police officer must possess a reasonable basis to suspect that criminal activity has occurred, might be happening, or is about to happen. When this standard has been met, the officer has the legal authority to detain a person and briefly ask reasonable questions concerning the situation. If the answers would satisfy the reasonable officer, the forced encounter ends, and the individual becomes free to leave without being subject to a pat-down. On the other hand, when the answers fail to satisfy a reasonable officer and the officer has a reasonable suspicion, based on articulable facts, that the individual might be armed and dangerous, the officer may decide to conduct a pat-down of the subject's outer clothing for the purpose of determining whether the person is armed. The unusual conduct observed may be observed by the officer, may have been reported by an informant, or can be based on a combination of the officer's personal knowledge and the informant's information. Criminal profiles may give rise to a stop and frisk situation as is often encountered using typical factors that might indicate that criminal behavior has occurred or is occurring. Police have developed criminal profiles that help identify persons involved in drug smuggling at airports, on highways, in bus stations, and for drug manufacturing. During a lawful pat-down, if the officer feels, without undue manipulation, objects the possession of which offends the criminal law, the officer may remove them from the subject and use the evidence in a prosecution. The stop and frisk standard of *Terry v. Ohio* is based on a lesser level of proof than the concept of probable cause to arrest or probable cause to search.

REVIEW EXERCISES AND QUESTIONS

1. According to *Terry v. Ohio,* what factors must a police officer consider prior to conducting a valid stop? What additional factors must be considered for a valid frisk?
2. What sources of information may an officer use to develop the proper "reasonable basis to suspect criminal activity" sufficient for a stop and frisk?

3. Assume that a person observed a police office nearby and immediately began to run in the opposite direction. What additional factors might have to be present before a police officer could initiate a stop followed by a frisk? Is flight upon seeing an officer sufficient?
4. What must an officer do when the initial encounter with a suspicious subject is clarified by a verbal discussion sufficient to end the officer's suspicion that criminal activity might have been about to occur? May the officer always conduct a frisk?
5. Explain what is meant by the phrase "drug courier profile" and why it gives rise to "reasonable suspicion" when the standard has been satisfied.
6. Describe what has been called the "plain feel" doctrine? Can it be used to justify an extended intrusion of a detainee's inner clothing? What about a situation where a police officer has justifiably frisked a known felon and felt a gun cartridge on his person during the "pat down"? Felons are not permitted to possess ammunition. Pursuant to the plain feel doctrine, could an officer recognize something in a defendant's pocket as powder cocaine based on his training and experience as a narcotics officer? Consult *United States v. McGlown*, 150 Fed. Appx. 462; 2005 U.S. App. LEXIS 21827 (6th Cir. 2005).
7. Suppose that an officer on a college campus observed an individual who was finishing stretching exercises under a streetlight and, upon noticing the officer, the individual started running in the opposite direction down a jogging trail. Should this type of activity allow a police officer to make a stop of the jogger? Would a person's flight upon seeing a police officer allow the officer to stop if it appeared that the person had initiated his or her jogging routine in a high-crime area? Would it matter if it were in the evening? What other factors could you add that might allow a stop? Do other factors that might be present have to be considered when a subject flees upon observing a police officer?
8. The stop and frisk concept has been extended to justify stops of persons who are not expected to be armed and to "frisks" of motor vehicle interiors. Give an example of a *Terry*-type limited search that does not involve a suspicion that a subject may be armed and dangerous.
9. Consider the case where a motorist had been lawfully detained for two misdemeanor traffic violations. The officer called for a K-9 unit (within seven minutes after the stop) to conduct a sniff scan of the stopped vehicle when the officer noticed heavily tinted windows, strong air freshener odor, and some false identification given in response to requests. The officer felt that he possessed a *Terry*-level of articulable suspicion that the occupants were possibly in violation of a narcotics law based on the observed facts. The K-9 officer and dog arrived and finished the sniff scan within twenty-four minutes of the original stop. Was the articulable suspicion sufficient for a *Terry* stop? Did the officers detain the motorists too long based on

reasonable suspicion? Would this case be controlled by *Florida v. Royer* mentioned in this chapter? See *State v. Ofori*, 170 Md. App. 211, 906 A.2d 1089, 2006 Md. App. LEXIS 151 (2006).

1. How Would You Decide?

In the United States Court of Appeals for the District of Columbia Circuit.

The appellant contended that evidence of his felony in possession of a firearm should have been suppressed because the officers did not have "reasonable suspicion" sufficient to stop him or to conduct a frisk of his clothing.

Following a radio dispatch involving an attempted unauthorized use of a motor vehicle, four non-uniformed police officers in an unmarked car went to the area where the crime had occurred. Police arrived within minutes of receiving the radio call. Observing a group of four men, all of whom wore clothing matching the description of the suspect, the officers pulled into the gas station where the men were standing. As the plainclothes officers approached the group, police observed the defendant walking away from the remaining group of three while holding the right side of his waistband, like he was hiding or holding a firearm. The situation appeared somewhat unusual given the fact that the group was aware that the approaching men were police officers. One of the officers heard defendant Goddard state that he had a gun. Two officers got control of the defendant and handcuffed him prior to conducting a *Terry* pat-down that revealed a gun in the defendant's waistband. The federal district court refused to suppress the gun evidence because the stop occurred close to the earlier reported attempted crime and the four men loosely met the description of the suspect given by the original victim of the attempted unauthorized use of a motor vehicle. Defendant Goddard pleaded guilty, but he reserved his right to raise the gun suppression issue on appeal by contending that he should have been neither stopped nor frisked.

How would you rule on the defendant's contention that the police officer had no lawful right to stop him or to conduct a frisk of his clothing that revealed the firearm?

The Court's Holding:

The United States Court of Appeals for the District of Columbia Circuit determined that there were two issues to be determined, that is, when the stop actually occurred and whether the officer conducting the frisk had reasonable suspicion at the time of the "pat down."

In deciding when a stop has occurred, the court noted that where there is a threatening presence of several officers, the display of a weapon, the demeanor of the officer, the time and place of the encounter, or some physical touching of the subject by police, such conduct may indicate that a stop had occurred. In this case, the men roughly matched the description of the person who had attempted to use a motor vehicle without permission, so the stop of defendant Goddard met the reasonable suspicion standard, especially since he was trying to leave the group and was somewhat furtive in his actions and demeanor. The court held that the stop occurred when one of the officers yelled, "gun," and directed their attention to Goddard while they ordered another man

to return to the original group. In *United States v. Brown*, 357 U.S. App. D.C. 339, 334 F.3d 1161, 1167 (D.C. Cir. 2003), the Court of Appeals held that furtive movements in response to police presence may create reasonable suspicion. In this case, Goddard had previously declared that he possessed a gun, giving the officers ample grounds for the *Terry* stop and for the immediate frisk. The Court of Appeals upheld the conviction based on the proper stop and frisk. See *United States v. Goddard*, 2007 U.S. App. LEXIS 14828 (D.C. Cir. 2007).

2. How Would You Decide?

In the United States District Court for the Middle District of Louisiana.

An Iberville Parish sheriff's patrol agent (police), Mire, stopped the defendant's Texas-tagged rental car because he was driving too slowly in the median lane of Interstate 10 and was impeding traffic. Defendant's driver's license and the car registration were verified as appropriate, but the officer asked him why he and his girlfriend were driving a rental car to Florida. The defendant indicated that his usual car used too much gasoline, but he was unsure whether he was staying with a friend or in a hotel and had no reservations at any destined Florida hotel. He admitted to prior drug arrests and that he was on parole in Texas. The defendant declined to allow the officer to search the motor vehicle, and the officer then deployed his narcotic-detecting dog, which walked around the rented Kia car and alerted to the presence of recreational pharmaceuticals. With probable cause to search, the officer and back-up officers discovered a .357 pistol and over 4000 grams of methamphetamine in the car. The stop took about thirty minutes before the officer decided to extend the stop to conduct a dog sniff of the automobile. The officer noted that drug couriers often are instructed to drop the drugs at particular locations but are not given the names of anybody who will receive the drugs, and in this case, the defendant could not tell him where his friend lived or if he had previously been destined to see a friend in Florida.

The officer gained continued suspicion after the initial vehicle stop when the defendant did not directly answer his questions concerning duration and where he was staying and his girlfriend did not know how long they would be in Florida and, similarly, did not know the name of the defendant's alleged friend with whom they might be staying.

The defendant contended that there was no reason to stop the automobile and that even if it were a legal stop, the continuation of the stop past the registration and driver's license check was illegal under the *Terry* standard.

How would you rule on the defendant's contention that his continued detention after the traffic stop and after his license and registration checked out was illegal because the officer did not have a reasonable suspicion sufficient to extend the detention beyond the traffic stop?

The Court's Holding:

In denying the defendant's motion to suppress the gun and recreational pharmaceuticals, the court noted that warrantless detentions of the car and its occupants constitute seizures, and they must be justified at their inception. In this case, the way the

vehicle was driving to impede traffic justified a stop because of the traffic violation. When the discussion concerning the driver's license and registration and surrounding general questions indicated that there were reasons to suspect that the driver might be a drug courier, additional detention time was warranted. The suppression court approved of asking casual questions concerning the travel itinerary, where and with whom he might be staying in Florida, and why he was driving a rental car. Additional suspicion was aroused in the officer by the fact that the driver, Mr. Gomez, was on parole and had prior drug convictions. The general rule is that police may not extend traffic stops beyond what was dictated by the initial stop unless additional information becomes available, which happened in this case. With indefinite information concerning his lodging plans, his girlfriend's lack of knowledge of the name of the friend that they were meeting or where his Florida friend lived, his prior record, the rental car, and defendant's other reluctant or deceptive answers, there was sufficient reason to detain the defendant longer and to allow the officer to deploy his drug detection dog that was readily available. The use of a dog does not constitute a search and is lawful if the detention has not been unreasonably extended, which was not the case in this situation.

According to the court, it found that the extension of the traffic stop was lawful and that the subsequent dog sniff around the exterior of the rental car was constitutionally permissible. Patrol Agent Mire had reasonable suspicion to extend the traffic stop because his suspicion was based on specific and articulable facts, and was much more than a mere hunch of criminality. The defendant's inconsistent answers, the defendant's previous arrest and actions consistent with the conduct of a drug courier, and the use of a rental car, are all facts that helped provide reasonable suspicion sufficient to justify the extension of the traffic stop, and the dog alert provided probable cause for the warrantless search of the vehicle. The district court judge ruled that the evidence would not be suppressed from any future trial. See (M.D.La.2020).

Notes

1. Amendment Four (1791). 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.
2. See *Adams v. Williams,* 407 U.S. 143 (1972).
3. See *Terry v. Ohio,* 392 U.S. 1 (1968).
4. See *Illinois v. Wardlow,* 528 U.S. 119 (2000).
5. Ibid.
6. See *Florida v. J.L.,* 529 U.S. 266 (2000). In this case, an anonymous informant conveyed news to police that a specifically described young male, wearing a plaid shirt, was standing at a particular bus stop and illegally carrying a concealed firearm. The Court held that an uncorroborated tip from an unknown informant could not justify a frisk.
7. 2020 Il App (1st) 171814, 2020 Ill. App. LEXIS 221 (2020).
8. 392 U.S. 40 (1968).
9. See *United States v. Darrell*, 945 F.3d 929, 2019 U.S. App. LEXIS38209 (2019).

10. See *State v. Duncan*, 846 S.E.2d 315, 2020 N.C. App. LEXIS 525 (2020).
11. There must be objective reasons to believe an informant. An anonymous tip from a telephone caller telling police that a young male standing at a particularly described bus stop illegally possessed a firearm was insufficient to permit a stop and frisk for the weapon. In *Florida v. J.L.,* 529 U.S. 266 (2000), the Court held that because police had no means to test the unknown informant's knowledge and credibility, the tip lacked sufficient indicia of reliability to provide reasonable suspicion necessary to make a *Terry*-type stop.
12. *Delaware v. Prouse,* 440 U.S. 648, 650 (1979).
13. See *Brendlin v. California*, 127 S. Ct. 2400, 168 L. Ed. 2d 132, 2007 U.S. LEXIS 7897 (2007). Police may set up roadblocks without any individualized suspicion as an exception to the general rule requiring at least reasonable basis to suspect criminal activity. See *Michigan v. Sitz,* 496 U.S. 444 (1990), where the Court allowed the Michigan State Police to check motorists for alcohol impairment.
14. *Kansas v. Glover*, ___ U.S. ___, ___, 140 S.Ct. 1183, 206 L.Ed.2d 412, 2020 U.S. LEXIS 2178 (2020).
15. *Id*. at 442.
16. *Utah v. Strieff*, 579 U.S. ___, 136 S.Ct. 2056, 195 Led.2d 400, 2016 U.S. LEXIS 3926 (2016).
17. *Id*. at 2063.
18. *Ransome v. Maryland,* 373 Md. 99, 108, 109; 816 A.2d 901, 905, 906 (2003).
19. *United States v. De Castro*, 905 F.3d 676, 2018 U.S. App. LEXIS 27988 (3rd Cir. 2018).
20. *Id*. at 679, quoting *United States v. Mendenhall*, 447 U.S. 544, 553–55 (1980).
21. 528 U.S. at 124.
22. See *People v. Webb*, 2020 Il App (1st) 180110, 2020 Ill. App. LEXIS 445 (2020).
23. *United States v. Wilson*, 963 F.3d 701, 2020 U.S. App. LEXIS20352 (7th Cir. 2020).
24. *Id*. at 704.
25. *United States v. Weaver*, 975 F.3d 94, 98 (2nd Cir. 2020).
26. See *Ybarra v. Illinois,* 444 U.S. 85 (1979). The Court determined that a *Terry*-type frisk of all patrons of a bar for which a search warrant had been issued was unreasonable, since no individualized suspicion existed for any particular patron. Police conducted a pat-down of the customers and returned to make a more extensive search on Ybarra by reaching inside his clothing when there was no reason to suspect him of any wrongdoing.
27. The Second Circuit Court of Appeals upheld the eventual conviction of El-Gabrowny, including, by implication, the search of El-Gabrowny's clothing prior to arrest in *United States v. El-Gabrowny,* 189 F.3d 88, 1999 U.S. App. LEXIS 18926 (2nd Cir. 1999).
28. See *Ybarra v. Illinois, supra* note 53. See also *United States v. Cargill*, 2018 U.S. Dist. LEXIS 152038 (W.D. Ohio 2018).
29. *Harford v. State,* 816 So. 2d 789 (Fla. 2002).
30. *Ex parte Gardner*, 2020 Ala. LEXIS 138 (2020).
31. See *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L.Ed.2d 334, 1993 U.S. LEXIS 4018 (1993).
32. *Shackelford v. State*, 579 So.2d 306, 1991 Fla. App. LEXIS 4340 (1991).
33. *Id*. at 307.
34. See *State v. Murray*, 2018 Del. Super. LEXIS 319 (2018). See also *United States v. Espinoza-Valdez*, 889 F.3d 654, 2018 U.S. App. LEXIS 11864 (9th Cir. 2018), where the court noted that drug courier profiles should be admitted only for limited purposes due to potential unfair prejudice.
35. *Boyett v. State*, 485 S.W.3d 581, 2016 Tex. App. LEXIS 1035 (2016).
36. *Id*. at 589.
37. *State v. McClure*, 2020-Ohio-1574, 2020 Ohio App. LEXIS 1524 (2020).
38. A routine pat-down for all motorists runs afoul of the *Terry v. Ohio* case teaching; only when there is articulable and objective concern that a person may be armed and dangerous is a pat-down permitted. Routine pat-downs may result in suppressible evidence.
39. Ex parte Gardner, 2020 Ala. LEXIS 138 (2020).
40. 2020 Pa. Super. Unpub. LEXIS 872 (2020).
41. *United States v. Place,* 462 U.S. 696, 709, 710 (1983).

42. Not all seizures require "individual suspicion," despite the *Terry* requirement. In *Michigan v. Sitz,* 496 U.S. 444 (1990), the Court upheld the use of "sobriety checkpoints" where the stop was extremely brief, officers stopped every vehicle, and the intrusion was outweighed by the state's interest in reducing drunk driving. Such stops did not involve any individualized suspicion of any particular driver but served as a screen to find impaired motor vehicle operators.
43. *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 960 (2004).
44. *Id*. at 187.

Arrest and Seizure of the Person 4

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Learning Objectives

1. Be able to state the legal standard of probable cause.
2. Understand the level of proof necessary to meet the Fourth Amendment standard of probable cause and offer a fact pattern that supports probable cause to arrest.
3. Recognize the sources of probable cause information and be able to synthesize these sources to produce probable cause.
4. Identify situations when information that produces probable cause becomes stale and orally justify the reasons a particular situation may indicate stale probable cause.
5. Explain why an arrest warrant is deemed a court order and articulate why a warrant carries the power to make its execution effective.
6. Discriminate between situations that require arrest warrants and those that do not and identify the reasons justifying the different approaches.
7. Be able to discuss when an arrest inside a suspect's home requires a warrant and identify situations where a warrantless arrest may be made within the home.

Chapter Outline

KEY TERMS

1. Arrest
2. Arrest in the home
3. Arrest in third-party home
4. Exceptions to warrant
5. Exigent circumstances
6. Expectation of privacy
7. Hot pursuit
8. Neutral and detached judicial official
9. Probable cause to arrest
10. Seizure
11. Stale probable cause
12. Standing
13. Warrant to arrest

1. Probable Cause Arrests: The Legal Standard

Within the American system of criminal justice, an arrest occurs when a law enforcement officer obtains dominion and control over a subject's person. The United States Supreme Court has noted that a police officer has legal justification to arrest when the officer, "if, under the totality of the circumstances, he[she] learned of facts and circumstances through reasonably trustworthy information that would lead a reasonable person to believe that an offense has been or is being committed by the person arrested."[1] If informed of an officer's attention to arrest an individual, that subject may submit to the officer's control, and an arrest has occurred. In some situations, the subject is not interested in complying with the officer's command or instruction and may resist or flee. At that point, the subject is not under arrest because the officer has no control over the individual; an arrest requires submission to authority or application of physical force to ensure compliance.[2] A brief seizure under the *Terry v. Ohio* standard for a stop and frisk situation does not constitute an arrest, although a limited seizure has occurred on a standard lower than probable cause to arrest. Under the *Terry* standard, when the officer's reasonable suspicion has been satisfied, the encounter must end and the detainee be allowed to continue with the prior course of conduct unencumbered by any law enforcement control. However, if evidence unearthed during a *Terry* stop and frisk reveals facts that rise to the level of probable cause for an arrest, the officer may effectuate the arrest or make some other disposition of the subject. In *Beck v. Ohio*,[3] the Supreme Court noted that probable cause for arrest is said to exist when the officers had at the moment, "facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

2. The Concept of Probable Cause for Arrest

An arrest is a seizure under the Fourth Amendment where an individual person, against his or her will, comes under the total physical control of a governmental agent. There must be either a submission to the will of the law enforcement official or a physical application of force sufficient to put the person in the custody of the officer. "A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned."[4] Merely chasing a suspect does not constitute a seizure or an arrest until the individual is physically caught or when he or she submits to the lawful authority of the officer. See *Michigan v. Chesternut*, 486 U.S. 567 (1988) and *California v. Hodari D.*, 499 U.S. 621 (1991). In *Hodari D.*, the Court noted that "a police pursuit in attempting to seize a person does not amount to a 'seizure' within the meaning of the Fourth Amendment."[5] To effectuate a lawful arrest, probable cause must exist, and the manner of the seizure must be reasonable under the circumstances. In order to issue arrest warrants, courts must comply with the same standard by following the wording of the Fourth Amendment. It provides that "no Warrants shall issue, but upon probable cause" which means that where a court is to issue an arrest warrant, it must make a finding that a strong fact pattern indicates that powerful reasons exist to think a person has committed a particular crime for which taking the person into custody would be reasonable.

3. Plain Meaning of the Fourth Amendment

Under an objective reading of the Fourth Amendment, a reasonable interpretation with logical inferences would appear to require that a warrant would have to have been issued in compliance with the dictates of the amendment prior to each and every arrest. Since colonial times, arrests in public places have been made under the common law without the use of warrants, and a warrant is not presently a necessity for felony arrests. In *United States v. Watson*, 423 U.S. 411 (1976), the Court affirmed the constitutionality of warrantless probable cause arrests, holding that the Fourth Amendment reflected the ancient common-law rule that a law enforcement official had the power to arrest without a warrant for a misdemeanor or a felony committed in his presence, as well as for a felony not committed in his presence if there was reasonable ground (probable cause) for making the arrest. According to *Watson*, a warrant is not generally required even where the officer has adequate time to procure one. By the lesson of history,[6] legislation passed by the Framers of the Fourth Amendment, and settled usage,[7] police officers may make warrantless arrests given the presence of probable cause.

4. Probable Cause Defined

Although the Fourth Amendment mentions the concept of probable cause, it does not define it or give it any parameters. Probable cause need not rise to the level of proof beyond a reasonable doubt but must be sufficient that the level of proof is above a mere

hunch or guess. To establish probable cause, as the Supreme Court long ago noted, "[R]equires only a probability or substantial chance of criminal activity, not an actual showing of such activity."[8] Settled usage of the time (1791) provided content and definition, while later court cases have construed and refined the meaning. Probable cause has been defined as where the facts and circumstances within the officer's knowledge are sufficient in themselves to warrant a prudent person of reasonable caution believing that a particular person is committing or has committed a particular offense.[9] See *Beck v. Ohio*, 379 U.S. 89 (1964).

Case 4.1 LEADING CASE BRIEF: THE NECESSITY OF DEVELOPING PROBABLE CAUSE FOR AN ARREST

Beck v. Ohio
Supreme Court of the United States
379 U.S. 89 (1964).

CASE FACTS:

Police officers signaled William Beck to pull over and park his automobile because they suspected that he was involved in gambling. Officers had seen a picture of Beck and knew of his prior reputation as a numbers runner. Although the officers had neither arrest nor search warrant, the officers immediately arrested Beck and conducted a search of his person and of his automobile that revealed nothing indicative of criminal activity. At a nearby police station, a second search of his person revealed an envelope containing a number of clearing house slips "beneath the sock of his leg."

According to testimony, the officers initially decided to stop Beck if they saw him make a "numbers" stop in a bar or tavern. The officers' actual decision to stop Beck was partially based on knowledge that he had a prior record involving gambling, knowledge of his identity from a picture, and the fact that they had "heard reports" that someone reliable had stated that Beck possessed clearing house slips. The officers conducted this individual stop, search, and arrest in the absence of any probable cause or warrant either for a search or an arrest. Even the arresting officer who testified at the trial said no more than that someone (he did not say who) had told him something (he did not say what) about the petitioner being involved in gambling.

The prosecutor charged Beck with possession of clearing house slips in Cleveland Municipal Court. His counsel filed a motion to suppress based on the allegation that the evidence seized from the search of his person incident to his arrest had been seized in violation of his Fourth Amendment rights. The argument that probable cause to arrest was absent was rejected by the court, and motion to suppress the evidence seized by police was overruled. A guilty verdict followed. An Ohio Court of Appeals affirmed the municipal court conviction, and the Supreme Court of Ohio upheld the decision. The United States Supreme Court granted Beck's petition for certiorari.

LEGAL ISSUE:

Where police possessed a photograph of a person, where they heard

from unnamed and unsubstantiated sources that the person possessed illegal gambling materials, where they knew the person had a reputation for illegal gambling, and where they initiated an arrest based upon such data, has sufficient information been obtained to constitute probable cause to arrest?

THE COURT'S RULING

Objective evidence must be possessed by police that would lead a person of reasonable caution to believe that a particular person has committed a particular crime that is sufficient to establish probable cause for an arrest.

ESSENCE OF THE COURT'S RATIONALE:

* * *

The trial court made no findings of fact in this case. The trial judge simply made a conclusory statement: "A lawful arrest has been made, and this was a search incidental to that lawful arrest." The Court of Appeals merely found "no error prejudicial to the appellant." In the Supreme Court of Ohio, Judge Zimmerman's opinion contained a narrative recital which is accurately excerpted in the dissenting opinions filed today. But, putting aside the question of whether this opinion can fairly be called the opinion of the court, such a recital in an appellate opinion is hardly the equivalent of findings made by the trier of the facts. In any event, after giving full scope to the flexibility demanded by "a recognition that conditions and circumstances vary just as do investigative and enforcement techniques," we hold that the arrest of the petitioner cannot on the record before us be squared with the demands of the Fourth and Fourteenth Amendments.

The [factual] record [in this case] is meager, consisting only of the testimony of one of the arresting officers, given at the hearing on the motion to suppress. As to the officer's own knowledge of the petitioner before the arrest, the record shows no more than that the officer "had a police picture of him and knew what he looked like," and that the officer knew that the petitioner had "a record in connection with clearing house and scheme of chance." Beyond that, the officer testified only that he had "information," that he had "heard reports," that "someone specifically did relate that information," and that he "knew who that person was." There is nowhere in the record any indication of what "information" or "reports" the officer had received, or beyond what has been set out above, from what source the "information" and "reports" had come. The officer testified that when he left the station house, "I had in mind looking for [Defendant Beck] in the area of East 115th Street and Beulah, stopping him if I did see him make a stop in that area." But the officer testified to nothing that would indicate that any informer had said that the petitioner could be found at that time and place. And the record does not show that the officers saw the petitioner "stop" before they arrested him, or that they saw, heard, smelled, or otherwise perceived anything else to give them ground for belief that the petitioner had acted or was then acting unlawfully.

No decision of this Court has upheld the constitutional validity of a warrantless arrest with support so scant

as this record presents. . . . [T]he record in this case does not contain a single objective fact to support a belief by the officers that the petitioner was engaged in criminal activity at the time they arrested him.

An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. "Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained." [Citation omitted.]

* * *

Where the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would "warrant a man of reasonable caution in the belief" that an offense has been committed. *Carroll v. United States*, 267 U.S. 132, 162. If the court is not informed of the facts upon which the arresting officers acted, it cannot properly discharge that function. All the trial court was told in this case was that the officers knew what the petitioner looked like and knew that he had a previous record of arrest or convictions for violations of the clearing house law.

As noted in *Beck*, the arresting officer had a picture of the arrestee, knew what he looked like, knew some of his prior convictions, and had "heard reports" that Beck was running numbers. The Court held that these facts did not rise to probable cause and that the arrest of Beck had been unlawful. The level of belief required to meet probable cause is much more than a mere hunch, as in *Beck*, but falls far below proof sufficient for guilt beyond a reasonable doubt.

In determining whether an officer possesses sufficient evidence to make a warrantless arrest, the Supreme Court of Michigan suggested an inquiry concerning

> whether there are any facts which would lead a reasonable person to believe that the suspected person has committed a felony. Secondly, a police officer's belief that a defendant has committed a felony must be based on facts which are present at the moment of the arrest.[10]

The court noted that when courts review probable cause determinations by police, they must analyze whether the facts sufficient to establish probable cause existed at the moment of the arrest that would justify a fair-minded person of reasonable caution and of normal intelligence in believing that the person with whom the officer was dealing had committed a felony. All the facts and circumstances known to the officer at the moment of arrest can and should be considered.

In the case the Michigan court had under review against a claim by the defendant that the arresting officers lacked probable cause, the officers knew the defendant had

been stalking and threatening the deceased female, understood that the smell of gasoline had been detected near the home, and observed that the defendant did not seem upset at news that his girlfriend had died in a fiery blaze. According to the court, the collective information known to the police offered probable cause to arrest for stalking,[11] at a minimum, and probable cause to arrest for murder also may well have existed.

In a Pennsylvania case where probable cause was held to have existed,[12] a police officer observed a subject and an associate taking packages from the porch of a residence where they did not live and to which they were not entitled. The facts and circumstances known to the officers were sufficient in themselves to warrant a person of reason able caution in believing that an offense had been committed by the observed persons. The officer arrested the pair of "porch pirates" based on the personally observed facts that indicated probable cause for theft, receipt of stolen property, and conspiracy to commit theft.

5. Sources of Probable Cause to Arrest

The information that matures probable cause to arrest may have a variety of sources. The officer may have personally observed the facts creating probable cause, have received information from a police dispatcher or fellow officer,[13] have received some or all information from an informant, or have based probable cause from a combination of some or all of these sources. Data from the Internet and personal digital devices may provide useable information that may help establish probable cause.[14] If an informant supplied the basis for probable cause, courts (and police) generally want to know what facts the informant observed and why the court (and police) should believe the particular informant. In *Draper v. United States*, 358 U.S. 307 (1959) (Case 4.2), an informant of known reliability gave excellent information concerning drug trafficking, and a law enforcement official later corroborated the facts. The information matured probable cause to arrest because of its detail and reliable informant source and because a reasonable person would have arrived at the conclusion that Draper was probably carrying drugs. Probable cause may be established based on the collective knowledge of the officers involved rather than only the knowledge personally obtained by the arresting officer.[15]

Case 4.2 LEADING CASE BRIEF: DEVELOPING PROBABLE CAUSE FOR ARREST THROUGH AN INFORMANT

Draper v. United States
Supreme Court of the United States
358 U.S. 307 (1959).

CASE FACTS:

A federal narcotics agent with twenty-nine years' experience, Marsh, arrested Draper for possession of heroin as he alighted from a train. The warrantless arrest had been prompted by information given to the agent by an informant, Hereford, who "worked" for the Bureau of Narcotics. Hereford, the "special employee," related to agent

Marsh that Draper had gone to Chicago by train to purchase three ounces of heroin and that he would return by train on one of two different mornings. The "special employee" offered a complete physical description of Draper, including minute details of clothing he would be wearing, facts that only a person intimately involved with Draper could know.

On one of the mornings suggested by the informant Hereford, a person matching Draper's description emerged from the Chicago train and rapidly strolled away. Agent Marsh and a police officer arrested Draper based on Hereford's description of Draper coupled with his visual and personal validation of these significant details. Subsequent to the arrest, Marsh conducted a search of Draper's person that disclosed two envelopes of heroin and a hypodermic needle.

Contending that police lacked probable cause to arrest him as he exited the train, Draper filed a motion to suppress the evidence of heroin based on an alleged illegal arrest under the Fourth Amendment. The trial court held that probable cause for an arrest existed and that the heroin was properly admitted as a search incident to a lawful arrest. At Draper's trial, the prosecutor introduced the drug evidence against Draper, who was convicted of violating federal law by knowingly concealing and transporting narcotic drugs in interstate commerce. The Court of Appeals affirmed the conviction, and the Supreme Court of the United States granted certiorari.

LEGAL ISSUE:

Where an informant, known to the police, has given reliable information in past cases, and where the informant offered a detailed description of a suspected criminal and his criminal activities, which was later validated by an agent personally present, does informant's information coupled with the verifications of the officer equal probable cause for an arrest?

THE COURT'S RULING:

While the Court reaffirmed that hearsay evidence could be used in determining probable cause, it held that where a reliable informant gives some evidence of criminal wrongdoing and predicts future activity of the suspect, where a police officer can later personally confirm the accuracy of the prior information and link it to the predicted behavior, probable cause will result.

ESSENCE OF THE COURT'S RATIONALE:

* * *

[The Court could not] agree with petitioner's second contention that Marsh's information was insufficient to show probable cause and reasonable grounds to believe that petitioner had violated or was violating the narcotic laws and to justify his arrest without a warrant. The information given to narcotic agent Marsh by "special employee" Hereford may have been hearsay to Marsh, but coming from one employed for that purpose and whose information had always been found accurate and reliable, it is clear that Marsh would have been derelict in his duties had he not pursued it. And when, in pursuing that information, he saw a

man, having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag that Hereford had described, alight from one of the very trains from the very place stated by Hereford and start to walk at a "fast" pace toward the station exit, Marsh had personally verified every facet of the information given him by Hereford except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified, Marsh had "reasonable grounds" to believe that the remaining unverified bit of Hereford's information—that Draper would have the heroin with him—was likewise true.

> In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.
>
> *Brinegar v. United States*, supra, at 175

Probable cause exists where the facts and circumstances within their [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 288. [(1925).]

We believe that, under the facts and circumstances here, Marsh had probable cause and reasonable grounds to believe that petitioner was committing a violation of the laws of the United States relating to narcotic drugs at the time he arrested him. The arrest was therefore lawful, and the subsequent search and seizure, having been made incident to that lawful arrest, were likewise valid. It follows that petitioner's motion to suppress was properly denied and that the seized heroin was competent evidence lawfully received at the trial.

Affirmed.

CASE IMPORTANCE:

Probable cause to arrest may mature through personal observations of police officers, through information offered by informants or a combination of informant hearsay and police verification.

Where an informant is involved, developing probable cause for an arrest involves virtually identical legal considerations as are involved in developing probable cause for a search. There needs to be sufficient reason to believe that the information given by the informant equals probable cause, and the informant must be believable as a person. This basic two-pronged test for evaluating an informant's information arose in *Aguilar v. Texas*[16] and was reviewed and essentially overruled in *Illinois v. Gates*[17] when the Court replaced the two-pronged *Aguilar* test with a totality of the circumstances test. Prior to *Gates*, the reliability of an informant was evaluated on two levels: was there a reason to believe this particular informant, and, if the informant was to be believed, did the facts

offered by the informant equal probable cause for an arrest or a search? *Gates* lowered the level of reliability demanded of an informant by allowing a weak showing of honesty to be cured by facts showing minute details that would be known only by one close to the situation. Although the *Gates* Court was clear that it overruled *Aguilar*, many courts still look largely at or at least consider the two prongs of the old *Aguilar* test when evaluating probable cause based on an informant's information.[18]

Gates involved the maturing of probable cause for a search a car and a home based on an anonymous letter in which the informant was unknown and the alleged facts uncorroborated at first. Police verified some of the information in the anonymous letter, but not every detail, and some facts were never corroborated. The letter noted that Gates and his wife made a living selling illegal drugs and predicted that Gates would take a plane flight from Chicago to meet his wife on a particular day in Florida where they would procure drugs. The informant suggested conduct that Gates would follow once he arrived in Florida at his wife's location; Florida and DEA officers verified more details suggested by the letter-writing informant. While there was no initial reason to believe the unknown informant, once police verified that the informant knew important details of how Gate's life would unfold, how he would fly to Florida, and how he did meet his wife there as suggested by the informant's letter, its truthfulness was significantly enhanced. Therefore, there was a strong reason to believe that the informant was telling the truth and that recreational pharmaceuticals would be found at their home and they would be bringing drugs back in their car from the trip. In upholding the validity of the search warrants involved in *Gates*, the Supreme Court made the future procurement of probable cause for arrest and for search warrants significantly easier and less contestable where an informant's information has been necessary to the development of arrest or search probable cause

Even after the *Gates* case, when determining probable cause to arrest based on an informant's information, it remains important to evaluate the informant's trustworthiness and to carefully consider what information has been communicated. Under the totality of the circumstances test, the officer needs to make a practical, common-sense determination whether, considering all the information available, probable cause to arrest exists while giving due consideration to the informant's information. In a Georgia drug case,[19] a drug informant told officers about a supplier of methamphetamine, but the informant was previously unknown to officers. In the presence of the officers, she arranged a drug purchase/delivery from her cell phone and accompanied the officers to the delivery scene, where the dealer arrived driving a vehicle that previously had been described by the informant. The facts as they unfolded helped prove the veracity of the informant and to establish the facts necessary to support probable cause for the arrest of the drug dealer.

As a general rule, probable cause to arrest or to search may be based on hearsay statements or declarations contained within a criminal complaint or attached to an affidavit for a warrant as long as there is a substantial reason for believing that the source of the hearsay evidence is believable and that a factual basis exists for the information. Arrest probable cause may exist following the evaluation of wiretap information obtained pursuant to a federal or state warrant. Research in public records and on Internet social

media sites, when combined with other information, may also indicate sufficient proof of probable cause to arrest.

Although the majority of arrests occur without the utilization of a warrant, the existence of probable cause for an arrest remains an absolute prerequisite for a valid seizure of a person. Where the police arrest an individual without a warrant, the Fourth Amendment requires a judicial determination of probable cause within a reasonable time. According to the Court in *Riverside v. McLaughlin*, 500 U.S. 44 (1991), the judicial determination of probable cause for a warrantless arrest must generally be made within forty-eight hours following a warrantless arrest.

6. Stale Probable Cause

As a general rule, where probable cause to arrest exists at a particular point in time, it will not subsequently cease to exist. As a Virginia court noted, arrest probable cause only becomes stale if facts emerge that indicate the probable cause was based upon subsequently discredited information.[20] If police have observed facts or have obtained information that indicates an individual is subject to arrest for a particular crime, the passage of time and continued police effort are most likely to generate more evidence of guilt rather than produce exculpatory evidence that would negate probable cause. The one clear case where probable cause to arrest has become stale exists when the statute of limitations for the particular crime has run and the person may no longer be prosecuted. However, in many situations, police officers may not be clearly cognizant of the intricacies of a statute of limitations, and the concept that the statute of limitations negates the finding of probable cause may not actually extinguish probable cause. The Third Circuit has held that a statute of limitations on bringing a prosecution is merely an affirmative defense to be determined by a court of competent jurisdiction since the application of the statute of limitations is not always a clear-cut matter in criminal prosecutions.[21]

Demonstrative of the concept that arrest probable cause normally does not become stale is a case in Illinois,[22] where police used a confidential informant to make a drug purchase from a dealer. No arrest was made at the time of the sale due to an ongoing investigation and because the police did not want to have the dealer become aware that the drug purchaser was also an informant. Several weeks later, police stopped the defendant's car; warrantlessly arrested him on the drug sale charge; and searched the car as incident to the arrest, revealing quantities of drugs and explosives. His complaint to the federal courts at trial and on appeal that the probable cause for arrest based on the drug sale had gone stale was rejected by the trial court and the appellate courts. The reviewing court noted that there is no requirement that a person be arrested at the moment probable cause matures and that longer delays prior to arrests are not considered any different whether days or weeks have passed.[23]

In some cases, however, the original grounds supporting probable cause for arrest could be disproved by subsequent investigation that at the same time turns up wholly new evidence supporting probable cause to arrest a different person. In that type of

situation, probable cause could become stale or cease to exist because it was based upon information now discredited. The outer time limitation for arrest, once probable cause to arrest has been established, is the passage of the statute of limitations, if any, for the particular crime. Once the statute of limitations has expired, probable cause, in the legal sense, no longer exists, and the person may not be arrested.

Probable cause may become stale because the underlying crime may have been resolved or the reason for arrest no longer exists. For example, in *Arizona v. Evans*, 514 U.S. 1 (1995), a justice of the peace issued an arrest warrant for the defendant, which was duly logged into the police computer. At a later time, the defendant appeared before the judicial official and resolved the outstanding legal matters. The judicial official had the warrant quashed (extinguished) because probable cause had ceased to exist. Phoenix police arrested Evans following a routine traffic stop when the officer became aware there was an outstanding misdemeanor arrest warrant. In essence, the arrest probable cause had become stale by the passage of more recent events.[24] A lawful search of his car following his arrest on the outstanding warrant revealed a recreational amount of marijuana. When the police notified the court that Evans had been arrested, the court advised the police that the warrant had been resolved. Evans argued that, because his arrest was based on a resolved legal issue for which probable cause no longer existed, the evidence seized incident to the arrest should have been suppressed. Although the *Evans* Court failed to decide the issue of whether the arrest was invalid due to stale information, a strong argument could be made that circumstances had caused the arrest probable cause to become stale. The *Evans* Court approved of the admission of evidence because it found that the police acted in objective good faith[25] that the warrant was valid, and since a court clerk made the error, not the police agency, the exclusionary rule should not be applied.

7. Arrest Pursuant to a Warrant

An arrest warrant[26] is a court order directed toward law enforcement officers to take into custody a particularly described individual. In order for a judicial official to issue an arrest warrant, the judge[27] or magistrate must be personally convinced that probable cause to arrest exists for a specifically described individual. Arrest warrants are often issued when the subject is known and has been indicted but his or her exact location is not known. There is a procedural advantage to arresting a person pursuant to a warrant: if the arrestee later wishes to contest the validity of probable cause, the burden of proof is on the defendant and not on the prosecution. Where a warrantless arrest has occurred without the benefit of a judicial decision, the prosecution must prove arrest probable cause by a preponderance of the evidence.

An arrest warrant typically contains the name of the defendant and/or a clear description from which he or she can be positively identified with reasonable certainty. The warrant should describe the offense for which the defendant has been charged and may have a copy of the complaint or indictment attached to it. The arrest warrant commands the person executing it to seize the person named and bring that individual before the court that issued the warrant without needless delay. Where a law enforcement officer makes the arrest and does not have a copy of the arrest warrant, the officer

AO 442 (Rev. 11/11) Arrest Warrant

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America
v.

)
)
)
)
)
)

Case No. _____

Defendant

ARREST WARRANT

To: Any authorized law enforcement officer

YOU ARE COMMANDED to arrest and bring before a United States magistrate judge without unnecessary delay

(name of person to be arrested) _____ ,

who is accused of an offense or violation based on the following document filed with the court:

❑ Indictment ❑ Superseding Indictment ❑ Information ❑ Superseding Information ❑ Complaint

❑ Probation Violation Petition ❑ Supervised Release Violation Petition ❑Violation Notice ❑ Order of the Court

This offense is briefly described as follows:

Date: _____

_____
Issuing officer's signature

City and state: _____

_____
Printed name and title

Return

This warrant was received on *(date)* _____ , and the person was arrested on *(date)* _____

at *(city and state)* _____ .

Date: _____

_____
Arresting officer's signature

_____
Printed name and title

FIGURE 4.1 Example of an Arrest Warrant Used by Federal Court. It is public domain and is internally documented.

Available at: www.uscourts.gov/sites/default/files/ao442.pdf

should inform the arrestee of as much of the information contained within the warrant as is known, but a failure to inform does not invalidate the arrest or otherwise affect the warrant to arrest. A warrant for an arrest used in federal courts has been reprinted in Figure 4.1.

AO 442 (Rev. 11/11) Arrest Warrant (Page 2)

This second page contains personal identifiers provided for law-enforcement use only and therefore should not be filed in court with the executed warrant unless under seal.

(Not for Public Disclosure)

Name of defendant/offender: _____

Known aliases: _____

Last known residence: _____

Prior addresses to which defendant/offender may still have ties: _____

_____

Last known employment: _____

Last known telephone numbers: _____

Place of birth: _____

Date of birth: _____

Social Security number: _____

Height: _____ Weight: _____

Sex: _____ Race: _____

Hair: _____ Eyes: _____

Scars, tattoos, other distinguishing marks: _____

_____

_____

History of violence, weapons, drug use: _____

_____

Known family, friends, and other associates *(name, relation, address, phone number)*: _____

_____

FBI number: _____

Complete description of auto: _____

_____

Investigative agency and address: _____

_____

Name and telephone numbers (office and cell) of pretrial services or probation officer *(if applicable)*: _____

_____

_____

Date of last contact with pretrial services or probation officer *(if applicable)*: _____

_____

_____

FIGURE 4.1 (Continued)

When an officer has an arrest warrant or believes probable cause to arrest exists, the legal authority to make the arrest carries with it the power to make the arrest effective. The level of force necessary to effectuate an arrest differs significantly from case to case. At times, significant force may be required; even deadly force may be necessary where the defense of the officer or others dictates its use. In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court held that a police officer who had probable cause to arrest used an unreasonable level of force when he observed an apparently unarmed suspected felon in the act of escaping and shot and mortally wounded the suspect to prevent the escape.

According to the *Garner* Court, determining whether a particular seizure is reasonable requires that the method of seizure and the rights of the individual be balanced against governmental interests in effective law enforcement. In making such an evaluation, it appeared that the Court would have approved the use of deadly force to prevent the escape of a suspected felon if the officer had probable cause to believe that the fleeing suspect had committed a felony and that he was presently dangerous to the point of posing an immediate threat of death or serious injury to others. Consistent with the use of reasonable force, in a civil rights suit,[28] a federal district court held that when an accused shoplifter tried to leave a store after being told she was under arrest and after she pushed back at the officer, he could use a reasonable level of force. Due to her physically resisting arrest, the officer was justified in tackling her to get her under control to effectuate the arrest. The court noted that the reasonableness of the level of force is judged from the perspective of a reasonable officer on the scene at the time of arrest.

8. Requirements for Arrest Without a Warrant

When a police officer possesses probable cause to reasonably believe that a person has committed a crime, generally a warrantless arrest is permissible. See Case 3.1, *Beck v. Ohio*, 379 U.S. 89 (1964). Under the common law and the general practice in effect at the time of the adoption of the Constitution of the United States, a peace officer or a private citizen could arrest a felon without a warrant. Both state and federal courts have generally been upheld this practice,[29] and there are many circumstances when a warrantless arrest for a misdemeanor may be appropriate, especially when the crime has been committed in the presence of the officer.[30]

Demonstrative of this principle is *United States v. Watson*, 423 U.S. 411 (1976), where the defendant had been arrested for a felony without a warrant. The arresting officer possessed probable cause due to earlier investigative efforts. Although the officer had time to procure an arrest warrant, he chose not to obtain one prior to effectuating the arrest. The *Watson* Court approved of the warrantless arrest so long as probable cause existed, largely by citing historical precedent. Although the Fourth Amendment could be interpreted as requiring a warrant for arrests, the *Watson* Court considered the practice and original intent of the Framers that existed at the time of the adoption of the Fourth Amendment. The Court noted that the Second Congress passed legislation giving United States marshals the same power as local peace officers to arrest without a warrant. It also noted that, given probable cause, the warrantless arrest practice has continued to the present for state, local, and federal officers. As a strong general rule, warrantless felony arrests may be made outside the home of the arrestee based solely upon probable cause. Therefore, the *Watson* Court upheld the warrantless nonemergency arrest of a United States Post Office employee who was suspected of being involved in credit card theft. Essentially, the Court said that where probable cause to arrest exists, either course of action—using a warrant or deciding not to obtain a warrant—is reasonable under the Fourth Amendment so long as arrest probable cause existed. For a valid warrantless arrest, the facts establishing probable must be apparent to a reasonable officer *prior* to the arrest.

Where police officers make a warrantless arrest based on evidence that a judge later rules was based on less than probable cause, they may have a defense based on qualified immunity if the arrestee later files a civil suit so long as a reasonable officer could have believed that probable cause existed. The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law"[31] but may not protect an officer when no reasonable officer would have found probable cause under the circumstances.[32]

Where police officers make an arrest on less than probable cause and such an error is reasonable under the circumstances, the general rule is that qualified immunity from civil or criminal prosecution exists so long as the error was a reasonable one. In *Hunter v. Bryant*, an individual who had made some threats in a letter against the president of the United States was warrantlessly arrested, allegedly in the absence of probable cause. Later, the case was dismissed on the government's motion. Bryant sued the Secret Service officer civilly. In upholding the dismissal of Bryant's civil suit, the Court cited the reasonableness of the arrest even though it was based on less than probable cause; the error of caution in protecting the president was an overriding desire that made the officer's actions reasonable even in the absence of probable cause. In this case, the error was reasonable given the laudable goal of protecting the president, but the principle of a good faith belief that probable cause to arrest exists shields a reasonable officer from a successful civil suit, and the principle applies to other situations that do not involve executive protection.

The general rule, based on history and practice, is that a police officer may arrest for any felony when probable cause exists and that arrests for misdemeanors require warrants or must be committed in the officer's presence. A court case from Texas reinforces the principle that probable cause to arrest for a misdemeanor committed in the officer's presence is all that a police officer constitutionally needs to make an arrest outside the home of the arrestee. In *Atwater v. City of Lago Vista*,[33] (Case 4.3) the defendant was driving her pickup truck with her children unrestrained, contrary to Texas law, when a police officer observed the violation and stopped her. After calling for backup, he arrested her in front of her children and took her to jail because of her apparent violation of the transportation code. Subsequent to her legal troubles, Atwater filed a civil suit against the jurisdiction alleging that the warrantless arrest for the seat belt violation violated her Fourth Amendment rights to be free from unreasonable seizure. The *Atwater* Court held that the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense punishable only by a fine. Central to the Court's rationale was the belief that, although some support existed for the concept that a police officer historically could not arrest for a misdemeanor not committed in the presence of the officer, a survey of English and American history and the weight of authority permitted an arrest without warrant. Early state practice permitted warrantless misdemeanor arrests, and Congress in 1792 gave federal marshals the same power to make warrantless arrests, which included misdemeanors. With this historical record, whether warrantless misdemeanor arrests are practically appropriate or intelligent in all cases, the practice passed constitutional muster. Thus, given probable cause to arrest for any criminal offense, a warrant is not a constitutional requirement to arrest outside of a home.

Case 4.3 LEADING CASE: FOURTH AMENDMENT PERMITS PROBABLE CAUSE MISDEMEANOR ARRESTS

Atwater v. City of Lago Vista
Supreme Court of the United States
532 U.S. 318 (2001).

CASE FACTS:

While on patrol, a Lago Vista police officer, Bart Turek, observed the driver of a pickup truck violating the law by not wearing a safety belt as required by Texas law. Accordingly, he stopped the driver, Gail Atwater, and arrested her for the crime of not wearing a seatbelt and for not requiring her children to wear appropriate child restraints. The officer berated and handcuffed Atwater and placed her in a cruiser. A friend heard of her plight and came to take charge of the children. Following her ride in handcuffs to the local lockup, police had her remove her shoes, jewelry, and eyeglasses prior to taking her mug shot and placing her in a cell. Atwater eventually pled guilty to a misdemeanor seatbelt offense and paid a fifty-dollar fine, the maximum penalty permitted under Texas law.

Subsequently, Atwater sued the City of Lago Vista, essentially alleging that her rights under the Fourth Amendment as applied to the states had been violated. The trial court dismissed the suit, but a three-judge panel of the Fifth Circuit Court of Appeal reversed, concluding that an arrest for a first-offender violation of a seatbelt ordinance was an unreasonable seizure under the Fourth Amendment. The en banc Fifth Circuit Court of Appeal reversed the three-judge panel on the theory that the officer had probable cause to arrest and that there was no evidence that the arrest had been done in an extraordinary manner that might have been unusually harmful to Atwater. The United States Supreme Court granted certiorari.

LEGAL ISSUE:

Does the Fourth Amendment, by incorporating common law restrictions on misdemeanor arrests or by some other legal theory, limit a police officer's authority to arrest for misdemeanors with probable cause in the absence of a warrant when the offense does not amount to a breach of the peace?

THE COURT'S RULING:

The common law may be ambiguous and fail to have complete consistency, and historical practice within the United States may fail to demonstrate consistency, but the Court held that the Fourth Amendment did not prohibit warrantless arrests for misdemeanors where a police officer possesses probable cause to arrest.

ESSENCE OF THE COURT'S RATIONALE:

* * *

II

The Fourth Amendment safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In reading the Amendment, we are guided by "the traditional protections against unreasonable

searches and seizures afforded by the common law at the time of the framing," *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995), since

> [a]n examination of the common law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable. *Payton v. New York*, 445 U.S. 573, 591 (1980) (footnote omitted).

Thus, the first step here is to assess Atwater's claim that peace officers' authority to make warrantless arrests for misdemeanors was restricted at common law (whether "common law" is understood strictly as law judicially derived or, instead, as the whole body of law extant at the time of the framing). Atwater's specific contention is that "founding era common law rules" forbade peace officers to make warrantless misdemeanor arrests except in cases of "breach of the peace," a category she claims was then understood narrowly as covering only those nonfelony offenses "involving or tending toward violence." Brief for Petitioners 13. Although her historical argument is by no means insubstantial, it ultimately fails.

A

We begin with the state of pre-founding English common law and find that, even after making some allowance for variations in the common law usage of the term "breach of the peace," the "founding era common law rules" were not nearly as clear as Atwater claims; on the contrary, the common law commentators (as well as the sparsely reported cases) reached divergent conclusions with respect to officers' warrantless misdemeanor arrest power. Moreover, in the years leading up to American independence, Parliament repeatedly extended express warrantless arrest authority to cover misdemeanor-level offenses not amounting to or involving any violent breach of the peace.

* * *

The great commentators were not unanimous, however, and there is also considerable evidence of a broader conception of common law misdemeanor arrest authority unlimited by any breach of the peace condition. Sir Matthew Hale, Chief Justice of King's Bench from 1671 to 1676, wrote in his History of the Pleas of the Crown that, by his "original and inherent power," a constable could arrest without a warrant "for breach of the peace and some misdemeanors, less than felony." 2 M. Hale, The History of the Pleas of the Crown 88 (1736).

* * *

We thus find disagreement, not unanimity, among both the common law jurists and the text writers who sought to pull the cases together and summarize accepted practice.

* * *

The evidence of actual practice also counsels against Atwater's position. During the period leading up to and surrounding the framing of the Bill of Rights, colonial and state legislatures,

like Parliament before them, supra at 333–335, regularly authorized local peace officers to make warrantless misdemeanor arrests without conditioning statutory authority on breach of the peace. . . .

The [law] reports may well contain early American cases more favorable to Atwater's position than the ones she has herself invoked. But more to the point, we think, are the numerous early- and mid-19th-century decisions expressly sustaining (often against constitutional challenge) state and local laws authorizing peace officers to make warrantless arrests for misdemeanors not involving any breach of the peace.

* * *

Accordingly, we confirm [that] . . . [i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.

IV

Atwater's arrest satisfied constitutional requirements. There is no dispute that Officer Turek had probable cause to believe that Atwater had committed a crime in his presence. She admits that neither she nor her children were wearing seat belts, as required by Tex.Tran. Code Ann. § 545.413 (1999). Turek was accordingly authorized (not required, but authorized) to make a custodial arrest without balancing costs and benefits or determining whether or not Atwater's arrest was in some sense necessary.

Nor was the arrest made in an "extraordinary manner, unusually harmful to [her] privacy or . . . physical interests." *Whren v. United States*, 517 U.S. at 818. . . . The arrest and booking were inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment.

The Court of Appeals' en banc judgment is affirmed.

CASE IMPORTANCE:

Consistent with the Fourth Amendment, police officers may make arrests without warrants for any misdemeanor committed in their presence so long as probable cause for arrest exists and local law allows.

One primary limitation on arrest procedure is that the manner of apprehension must be reasonable under the Fourth Amendment. Clearly, an officer may not effectuate the arrest by killing the subject,[34] absent self-defense or under circumstances where the subject presents a significant threat to others. The force used must be necessary to accomplish the arrest, but it must not be outrageously excessive when measured by the level of force, if any, offered in resistance.

Following an arrest without a warrant, the arresting officer or another officer should bring the arrested person, without undue delay, before a court of competent jurisdiction for a judicial consideration of probable cause. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), in addressing the Fourth Amendment's prohibition against unreasonable seizures, the Court determined that a police detention of an arrestee requires a prompt judicial determination of probable cause following an arrest made without a warrant. In

arrest situations, where police alone have determined probable cause, a judge or magistrate must reconsider whether probable cause exists, and the judge must do so within a reasonable time following the arrest. See *Riverside v. McLaughlin*, 500 U.S. 44 (1991). According to the *Riverside* Court, a reasonable time to be incarcerated on less than a judicial showing of probable cause or a grand jury indictment was forty-eight hours.[35] As a practical matter, charges that support the arrest should be filed by the officer or one acting on behalf of the officer within a reasonable time, but a judicial official should rule on probable cause within the two-day period. A sample form has been reprinted subsequently that is demonstrative of forms courts use when making a probable cause only determination within the required forty-eight hours.

9-207A. **Probable Cause Determination.**

[For use with District Court Rule 5-301 NMRA, Magistrate Court Rule 6-203 NMRA, Metropolitan Court Rule 7-203 NMRA, and Municipal Court Rule 8-202 NMRA]

STATE OF NEW MEXICO
[COUNTY OF_____]
[CITY OF_____]
_____ COURT
[STATE OF NEW MEXICO]
[COUNTY OF _____]
[CITY OF _____]
v. No. _____
_____, Defendant.

PROBABLE CAUSE DETERMINATION
(For use only if the defendant has been arrested without a warrant and has not been released.)

Finding of Probable Cause
[ ] I find that there is a written showing of probable cause to believe that a crime has been committed and that the above named defendant committed it.
It is ordered that the defendant shall be released:
[ ] on personal recognizance.
[ ] on the conditions of release set forth in the release order.
[ ] only upon entry of a release order after the defendant has appeared before a judge.

Failure to Make Showing of Probable Cause
[ ] I find that probable cause has not been shown that a crime has been committed and that the above named defendant committed it. It is ordered that the defendant be released on personal recognizance.

[ ] A probable cause determination has not been made within forty-eight (48) hours of the defendant's arrest. It is ordered that the defendant be released on personal recognizance.

_____
Judge
_____
Date
_____
Time

FIGURE 4.2 Example of a Judicial Probable Cause Determination Made after a Warrantless Arrest.[36]

9. Requirements for Arrests Within the Home

The Fourth Amendment has been judicially construed to prohibit a warrantless arrest within one's home unless exigent circumstances, destruction of evidence, hot pursuit, or some other exception applies. In construing the Fourth Amendment, the Court emphasized that, in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), there was a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search, seizure, or arrest that occurs inside a place of residence without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances."

In a case in the Second Circuit Court of Appeal, the court reaffirmed its view that a home arrest requires a warrant when it stated:

> To be arrested within the home involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when arrest probable cause is clearly present.[37]

Even with an arrest warrant, the officer must make a strong effort to determine whether the arrestee is likely to be inside a particular home before forcing an entry. In an Alabama case,[38] the officer possessed an arrest warrant and had been told by an occupant that the subject of the warrant was not present and did not live there. The officer forced his entry into the home with a crowbar and conducted a room-to-room search. In addition, police had old driver's license data and had made no real effort to determine whether the subject lived at the listed home. Such activity can subject the officer to a successful civil rights suit.

In a landmark warrantless entry case, *Payton v. New York*,[39] police officers had developed probable cause to arrest Payton for murder, but they warrantlessly entered his home illegally. The Court held that the officers needed an arrest warrant to enter the home and that by entering without a warrant, they had violated Payton's Fourth Amendment rights[40] in warrantlessly seizing evidence. In *Payton*, the Court recognized that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[41] The requirement for a warrant to make an in-home arrest was reaffirmed in *Kirk v. Louisiana*,[42] where police warrantlessly entered, arrested Kirk, and searched his residence with probable cause to believe that drugs were being sold on the premises. In a *per curiam* decision, the *Kirk* Court held that a warrantless entry to search and/or arrest requires a warrant or some exception to the warrant requirement; it sent the case back for further proceedings consistent with *Payton v. New York*.[43] Similarly, in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), officers had probable cause to arrest Welsh for driving while intoxicated. Police gained entry to Welsh's home and arrested him in his bed, even though there had been no immediate or continuous pursuit (no hot pursuit) of Welsh from the scene of the crime. The Court held that, under the circumstances of the case, the arrest of Welsh in his own bed was illegal under the Fourth Amendment. However, when police develop probable cause to arrest, the arrest will be considered lawful

if the subject voluntarily steps outside of his home to address the officer. In one case,[44] police developed probable cause to believe that a father had violated a protective order preventing contact with the mother of his child and went to his residence to speak with him. A warrant arrest was proper once probable cause existed and the subject voluntarily stepped outside the home on the porch to verbally harass the officer.

The expectation of privacy in the home has been so protected from intrusion that even police with probable cause to arrest may not transgress the home boundaries without a warrant or some emergency circumstance. Consistent with the general prohibition against warrantless arrests inside one's home, the Supreme Court of Michigan reversed a driving while intoxicated case[45] because a police officer, with misdemeanor probable cause and no warrant, stepped inside the defendant's home to arrest her when she refused to leave her home to come out on the porch. The Michigan court found that the seizure of her person occurred beyond the line that marked the entrance to her home and "was unreasonable because it was accomplished without a warrant, without consent, and without any exigent circumstances."[46]

Police may prevent a home occupier from reentering his home where probable cause to search the residence exists. In addition, law enforcement officials may detain the occupants who are present while officers execute a search warrant[47] but may not detain persons who were in the process of leaving prior to the actual execution of the home search warrant.[48] For officer safety and to prevent the destruction of evidence, police may prevent an occupant from entering or reentering the home until a judge has issued, or refused to issue, a search warrant. In one case,[49] an estranged wife told police that she knew that her husband had illegal drugs within their trailer home when she asked police to stand nearby while she picked up some of her belongings. She had recently been inside the home and had first-hand knowledge, facts which gave rise to probable cause to search. Police suspected that if the husband reentered the place, he would flush the evidence, so they prevented him from going inside without a police escort. Once police searched the home and found marijuana, probable cause for arrest of the husband existed. Despite the defendant's contention that the police illegally seized his home without a warrant, the Supreme Court held that probable cause did exist to search the trailer home and that it was reasonable police conduct that prevented the occupant from reentering his home while a warrant was being obtained.

10. Requirements for Arrests Within a Third Party's Home

Where police have an arrest warrant for one person but have reason to believe that the subject is inside the home of a third person, a warrant or a substitute theory to enter the home of the home occupier may be required.[50] The person living in his or her home where the potential arrestee is believed to be present has Fourth Amendment rights and expectations of privacy. This merely restates the general rule that, absent exigent circumstances or consent, a home may not be searched without a warrant. If the subject of the arrest warrant actually resides within the home owned or occupied by another person, the arrest warrant may be executed in any event under such circumstances. In a civil suit[51] alleging

a violation of civil rights where police had entered the dwelling of one party to arrest a another individual believed to be staying in the trailer home, the Tenth Circuit noted

> It is not clearly established that entering a third party's residence to execute a valid arrest warrant against an individual "temporarily staying" in the residence violates the third party's Fourth Amendment rights. It is clear that if the subject of an arrest warrant is merely a guest in a home, law enforcement may not enter without a search warrant or exigent circumstances. *Steagald v. United States*, 451 U.S. 204, 215–216, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981). However, if the subject of the arrest warrant lives in the residence, law enforcement may enter to execute a valid arrest warrant without a search warrant or exigent circumstances. *Payton v. New York*, 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) ("[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.")

In *Steagald v. United States*, 451 U.S. 204 (1981), noted previously, Drug Enforcement Administration agents entered Steagald's home with an arrest warrant to search for another man without first obtaining a search warrant for Steagald's residence. Although DEA agents had legal authority to arrest the targeted individual, they arrested the homeowner, Steagald, after warrantlessly entering his home and after it appeared that Steagald possessed illegal recreational pharmaceuticals and other contraband. The *Steagald* Court held that the entry and search of Steagald's home and the arrest of Steagald were illegal as to Steagald and contrary to the requirements of the Fourth Amendment in the absence of exigent circumstances or consent. To have lawfully searched Steagald's home for the target of the arrest, law enforcement officials would have had to have procured a search warrant for the home. Consistent with the logic of *Steagald*, in a situation where the home-occupier female called police for assistance with her drunk significant other and invited officers into her home, the arrest of the drunk and out-of-control significant other did not require an arrest warrant when the arrest occurred within the home of the person requesting law enforcement assistance.[52]

Possession of an arrest warrant indicates that a judicial official has determined that circumstances reasonably permit the seizing of the person wherever the individual may be located, including within the suspect's home. The arrest warrant carries with it the power to make it effective by using a reasonable level of force, if necessary. Without an arrest warrant, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness and illegality that attach to all warrantless home arrests. Arresting an individual within another person's home touches on the Fourth Amendment rights of the home occupier but may not involve any violation of the rights of the subject of the arrest who is found within the home of another person.

11. Summary

The federal or a state government may warrantlessly take a person into custody when probable cause exists to believe that that person has committed a felony or when

the individual has committed a misdemeanor in view of the officer. Probable cause exists where the facts and circumstances that have been presented or made known to an officer of reasonable caution would reasonably lead that officer to conclude that a crime has been committed or is being committed by a particular person. The concept of probable cause requires only a proper proof or a substantial chance that a particular person has committed a crime. The evidence encompassing probable cause that comes to a law enforcement officer may be from an informant's information, the police officer's observations, a fellow officer's information, a citizen's complaint, the Internet, or a combination of these sources, as well as others. Where probable cause to arrest exists, the officer may make the arrest wherever the person may be found, except that if the person subject to arrest is inside his or her own home, an arrest warrant will probably be required, absent the presence of an excusing legal theory such as consent to enter or an emergency. If an arrestee is discovered within the home of a third party, as a general rule, a warrant will be required to enter the home of a third party as a way of protecting the rights of privacy belonging to the third party. As a strong general rule, arrest warrants can only be issued by neutral and detached judicial officials when the presence of probable cause to arrest has been demonstrated.

REVIEW EXERCISES AND QUESTIONS

1. What is the legal standard for probable cause to arrest? Offer some examples that would equal probable cause.
2. From what sources may a police officer obtain information that meets the standard of probable cause to arrest?
3. How can the validity of an informant's information be determined? How does a police officer determine whether to believe an informant or to know whether to seek additional information to develop probable cause?
4. Does the "totality of the circumstances" test for evaluating informant reliability under *Illinois v. Gates* make the determination of probable cause easier than the old two-pronged test?
5. Why does "stale" probable cause to arrest rarely become an issue? What is the outer limit of probable cause with respect to the passage of time?
6. What is an arrest warrant? What is the procedural advantage of arresting with a warrant as compared to arresting without a warrant?
7. Although the Fourth Amendment appears to require warrants for all seizures, including arrests, why are arrest warrants generally not required where probable cause exists?
8. Assume that a defendant has been warrantlessly arrested within her own home and that she neither invited the officers inside the premises nor was hotly pursued inside her home. Under these circumstances, would her arrest valid? Can a prosecutor still prosecute her if the arrest is determined to have been illegal?

1. How Would You Decide?

In the Seventh Circuit Court of Appeals.

Police became interested in Michael Haldorson after an informant, who had provided information in the past to police, told an officer that Haldorson was dealing in illegal drugs and that the informant could make a purchase for police of recreational drugs from Haldorson. The informant provided many details on Haldorson and the make and model, license plate number, and color of the car he drove. The informant had pictures of the defendant and his car as well as the defendant's phone number. The controlled purchase was arranged, and police properly observed the situation but were not able to clearly observe Haldorson selling cocaine to the informant because a stray vehicle got in their way. Prior to the sale, Officer Insley proceeded to prepare for the controlled purchase by providing the informant with funds to buy the drugs, and he wired the informant with a recorder to monitor the deal. Police heard the discussion between the informant and Haldorson relative to the sale. The officer set a visual surveillance team of other police officers who were present. Prior to the purchase, Officer Insley also searched the informant and his vehicle to make sure that he had no contraband. The drug deal was done with general police observation, and the informant possessed the cocaine after the exchange. Haldorson was not then arrested even though he sold 1.7 grams of cocaine to the informant.

After arranging a second controlled purchase, police observed defendant Haldorson driving to the arranged sale location but stopped his car before Haldorson arrived so as not to tip him concerning who had set him up. Police arrested him based on probable cause from the original drug sale. No arrest warrant existed and no search warrant was ever procured. Haldorson's vehicle was removed to the police station, where a search incident to arrest revealed numerous types of illegal recreational pharmaceuticals, a firearm, and some suspected pipe bombs. An inventory search theory might have also supported the vehicle search.

Defendant Haldorson filed a motion to suppress the drugs and pipe bombs; he was convicted on many counts, and he appealed to the Seventh Circuit Court of Appeals. Haldorson's primary contention was that the information from the original controlled buy was too stale three weeks later to support probable cause for his arrest.

How would you rule on defendant Haldorson's motion to suppress the evidence based on his contention that probable cause to arrest had become stale and no longer supported his arrest?

The Court's Holding:

1. Probable cause to arrest Haldorson.

The officers did not have a warrant to arrest Haldorson, "but an officer may make a warrantless arrest consistent with the Fourth Amendment if there is 'probable cause to believe that a crime has been committed.'" *United States v. Daniels*, 803 F.3d 335, 354 (7th Cir. 2015) (quoting a different case). "Police officers possess probable cause to arrest when the facts and circumstances within their knowledge and of which they

have reasonably trustworthy information are sufficient to warrant a prudent person in believing that the suspect has committed an offense." (Citation omitted.) We examine the totality of the circumstances in a common sense manner to determine whether probable cause exists in a given situation.

Haldorson's primary contention is that the information from the controlled buy was too stale three weeks later to support probable cause for an arrest. The mere passage of time does not necessarily dissipate the probable cause for an arrest. It is well-established that "there is no requirement that an offender be arrested the moment probable cause is established." *United States v. Reis*, 906 F.2d 284, 289 (7th Cir. 1990). In *Reis* we found that an "overnight delay simply has no bearing on the existence of probable cause for arrest," and we see no reason to treat reasonably longer delays any different. Indeed, we have previously held that the defendant's participation in a controlled drug buy a month earlier "provided the police with probable cause to arrest [the suspect] which was not rendered stale by the passage of one month." (Citation omitted.) [The Seventh Circuit court noted that its sister circuits also agree that the passage of time alone does not render probable cause to arrest stale. It also emphasized that the case law makes clear that law enforcement is not required to arrest a suspect immediately upon development of probable cause.] [In *Reis*,] probable cause existed to arrest [the defendant] because the earlier tip from the confidential informant and the controlled purchase [four to six days earlier] provided [the police] with facts that would support a reasonable person's belief that an offense had been committed and that the individual arrested was the guilty party."

Our facts are nearly identical to those that the Tenth Circuit confronted in *United States v. Hinson*, 585 F.3d 1328 (10th Cir. 2009). There, the police arranged for a controlled buy between an informant and the defendant at an auto parts store. Police surveilled the informant while he drove to the location, got into the defendant's car, and negotiated the purchase of methamphetamine. The police did not immediately arrest the defendant, "[a]pparently hoping to investigate further." About a month later, the police sought to have the informant conduct another controlled buy but the informant refused (even though a few days earlier he told the police he could set up another deal). Unable to convince the informant to cooperate, the police resolved to arrest the defendant. Instead of obtaining an arrest warrant, they decided to simply follow his car until he committed a traffic violation and then stop and arrest him—which they did. The Tenth Circuit held that the police officers had probable cause to arrest the defendant "based on the controlled buy they witnessed a month before his arrest." "[T]he passage of time did not make that information stale or otherwise destroy the officers' probable cause."

There was probable cause to arrest Haldorson on June 23, 2015, based on the June 1, 2015, controlled buy. The facts overwhelmingly support this conclusion. The confidential informant first provided Officer Insley with Haldorson's phone number and a picture of his black Pontiac G8, including the license plate. Officer Insley was able to run the license plate through a law enforcement database and trace the car's registration to Haldorson. The informant then positively identified a photograph of Haldorson as his drug supplier. But the probable cause for the arrest was not merely based on a "tip" from a confidential informant—that was just the beginning. The officers then set up a controlled buy. Multiple officers were surveilling the deal and observed Haldorson's car drive into the parking lot at the prearranged location, park next to the confidential informant, and

the confidential informant get into the passenger seat of Haldorson's car. Although no officers witnessed the actual transaction, Officer Insley listened to the entire interaction in realtime via the informant's hidden wire. Officer Insley also searched the confidential informant and his car both before and after the controlled buy; the only drugs he had were the 1.7 grams of cocaine purchased from Haldorson during the controlled buy. On this last point, critically, the district court found Officer Insley's testimony credible, and we certainly cannot say that that finding was clearly erroneous. The passage of three weeks did not render the information from the controlled buy stale.

It is the rare case where "staleness" will be relevant to the legality of a warrantless arrest. When there is a reasonable belief that someone has committed a crime, time by itself does not make the existence of that fact any less probable. . . .

The information provided by the confidential informant and the June 1st controlled buy provided probable cause to arrest Haldorson on June 23, 2015. See *United States v. Haldorson*, 941 F.3d 284, 2019 U.S. App. LEXIS 31569 (7th Cir 2019).

2. How Would You Decide?

In the Court of Criminal Appeals of Tennessee.

Police developed a suspicion that one Scotty Henry was manufacturing methamphetamine in his trailer home, a tip that was based on information they received from a "meth lab hotline." Without probable cause to arrest, two officers identified Henry's residence and walked up on the porch to conduct a "knock and talk" with any person who answered the door. There was an absence of "no trespassing" signs that might have precluded the officers from entering the property. The officers had their badges around their necks when a man identified as Watson answered their knocks and opened the front door all the way. One officer immediately recognized a strong chemical odor. When the officers asked to speak to Henry, Watson indicated that Henry was present inside the home, and Watson invited the officers to enter the home when he stated, "Sure. Come on in." Prior to entering the trailer home, the officers scanned the parts of the interior that were visible to them and also smelled a chemical odor. The officers recognized the smell as indicating the presence of components needed in the manufacture of methamphetamine. Police arrested Henry, Watson, and others immediately.

The defendant, Henry, sought to suppress the evidence of methamphetamine manufacturing and contended that the search of his home and his arrest were illegal under the Fourth Amendment. The trial court held that the officers had probable cause to perform the warrantless search of his home because the "knock and talk" was lawful. The court observed that Watson appeared to be in control of the home and could give valid consent to enter. Once the door was opened and the officers were invited inside and continued to smell traditional odors associated with meth manufacture and observe chemicals and pill soak, they were lawfully on the premises and could make warrantless arrests based on probable cause. The appellate court observed that the officers possessed experience in methamphetamine lab seizures and were aware of the odors to be expected when a meth lab would be encountered. The trial court concluded that the officers had lawfully observed a crime being committed that gave probable cause to arrest. Defendant Henry pled guilty to the charges but reserved the right to an appellate challenge concerning

whether the officers had probable cause to search his house. Implicit in this reservation is the question concerning whether the officers had the right to lawfully enter the home on Watson's permission immediately prior to the arrests.

How would you rule on the defendant's contention that the officers should not have entered his home without a warrant and following such a procedure made his arrest unlawful under the Fourth Amendment?

The Court's Holding:

The Court of Criminal Appeals of Tennessee noted that the Constitution of the United States and the Tennessee Constitution protect the homes of people from unreasonable searches and seizures and that the general rule contemplates that homes will not be entered for searches or arrests unless probable cause and a warrant exist. The "knock and talk" procedure has been previously determined to be a lawful approach for which probable cause is not a necessary requirement and, in this case, the occupants had not placed "no trespassing" signs on the property. The officers were lawfully allowed to enter the home because Watson possessed apparent authority over the property sufficient to invite others, including police officers, to enter. Therefore, the officers were lawfully inside the home when they viewed incriminating activity and smelled incriminating odors for which felony probable cause to arrest matured. Citing *Payton v. New York*, 445 U.S. 573, 583–90 (1980), the appellate court agreed that warrantless arrests within a home are generally unreasonable and therefore unlawful, but where the police have been invited to enter the home, no complaint that the officers were not lawfully on the premises can be sustained. In addition, the officers could see some of the methamphetamine production from their vantage point on the front porch. The appellate court rejected Henry's appeal that the arrests were unlawful and that the home had been improperly searched, and the court affirmed the convictions. See *State v. Henry*, 2007 Tenn. Crim. App. LEXIS 302 (2007).

Notes

1. *Maryland v. Pringle*, 540 U.S. 366, 370–71, 124 S.Ct. 785, 157 L.Ed2d769 (2003).
2. See *California v. Hodari D*., 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.3d. 690, 1991 U.S. LEXIS 2397 (1991). Teenaged subject fled from officer and was not under arrest until an officer captured the juvenile following a chase.
3. 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142, 144, 1964 U.S. LEXIS 151 (1964).
4. *Brendlin v. California*, 127 S.Ct. 2400, 2405 (2007).
5. *California v. Hodari D*., 499 U.S. 621, 626 (1991).
6. "The rule of the common law, that a peace officer or a private citizen may arrest a felon without a warrant, has been generally held by the courts of the states to be in force in cases of felonies punishable by the civil tribunals." See *Kurtz v. Moffitt,* 115 U.S. 487, 504 (1885).
7. Many federal law enforcement officers have been expressly authorized by statute to make felony arrests on probable cause but without a warrant. This is true of United States marshals, 18 U.S.C. § 3053, and of agents of the Federal Bureau of Investigation, 18 U.S.C. § 3052; the Drug Enforcement Administration, 84 Stat. 1273, 21 U.S.C. § 878; the Secret Service, 18 U.S.C. § 3056(a); and the Customs Service, 26 U.S.C. § 7607.
8. *Illinois v. Gates,* 462 U.S. 213 (1983).

9. In *Carroll v. United States,* 276 U.S. 132 (1925), which offered a definition of probable cause in the context of a bootleg liquor search, the Court stated: "This is to say that the facts and circumstances within their [the police] knowledge and of which they had reasonably trustworthy information were sufficient, in themselves, to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." The legal standard for a search is the same level of proof as for an arrest.
10. *Michigan v. Davis,* 660 N.W.2d 67, 69 (2003).
11. *Davis* at 70.
12. See *Wagner v. N. Berks Reg'l Police Dep't*, 816 Fed. Apps. 679, 2020 U.S. App. LEXIS 22271 (3rd Cir. 2020).
13. *United States v. Perkins,* 994 F.2d 1184 (6th Cir. 1993).
14. See Ashleigh Elizabeth Draft, *Pacemakers, FitBits, and the Fourth Amendment: Privacy Implications for Medical Implants and Wearable Technology*, 2019 Mich. St. L.Rev. 511 (2019).
15. See *Collins v. Nagle,* 892 F.2d 489, 495 (6th Cir. 1989).
16. 378 U.S. 108 (1964).
17. 462 U.S. 213 (1983).
18. See *State v. Haithcote*, 2020 Tenn. Crim. App. LEXIS 550 (2020).
19. *Nunez-Mendoza v. State*, 354 Ga. App. 297, 300, 840 S.E.2d 771, 774, 2020 Ga. App. LEXIS 162 (2020).
20. *Hairston v. Commonwealth*, 67 V. App. 552, 565 (2017).
21. *Sands v. McCormick*, 502 F.3d 263, 269, 2007 U.S. App. LEXIS 22218 (3rd Cir. 2007). See also *Evans v. Nev. County Sheriff's Dept*, 2014 U.S. Dist. LEXIS 170058 (E.D. Cal. 2014).
22. *United States v. Haldorson*, 941 F.3d 284, 2019 U.S. App. LEXIS31569 (7th Cir. 2019).
23. *Id*. at 291.
24. The case, *Arizona v. Evans,* dealt primarily with the application of the exclusionary rule of the Fourth Amendment, but it serves as an example of stale probable cause.
25. See Chapter 2 for an explanation of the good faith exception to the exclusionary rule.
26. An arrest warrant is an order of court issued by a neutral and detached judicial official who has determined that probable cause for arrest exists. The warrant directs law enforcement officers to take into custody a particularly described individual for having committed a specifically described crime where the evidence would permit a person of reasonable caution to believe that the described person has committed the crime or crimes.
27. The general rule is that an arrest warrant or search warrant must be issued by a judge or magistrate. See *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). Justice Stewart wrote the lead opinion for the *Coolidge* Court, which invalidated a search warrant because it had not been issued by a neutral and detached judicial official. In the context of a search warrant, in Justice Brennan's dissent in *Horton v. California,* 496 U.S.128 at 148 (1990), he noted that generally, "The Fourth Amendment demands that an individual's possessory interest in property be protected from unreasonable governmental seizures, not just by requiring a showing of probable cause but also by requiring a neutral and detached magistrate to authorize the seizure in advance." Arrest warrants are not required so long as probable cause exists, but where an arrest warrant is to be issued, a member of the judicial branch must make the probable cause determination.
28. See *Butler v. Fleming*, 2019 U.S. Dist. LEXIS175788 (N.D. Ga. 2019).
29. See *United States v. Watson,* 423 U.S. 411 (1976) and *Atwater v. City of Lago Vista,* 532 U.S. 318 (2001).
30. *State v. Clarke*, 446 P. 3d 451, 454, 2019 Ida. LEXIS 97 (2019). See also Idaho Code § 19–603. When peace officer may arrest.
31. See *Malley v. Briggs,* 475 U.S. at 343, 341 (1986).
32. See *Doe v. Leach*, 2020 U.S. App. LEXIS 31038 (11th Cir. 2020).
33. 532 U.S. 318 (2001).
34. In *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1, 1985 U.S. LEXIS 195 (1985), the Court held that using deadly force against an apparently unarmed, nondangerous fleeing suspect for whom probable cause existed cannot be justified as reasonable under the Fourth Amendment, unless

necessary to prevent an escape from arrest where the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. According to the *Garner* Court, "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable."

35. When the forty-eight-hour period of custody without a judicial determination of probable cause is violated, the remedy is not clear. In *United States v. Alvarez-Sanchez,* 511 U.S. 350 (1994), the arrestee argued on appeal that his rights were violated, since he had not been given a hearing within forty-eight hours of arrest and had made incriminating statements while being held illegally under *McLaughlin*. The Court held that he had waived the argument by not raising it in the lower courts. Thus, the remedy for a violation of the forty-eight-hour period is not clear at this point, but it would appear that a successful litigant would have to show prejudice.
36. This form is in the public domain and is used in New Mexico courts.
37. *United States v. Reed,* 572 F.2d 412, 423 (CA2 1978).
38. See *R.R. v. Eaton*, 2019 U.S, Dist. LEXIS62520 (N.D. Ala. 2019).
39. See *Payton v. New York,* 445 U.S. 573 (1980).
40. See *Payton v. New York,* 445 U.S. 573 (1980). An illegal arrest does not prevent the government from convicting the individual whose rights have been violated. See *Frisbie v. Collins*, 342 U.S. 519 (1952). The effect of the illegal arrest inside the home is that evidence which has been observed or seized within the home as a result of the illegal arrest will be suppressed from prosecutorial use at trial for proof of guilt.
41. *Payton* at 585.
42. 536 U.S. 635 (2002).
43. See *Payton v. New York,* 445 U.S. 573 (1980).
44. See *Albritton v. State*, 2020 Ind. App. Unpub. LEXIS 762 (2020).
45. *People v. Hammerlund*, 504 Mich. 442 (2019).
46. *Id*. at 462.
47. *State v. Phipps*, 454 P. 3d 1084, 1088 (2019), citing *Michigan v. Summers* 452 U.S. 692, 705 (1981). In *Phipps*, police detained parolee and another occupant while their home was being searched pursuant to parole conditions. See also *Muehler v. Mena*, 544 U.S. 93 (2005). Officers reasonably detained and handcuffed occupant for two to three hours during drug/gang house search.
48. See *Bailey v. United States*, 568 U.S. 186, 133 S.Ct. 1031, 185 L.Ed.2d 19, 2013 U.S. LEXIS 1075 (2013).
49. See *Illinois v. McArthur,* 531 U.S. 326 (2001).
50. See *State v. Brown*, 2004 Wash. App. LEXIS 1748 (Wash. 2004), where the court upheld a lawful entry and arrest of a suspect where police received permission from a third party to enter the home where the subject had been hiding. The third party had had dominion and control over the home and consented to the police entry.
51. *Crall v. Wilson*, 769 Fed. Appx. 573, 576, 2019 U.S. App. LEXIS 11420 (10th Cir. 2019).
52. *Maric v. Alvarado*, 2020 U.S. Dist. LEXIS 33848 (N.D. Cal. 2020).

Miranda Principles: Fifth and Sixth Amendment Influences on Police Practice

5

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Learning Objectives

1. Explain the rationale by which the Supreme Court determined that police must offer warnings of constitutional rights when law enforcement officials want to interrogate persons in custody.
2. Be able to articulate the constitutional rationale for the *Miranda* warnings.
3. Describe police interrogation techniques that were common practice prior to the case of *Miranda v. Arizona*.
4. Define the two prerequisites or triggering events that need to be present before police must administer the *Miranda* warnings.
5. Orally offer the substance of the *Miranda* warnings that must be offered to detainees police wish to interrogate.
6. Articulate when police must cease questioning, if already initiated, and explain the circumstances when police may renew interrogation.
7. Describe the concept that is referred as the "functional equivalent" of interrogation under *Miranda*.
8. Offer two hypothetical emergency fact situations, called exigent circumstances, that may permit interrogation of a subject in cases where the *Miranda* warnings would otherwise have to be read to the suspect prior to questioning.
9. Offer two hypothetical fact situations when a person subject to the *Miranda* warnings may properly waive his or her rights and agree to talk with police.

Chapter Outline

KEY TERMS

1. Booking exception
2. Constitutional requirement for warning
3. Custody
4. Emergency exception
5. Functional equivalent of interrogation
6. Impeachment use of *Miranda*
7. Interrogation
8. *Miranda* warning
9. Misdemeanor warning
10. Necessary conditions for warning
11. Public safety exception
12. Right to counsel
13. Right to remain silent
14. Separate offense interrogation
15. Waiver

1. Introduction to *Miranda* Warnings

Consistent with the Constitution of the United States and pursuant to judicial interpretation by the Supreme Court, no person who has been accused, either formally or informally, may be required to offer evidence that might help the prosecution prove its case against that individual. According to the Supreme Court,

> [T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.[1]

The Fifth Amendment privilege against self-incrimination provides that no person "may be compelled in any criminal case to be a witness against himself." In support of this right, the teaching of *Miranda v. Arizona*, 384 U.S. 436 (1966), requires that police advise a person who may be subject to custodial interrogation that he or she does not have any affirmative duty to speak with representatives of the government and that he or she may remain silent. Whether an accused has been charged in state or federal court, he or she has no obligation to assist the prosecution. Many individuals who become defendants are unaware of the right to remain silent and are similarly ignorant of other important constitutional rights possessed by persons under United States jurisdiction. As a result of constitutional requirements and from a concern that trained police officers might overcome an individual's reluctance to speak with police, judicial decisions have required law enforcement agents to offer a minimum measure of legal advice to those who come into police custody and the police wish to interrogate. The legal advice should be calculated to alert an arrestee that he or she has the right of silence that can be asserted at any

Miranda Warning

1. Your have the right to remain silent.
2. Anything you do say can and will be used against you in a court of law.
3. You have the right to talk to a lawyer and have him or her present with you while you are being questioned.
4. If you cannot afford to hire an attorney, one will be appointed to represent you before any questioning.
5. You can decide at any time to exercise these legal rights and not answer any questions or not make any statements.

Waiver

Do you understand these rights as I have explained them to you?
Having these rights in mind, do you wish to talk to me now?

FIGURE 5.1 Typical *Miranda* Warning Card Carried by Police Officers.

time and the right to consult with an attorney. In addition, the warning must include information that legal counsel will be made available free of charge to those who might have difficulty hiring an attorney. The warnings must be administered in a manner the arrestee can understand, and *Miranda* must be given whether the suspect is in custody for a felony or misdemeanor.[2] Mere silence for some period of time following a detainee's receipt of the *Miranda* warnings followed by later answering some police questions does not by itself constitute reliance on the warnings or an invocation of the right to silence that otherwise would require that police quit any interrogation.[3] Therefore, a period of silence following receipt of the *Miranda* warnings does not constitute an assertion of rights under the *Miranda* doctrine.

2. The Basis for the Warnings

Under the Constitution of the United States, Amendment Five,[4] no person can be required to become a "witness against himself" unless the person freely and voluntarily makes the decision to testify or otherwise offer adverse evidence. If an individual is ignorant of the right or is overreached by law enforcement officials, the right may be lost. Prior to 1966, officers could bring pressure to bear on a person in custody to tell police the facts in criminal cases, and arrestees often confessed due to overwhelming mental, and sometimes physical, pressure. According to *Miranda v. Arizona*,[5] police violence and the "third degree" flourished in numerous places in the 1930s and in some places thereafter (see Case 10.1).

Reportedly, some police resorted to physical brutality, beating, hanging, and protracted isolation from friends and relatives to obtain confessions.[6] Such police conduct, designed to make a person confess and become a witness against him or herself, transgressed the guarantee of the Fifth Amendment.[7]

Originally, the Fifth Amendment limited federal law enforcement practice and had no application against the states because the intent of the Bill of Rights involved limitations on the federal government. While many state constitutions offered identical protections from compelled testimonial self-incrimination, state courts did not always

enforce the guarantee equitably in criminal prosecutions. When the Supreme Court decided *Malloy v. Hogan*,[8] state and federal criminal procedure became virtually identical with respect to protections against self-incrimination under the Fifth Amendment. *Malloy* determined that the Fifth Amendment's privilege against self-incrimination was incorporated into the Due Process Clause of the Fourteenth Amendment and was enforceable against the states. Police practices developed that partially undercut the self-incrimination guarantee by careful use of psychology and other methods that produced confessions without physical violence or threat. Police manuals of the pre-*Miranda* era taught psychological tactics that could break down a suspect's will to resist, such as keeping the arrestee isolated in unfamiliar surroundings, having the officers alone with the individual and in total control, appearing to want only specific details, since guilt was to be assumed, and giving the arrestee logical reasons for having committed the crime. Although not everyone succumbed to these practices, for many people, the totality of police tactics had the effect of "wearing them down" to the point that some arrestees confessed, while some even confessed to crimes they had not committed.

3. The Road to *Miranda*

An example of the problems surrounding police interrogation is provided by the case of *Escobedo v. Illinois*, 378 U.S. 478 (1964), where Mr. Escobedo had been arrested and interrogated for a homicide. His attorney succeeded in having him released, but police rearrested him and kept him away from family, friends, and his attorney. His attorney arrived at the police station and observed Mr. Escobedo but was prevented from talking to him despite Escobedo's clear, repeated requests.[9] At no time was Escobedo warned about his right under the Constitution to remain silent. During the interrogation, he remained handcuffed in a standing position, and he stated that he was nervous, upset, and agitated, since he had not slept well for more than a week. A Spanish-speaking officer played Escobedo against another suspect and told him that he could go home if he implicated the other suspect in the crime. After Escobedo noted some involvement in the homicide, officers moved to obtain the details that implicated him further.

Escobedo alleged that his right to remain silent under the Fifth Amendment and his right to an attorney under the Sixth Amendment had been violated by techniques the police used. When the Supreme Court decided the case, it ruled in Escobedo's favor and held that where an investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, where the suspect has been taken into police custody and the police carry out a process of interrogation that lends itself to eliciting incriminating statements, where the suspect has requested and been denied an opportunity to consult with his lawyer, and where the police have not effectively warned the suspect of his or her absolute constitutional right to remain silent, the accused has been denied "the assistance of counsel" in violation of the Sixth Amendment. In *Escobedo v. Illinois*,[10] the Court held that no statement elicited by the police during the interrogation should have been used against him at his criminal trial. The

Court stopped short of requiring that police affirmatively warn all persons interrogated while in custody of their constitutional rights, but that appeared to be the direction in which it was moving.

4. The Case of *Miranda v. Arizona*

In *Miranda v. Arizona*[11] (Case 5.1), the police took Ernesto Miranda into custody, kept him in an unfamiliar atmosphere, and subjected him to traditional police practices designed to get him to confess to the crime for which he had been arrested. Miranda, who had some mental problems, had been described as an indigent Mexican and as a seriously disturbed individual with pronounced sexual fantasies. None of the police practices involved overt physical coercion, disingenuous psychological games, or unusual tricks to gain a confession. However, the police *did not* inform Miranda that he had a right to remain silent and that he possessed a privilege against self-incrimination; that he could have an attorney to advise him; and that if he was too poor to pay for legal advice, the assistance of legal counsel would be free of charge. The *Miranda* Court felt that the presence of counsel, in Miranda's case, would have provided the adequate protection necessary to make the police interrogation conform to the dictates of the privilege against self-incrimination. Counsel's presence with Miranda would have ensured that statements made in the government-controlled interrogation atmosphere were not the product of compulsion. The Court made reference to the fact that police interrogation manuals emphasized isolating the subject in unfamiliar surroundings to deprive the detainee of every psychological advantage and to make an assumption of guilt while inquiring into the reasons for the criminal activity. The Supreme Court reversed Miranda's felony convictions based on the violations of his Fifth and Sixth Amendment rights.[12]

The *Miranda* Court noted[13] that the following four warnings were required to be offered to a person in custody prior to initiating interrogation:

> [A person in custody] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

The Court has noted that the essence of the four warnings is not variable, but the Court has never dictated the words that must be used in conveying the essential information that must be delivered.[14]

In deciding *Miranda*, the Court resorted to "rule-making" by holding that an individual held for interrogation must be clearly informed by police that he or she has the right to consult with a lawyer and to be represented by an attorney during interrogation. The person must be told that anything he or she says can be used as evidence. The Court noted that the warning under *Miranda* was an absolute prerequisite to interrogation.[15] According to the Court, it would not accept any circumstantial evidence that the person may have been aware of the right against self-incrimination. The Court believed that only through such a warning would there be ascertainable assurance that an accused

would be aware of this right. Following the *Miranda* decision, if an individual who is in police custody indicates that the assistance of counsel is desired before any interrogation occurs, the police cannot rationally ignore or deny this request on the basis that the individual does not have or cannot afford a retained attorney. After the warnings have been given, when an arrestee indicates that he or she would like to remain silent, at any time indicates that he or she wants to remain silent thereafter, or requests the assistance of legal counsel, according to the *Miranda* Court, interrogation must cease immediately.

Case 5.1 LEADING CASE BRIEF: POLICE CUSTODIAL INTERROGATION REQUIRES WARNINGS TO SUBJECT

Miranda v. Arizona
Supreme Court of the United States
384 U.S. 436 (1966).

CASE FACTS:

Phoenix police arrested Ernesto Miranda for kidnapping and rape at his home on March 13, 1963, and removed him to the police station. After the complaining witness identified Miranda from a lineup, police questioned him for two hours. Miranda and the police emerged from the room with a signed confession in which Miranda acknowledged that he had voluntarily confessed with complete knowledge that his statement could be used against him in court.

Miranda's attorney objected to the admission of his confession on the ground that the confession was obtained in violation of Miranda's Fifth Amendment right to remain silent. The officers recounted Miranda's confession and related the specifics under which it had been obtained. The trial court admitted the confession into evidence over Miranda's continued objection. The trial court found Miranda guilty of kidnapping and rape, and the court sentenced him to twenty to thirty years on each count, with the sentences to be served concurrently.

The Supreme Court of Arizona held that none of Miranda's constitutional rights had been violated and affirmed his conviction. The court relied heavily on the admitted fact that Miranda had not specifically requested the assistance of counsel. (Several other cases were consolidated with the *Miranda* case.)

LEGAL ISSUE:

Where police desire to interrogate an arrestee, must police warn the subject of the right to remain silent under the Fifth Amendment, of the right to have the assistance of counsel under the Sixth Amendment prior to beginning any interrogation, and of the fact that what the person says may be used against that person?

THE COURT'S RULING:

Whenever a person is taken into police custody and police desire to question that individual, police must warn the subject of the right to counsel; that the right to counsel exists presently; that that the person has the right of silence and does not have to speak with

police officers; and that if the individual speaks, what he or she says may be used against them in a court of law. The warning helps enforce the Fifth Amendment privilege against self-incrimination by using the Sixth Amendment right to counsel to assist the arrestee in making an informed decision.

ESSENCE OF THE COURT'S RATIONALE:

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to ensure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admission, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at

such interrogations stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous *Wickersham Report to Congress by a Presidential Commission*, it is clear that police violence and the "third degree" flourished at that time. In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions. The Commission on Civil Rights in 1961 found much evidence to indicate that "some policemen still resort to physical force to obtain confessions," 1961 *Comm'n on Civil Rights Rep. Justice*, pt. 5, 17. The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party.

* * *

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogatory's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the fact of accusation is itself damning and will bode ill when presented to a jury. Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

* * *

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

* * *

In order to fully apprise a person interrogated of the extent of his rights under this system, then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the

admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

* * *

[The Court reversed Miranda's conviction.]

CASE IMPORTANCE:

There is a virtual presumption that where an arrestee speaks with police in the absence of a proper warning of rights that the person's decision to speak with police has been involuntary and that the police may have coerced the individual. In the absence of the warning and a clear waiver of the rights mentioned within the warning, the words of the arrestee will not be admitted in court against the person to prove guilt.

5. Prerequisites for *Miranda* Warnings

Subsequent to the Court's *Miranda* decision, all law enforcement agencies were required to carefully advise every detainee of the constitutional rights under the Fifth and Sixth Amendments at any time the police contemplated questioning a person in custody concerning the merits of why the person was in custody. While the original *Miranda* case dealt with two felonies, a later decision[16] extended the right to be apprised of constitutional rights to misdemeanant detainees for whom interrogation was desired. However, if a person is conversing with police and the person is not in

custody, statements or silence that might be indicative of criminal activity may be used against that person. In *Salinas v. Texas*,[17] a suspect in a murder case, who had been asked to come voluntarily to the police station and who was not in custody, answered some police questions but became silent when asked if gun marks on a shell casing would match his personal shotgun. Salinas appeared to be visibly nervous, bit his lip, and shuffled his feet. The prosecutor used the fact of Salinas' silence and his demeanor against him at trial over his objection that such practice violated his Fifth Amendment privilege. The Supreme Court approved because, at the time of the questions, *Miranda* had not been implicated since the defendant was not then in custody. In reliance on *Salinas*, the Supreme Court of California held that the defendant's post-arrest pre-Miranda silence concerning the status of persons he had injured in a vehicle crash was admissible because the defendant needed to make a timely assertion of his Fifth Amendment privilege in order to benefit from it.[18] Most persons would have been concerned about to the welfare of persons a defendant had just injured and his silence pre-*Miranda* could be used against him. The lesson is that prior to *Miranda* warnings being offered, the Fifth Amendment is not self-executing, and a witness who desires to invoke its protections must clearly claim them. In that event, the prosecutor could not have commented on the defendant's silence at the police station had he indicated that he was standing on his privilege against self-incrimination.

In *Berkemer v. McCarty*,[19] police had made a traffic stop for suspicion of misdemeanor driving under the influence of alcohol or drugs. While McCarty was detained and under the control of law enforcement officials, police questioned him concerning the details of his offense in hopes of obtaining evidence to be used against him. At no point in this sequence of events did the police inform McCarty that he had a right to remain silent, to consult with an attorney, and to have an attorney appointed for him if he could not afford one. During the police stop, McCarty offered incriminating evidence, which the prosecutor later introduced against him in court. The *McCarty* Court held that the *Miranda* warnings had to be given to misdemeanor suspects in custody who the police wished to interrogate. But the Court held that persons who have been detained during a traffic stop are not "in custody" for *Miranda* purposes unless the stop results in an arrest.[20] Following *McCarty, Miranda* warnings must be given to all individuals prior to custodial interrogation, whether the offense investigated is a felony or a misdemeanor and regardless of the educational level or legal understanding of the arrestee. The warnings need not be offered if interrogation is not contemplated or in situations where custody does not exist at the time the question is uttered.

However, most traffic stops are considered exceptions to the requirements under *Miranda* because they are generally fairly brief, occur in public view, and do not typically generate the control associated with the necessity of offering a *Miranda* warning. Clearly a motorist can be said to be in the custody of a police officer at a traffic stop, but the custody is not considered the type of custody that the *Miranda* warnings were designed to address. Unless and until the traffic stop results in an arrest where the officer desires to interrogate the driver, the necessity of offering the *Miranda* warnings does not exist, since roadside detention and interrogation is not considered custody for *Miranda* purposes.[21]

6. Substance of the Warnings

According to the *Miranda* Court, several warnings must be given to a person who is in custody and whom police officers would like to interrogate. The individual must be first informed in clear and unequivocal terms that he or she has the right to remain silent. Without this information, the person in custody might be unaware of the legal right not to speak. This warning seems to be an absolute prerequisite to overcoming the inherent pressure to talk that accompanies the interrogation atmosphere of an arrest. Second, the individual must be told that anything that is communicated to police may be used against him or her in a court of law. This advice is necessary to create awareness not only of the right to silence but also of the consequences of deciding to forgo it by speaking to law enforcement personnel. Third, the arrestee must be informed of the right to consult with an attorney; otherwise, the circumstances surrounding an in-custody interrogation can often overcome the will of an individual who has only been told about the right to remain silent and of the potential use of information if he or she chooses to speak. With the assistance of an attorney, there is much less likelihood that the police will attempt any level of coercion, and if any does occur, the attorney may testify about that fact. Fourth, the police must inform the arrestee that if he or she cannot afford an attorney, one will be appointed prior to any questioning. The information concerning free legal advice may prove very important for many individuals who lack financial resources. In the absence of this knowledge, an arrestee might otherwise understand that a right to legal counsel exists only if one can afford to pay for the service. If these four basic warnings are not properly offered by law enforcement personnel to an individual who has been subjected to custodial interrogation, any evidence that the individual might convey, though offered voluntarily under traditional analysis, will be excluded from the prosecution's case in chief.

7. Delivering the *Miranda* Warnings

In an effort to properly comply with the *Miranda* requirements, police officers often resort to a reading of the warnings from a printed form or card. However, *Miranda* warnings do not need to be delivered with a precise formulation of language.[22] Problems arise when officers administer the warnings in less than perfect order or, in some cases, with less than textbook clarity.[23] As a matter of routine practice, many police departments follow the oral warning with a written warning containing a check sheet to be signed by the person in custody. The sheet indicates whether the person understood the advisement of rights, desired to waive the warnings or to take advantage of them, wished to remain silent, and/or desired to consult with an attorney. The lapse of time between offering the warning and a change of interrogator does not generally render *Miranda* warnings stale, which would otherwise require a repetition of the warnings before continuing the interrogation.

One of the difficulties with reading the *Miranda* warnings involves the circumstances under which they are typically administered. An oral warning sometimes must

be given during an unsettled street scene or a domestic disturbance, situations that are less than ideal for conveying information. Although there must be a fairly clear administration of the warnings, some deviation from the original language has been upheld as appropriate. In *Duckworth v. Eagan*,[24] the Supreme Court approved a warning[25] given in a confusing manner in which the officer stated that the arrestee had the right to an attorney if and when he went to court. The warning first indicated that there was the right to counsel but then removed the essence of the guarantee when the arrestee was told that the police had no way to give him an attorney. Even though the language was less than a model of clarity and could imply that an attorney was not available immediately, the Court held that it met the minimum standards under *Miranda*.

There are situations in which the arrestee does not understand the reading of the *Miranda* warnings, either due to lack of intelligence or an absence of sufficient education. The duty to be sure that the warnings are comprehended by the subject remains on the interrogating officer. In a Georgia murder case,[26] the arrestee, whose education ended at the ninth grade, was properly read the warnings from a card and he was asked if he understood the warnings. After he indicated the he comprehended the warning delivered by the officer, he stated that the warnings meant that "I go to court, and I can't answer no questions or ask no questions."[27] The officer indicated that the warnings did not mean what the subject stated, and he attempted to explain the right to talk or not to talk, but the officer never followed up with additional explanations of the fact that what was said could be used in court against him. Also, the court noted that the officer failed to make sure that the subject knew he could speak with an attorney before questioning and that he could get an attorney even if he could not afford to hire one. The officer never referred back to the card he had initially read to the subject, and it appeared that the arrestee really did not understand the *Miranda* warnings. As the Georgia Supreme Court noted, "Needless to say, a person must understand his rights in order to knowingly and intelligently waive them."[28] Due to these deficiencies in offering the *Miranda* warnings and the lack of comprehension by the subject, the Supreme Court of Georgia reversed the murder conviction of the defendant.

8. When *Miranda* Warnings Are Required: The Triggering Events

As a general rule, law enforcement officials possess no affirmative duty to warn any person of constitutional rights until the officer places the individual in custody and intends to initiate questioning. Thus, the triggering factors that give rise to the necessity of offering the *Miranda* warnings are governmental custody coupled with interrogation. However, interrogation concerning name, address, and related matters is not considered covered by the warnings otherwise required. As a general rule, if custody exists and interrogation occurs, any statement made by the subject in response to a police question prior to the administration of proper warnings cannot be admitted in evidence against defendant for proof of guilt. For example, in *Oregon v. Elstad*,[29] prior to giving the proper warnings, police lawfully arrested Elstad inside his bedroom, asked an

incriminating question, and received an incriminating response. Elstad's immediate answer, including his incriminating statements, was suppressed from his trial. Since police had an arrest warrant for Elstad and an officer was in his bedroom at the time the officer asked an incriminating question and received an answer, the Supreme Court determined that Elstad was in custody while the officer interrogated him, violating the principles of *Miranda*. Subsequent statements at the police station that Elstad made after he had been given the *Miranda* warnings were properly admitted at his burglary trial.[30] However, the Court suppressed the answers to questions in the bedroom but held that the stationhouse statements made after a formal *Miranda* warning were admissible and not tainted by the earlier unwarned answers in his home.

However, when police intentionally fail to offer the *Miranda* warnings in a question-first-warn-later technique, with the goal of obtaining an excludable admission or confession that will lead to admissible evidence, the later evidence following a proper reading of Miranda will be excluded from trial. In *Missouri v. Seibert* (Case 5.2), police questioned one of the defendants while in police custody prior to giving any *Miranda* warning. Both custody and interrogation occurred under circumstances that the warnings were mandatory. The police were hoping to obtain an inadmissible confession and then, after some time passed, offer the *Miranda* warnings and attempt to obtain the same confession that they felt should be admissible. Once the person had confessed prior to *Miranda*, the theory was that the person would feel as if no harm could be done to the case by making a repeat confession, since the earlier, unwarned confession had been made to police. In the *Seibert* case, the arrestee repeated her unwarned confession after she had been *Mirandized* and the trial court allowed the second confession to be used against the defendant. The Supreme Court held that reciting the warnings after intentionally obtaining an unwarned confession failed to comply with the philosophy of the original *Miranda* case. The second confession should not have been admitted against the defendant because police were trying to thwart *Miranda*'s design of reducing the risk that an involuntary confession would be admitted. The use of successive interrogations designed to produce confessions failed to support a conclusion that the giving the warnings in that manner could serve their purpose under *Miranda* (Case 5.2).

Case 5.2 LEADING CASE BRIEF: ATTEMPTS TO AVOID *MIRANDA* WARNINGS PRODUCE INADMISSIBLE EVIDENCE

Missouri v. Seibert
Supreme Court of the United States
542 U.S. 600 (2004).

CASE FACTS:

Defendant-respondent Seibert feared that charges of neglect would be brought against her when her 12-year-old son, who suffered from cerebral palsy, died in his sleep in her trailer home. Seibert listened to a plan offered by two of her sons and their friends to burn the family's trailer home to conceal the circumstances of the death of her impaired son. The plan contemplated that Donald, an unrelated mentally ill

18-year-old living with the family, was to be left to die in the fire in order to avoid the appearance that defendant-respondent's son had been unattended. Donald perished in the fire, according to plan. Following a short investigation, police arrested Seibert but intentionally failed to read her the rights to which she was entitled under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). At the police station, one of the officers interrogated her for thirty to forty minutes, obtaining an unwarned confession that the plan was for Donald to die in the fire. As part of a scheme derived from police training manuals, the officer gave the defendant-respondent a twenty-minute break, after which he returned, offered the *Miranda* warnings to her, and obtained a signed *Miranda* waiver. The officer resumed questioning by confronting Seibert with her prewarning statements, and he managed to influence her to repeat the earlier unwarned confession. Prior to trial, Seibert filed a motion to suppress both her pre-warned and post-warned statements. The interrogating officer testified that he made an intentional decision to withhold *Miranda* warnings, question her first, then give the warnings, and then repeat the questions to her until he received a repeat of the unwarned confession.

In ruling on the motion to suppress, the trial court held that the confession taken in violation of *Miranda* was inadmissible. However, the judge ruled that the second, post-*Miranda* statement/confession should be admitted in evidence, with the result that Seibert was convicted of second-degree murder. The Missouri Supreme Court disagreed with the trial court and held that, because the interrogation was nearly continuous, the second confession, which was clearly the product of the invalid first statement, should have been suppressed. The Supreme Court of the United States granted certiorari.

LEGAL ISSUE:

May police officers, consistent with the requirements of the *Miranda* warnings, conduct custodial interrogation until a confession is obtained, then offer the warnings with the hope that the original, unwarned confession will be repeated?

THE COURT'S RULING:

Attempts to evade the constitutional requirements of the *Miranda* warnings by careful interrogation or by use of other plans will not be acceptable to the Court and will result in evidence being excluded.

ESSENCE OF THE COURT'S RATIONALE:

* * *

[W]e hold that a statement repeated after a warning in such circumstances is inadmissible.

* * *

In *Miranda*, we explained that the "voluntariness doctrine in the state cases . . . encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice," *id*. at 464–465, 16 L. Ed. 2d 694, 86 S. Ct. 1602. We appreciated the

difficulty of judicial enquiry *post hoc* into the circumstances of a police interrogation, *Dickerson v. United States*, 530 U.S. 428, 444, 147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000), and recognized that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk" that the privilege against self-incrimination will not be observed, *id*., at 435, 147 L. Ed. 2d 405, 120 S. Ct. 2326. Hence our concern that the "traditional totality-of-the-circumstances" test posed an "unacceptably great" risk that involuntary custodial confessions would escape detection. *Id*., at 442, 147 L. Ed. 2d 405, 120 S. Ct. 2326.

* * *

There are those, of course, who preferred the old way of doing things, giving no warnings and litigating the voluntariness of any statement in nearly every instance. In the aftermath of *Miranda*, Congress even passed a statute seeking to restore that old regime, 18 U.S.C. § 3501, although the Act lay dormant for years until finally invoked and challenged in *Dickerson v. United States, supra*. *Dickerson* reaffirmed *Miranda* and held that its constitutional character prevailed against the statute.

* * *

When a confession so obtained is offered and challenged, attention must be paid to the conflicting objects of *Miranda* and question-first. *Miranda* addressed "interrogation practices . . . likely . . . to disable [an individual] from making a free and rational choice" about speaking, 384 U.S., at 464–465, 16 L. Ed. 2d 694, 86 S. Ct. 1602, and held that a suspect must be "adequately and effectively" advised of the choice the Constitution guarantees, *id*., at 467, 16 L. Ed. 2d 694, 86 S. Ct. 1602. The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.

* * *

The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

* * *

The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating

potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used.

* * *

VI

Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute. Because the question-first tactic effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert's postwarning statements are inadmissible. [The Supreme Court of the United States held that] [t]he judgment of the Supreme Court of Missouri is affirmed.

CASE IMPORTANCE:

In a prior case, *Dickerson v. United States*, 530 U.S. 428, (2000), the Court determined that the *Miranda* warnings were required by the federal Constitution. The Court stressed and reaffirmed that the guarantees of the Constitution cannot be evaded by skilful police interrogation designed to avoid the philosophy and the requirements of the *Miranda* warnings.

Some state courts have not followed the lessons of *Seibert* precisely and have often made efforts to distinguish case patterns from the situation in *Seibert*. In a habeas corpus case from Pennsylvania, a federal district court failed to overturn a conviction approved by the Supreme Court of Pennsylvania. Similar to *Siebert*, the defendant had been previously interrogated without any warning and made an earlier statement and later repeated the substance of the statement after being offered the *Miranda* warnings. The Commonwealth Court had upheld, and the federal district court did not disturb the ruling that admitted evidence from a post-*Miranda* statement.[31] In this case, involving a two-step interrogation, the murder suspect had been in custody overnight, and the officers were in the process of obtaining biographical information from him. Prior to offering the *Miranda* warnings, one officer inquired of the suspect about the circumstances surrounding the killing of the victim, and the suspect explained in some detail the circumstances that occurred during the fatal fight and gunfire. At some point, the interrogating officer ceased questioning and offered the *Miranda* warnings to the arrestee, who waived them orally and in writing. Subsequently, the arrestee gave some of the same information coupled with additional data that was introduced at his homicide trial, but the unwarned statements were not introduced. The federal district court refused to overturn the conviction because the officers had not deliberately employed a two-step approach to get the

arrestee to talk about the crime. The district court noted that the officer's first questioning consisted primarily of booking information and that since the pre-*Miranda* interrogation was not systematic or exhaustive and was not performed with psychological design, the first statement, though not admissible in court, did not taint the post-*Miranda* answering of police questions.

Evidence taken in violation of *Miranda* principles may have utility for impeachment purposes if the defendant were to offer testimony from the witness stand that directly conflicted with earlier non-*Mirandized* statements.[32] In such a situation, the prosecution may introduce the illegally obtained statements solely to attempt to impeach the defendant and not for proof of guilt. In *Harris v. New York*,[33] the prosecution had good evidence that the defendant had sold drugs to undercover officers on two occasions. Harris admitted his guilt, but the admission followed a defective *Miranda* warning, so the defendant's statements could not be introduced to prove guilt. Harris's trial testimony on his own behalf contrasted sharply with what he told officers immediately after his arrest. After the defendant changed his story at trial and testified that he knew one of the officers but that he had never made any narcotic sales to either officer, the prosecution introduced the improperly warned statements taken in violation of *Miranda* to impeach the defendant's trial testimony. The Supreme Court approved the use of evidence improperly obtained in violation of *Miranda* for impeachment purposes because, otherwise, the defendant would have obtained a license to commit perjury.

Once the warnings have been properly administered, the subject may choose to assert the rights under *Miranda* or may decide to waive the rights to silence and/or counsel. A waiver may be oral, written, or both, but the essence of a waiver is that the arrestee understands the significance of the rights being relinquished and the consequences that may flow from that decision. If the arrestee has been taken to a police station, the written waiver is most commonly used; a street waiver typically takes an oral form.

9. When Interrogation Must Cease

During the encounter with police, if the arrestee indicates in any manner and at any time that there is no further desire to be interrogated, the police inquiry must immediately cease, according to the Court in *Edwards v. Arizona*.[34] The police are not allowed to try to change the mind of the arrestee; they must respect the right to silence until he or she has consulted an attorney and indicates a desire to speak to the police. In *Edwards*, the defendant asserted his right to speak with an attorney, and the initial interrogation ended. The next morning, when two detectives arrived at the jail, the detention officer in charge told Edwards that he "had" to speak with officers who wanted to talk to him. Eventually, Edwards implicated himself in criminal activities. The Court held that the admission into evidence of Edwards' confession given to the two detectives violated his rights under the Fifth and Fourteenth Amendments as construed in *Miranda v. Arizona*. According to *Miranda*, if the accused indicates a wish to remain silent, the interrogation must cease; if he requests counsel, the interrogation must cease until the arrestee has consulted with an attorney. The Court decided that where an accused has expressed the desire to deal with the police only through counsel, he or she is not subject to further

interrogation by the authorities until counsel has been made available, unless the arrestee personally initiates further communication, exchanges, or conversations with the law enforcement officers.

For example, in a recent Florida case,[35] the *Mirandized* subject was being interrogated for a homicide and later indicated that he did not want to continue to speak with detectives concerning the case and had requested an attorney. However, detectives continued to verbally engage with him. The Court noted that police had informed the arrestee that they had spoken on the phone with his mother about her "losing another son" and told him that there was a difference between a "needle in one's arm and a life sentence." Such continued interaction with the subject ran afoul of the principles of *Miranda*. The conversational banter between the suspect in custody and the detectives, according to the Supreme Court of Florida, constituted the functional equivalent of interrogation after the subject had requested an attorney and wanted to remain silent. The Court held that because the arrestee had asserted his rights under *Miranda*, the detective's subsequent statements to the subject were designed to get him to talk. Such activity by police violated *Miranda* principles and meant that the arrestee's subsequent waiver was not voluntary. The interrogatory-type statements by police induced him to continue engaging with the officer, even though he had invoked his right to silence many times. The murder conviction was reversed because the *Miranda* error was not harmless.

However, when a subject in the custody of a parole agent admitted to current methamphetamine use when no questions were asked of him, the subject had not been subjected to *Miranda* questioning.[36] The convict's parole was in the process of being terminated because the parolee had refused an earlier required drug test on the ground that he had recently used prohibited drugs. In the presence of the parolee, the parole agent was typing documents to end parole because of the testing refusal. No *Miranda* warnings had been offered after the agent decided to take the parolee into custody. At that time, the parolee volunteered, without any prompting, that his refusal to submit to testing was due to methamphetamine use, twice that day. Under the circumstances, no *Miranda* interrogation had occurred, and the situation did not involve the functional equivalent of interrogation even though the parolee was in handcuffs in the parole agent's office when he voluntarily offered his incriminating statements. The parole agent was not involved in any attempt to get the parolee to talk or to confess, and there was no reason for a law enforcement agent to think that typing parole revocation paperwork would prompt an oral response. According to a reviewing court, the drug use information was properly received because no functional equivalent of interrogation in violation of *Miranda* had occurred.[37]

Interrogation with custody has been permitted where an arrestee has not requested an attorney and has not clearly noted his or her desire to remain silent or where the arrestee has made an ambiguous reference to counsel insufficient to invoke the prohibition against further questioning. Nothing in *Edwards* requires the furnishing of counsel to a suspect who consents to answer questions without the assistance of a lawyer. Where an arrestee indicates only a desire to stand on the Fifth Amendment privilege against self-incrimination and has not requested to speak with a lawyer, police may inquire if he or she wants to answer questions after they have waited a significant amount of time.

Police may only inquire concerning crimes *unrelated to the crime for which the person is in custody*, and police must offer the *Miranda* warnings a second time.[38]

Even where police attempt to question an arrestee about additional crimes *unrelated* to the reason for initial custody and the arrestee has previously invoked the right to counsel protections under *Miranda*, such questioning runs afoul of *Arizona v. Roberson*.[39] In *Roberson*, the arrestee indicated that he did not wish to speak with police and wanted an attorney. Three days later, while the defendant was still in custody, a different police officer approached him, advised him of his rights, and obtained a confession for a crime for which Roberson was not then under arrest. Since Roberson had indicated that he wished to speak only to a lawyer and not to police, that wish should have been respected under the *Edwards* rule. The *Roberson* Court held that the confession for the second crime should have been excluded from admission at his trial for the second offense.

However, when the arrestee has not refused to speak with police or has not asserted his or her right to silence and has not requested to speak with an attorney but has been to court on different charges, police may ask if the arrestee is willing to waive *Miranda* rights and speak with police concerning criminal matters unrelated to the reason the defendant was in court. An accused's invocation of his or her Sixth Amendment right to counsel during a judicial proceeding does not constitute an invocation of the *Miranda*-derived right to counsel emanating from the Fifth Amendment's guarantee against compelled self-incrimination.[40] Under these circumstances, the *Edwards* rule does not apply. In one Supreme Court case, the Court added an interpretative twist to the *Edwards* rule. In *Maryland v. Shatzer*,[41] the defendant was incarcerated in a state correctional facility and police wanted to speak with him concerning a crime unrelated to the reason for his incarceration. Following receiving *Miranda* warnings, he declined to talk to a police officer about the unrelated crime by asserting his *Miranda* rights. When different officers wanted to question him on the same unrelated crime three years after his initial invocation of the *Miranda* warnings, the Supreme Court held that the principles of *Edwards* were not violated when an officer offered new *Miranda* warnings, which the prisoner waived and which resulted in damaging evidence being presented to the police officer by the prisoner. According to the *Shatzer* Court, the three-year break allowed the inmate to return to his normal prison existence and offered plenty of time for him to discuss the matter with friends in prison and be free of any residual coercive effects of talking to the other officer three years prior. The *Shatzer* Court engaged in a bit of rulemaking when it announced that neither the principles of *Miranda* nor the teaching of the *Edwards* rule would be broken if a second effort at interrogation follows at least fourteen days after the first attempt to interrogate a subject who was in custody for *Miranda* purposes and who initially invoked his or her rights under *Miranda*.[42]

Since *Miranda* warnings are necessary only where both custody *and* interrogation are present, if police merely make an arrest with no immediate design of interrogation, there is no absolute need to offer *Miranda* warnings. Similarly, where a question directed to a person clearly not in custody might elicit an incriminating response, no *Miranda* warning is essential, since the person is free to leave and free to disregard the question. Some situations involving both custody and interrogation do not require a *Miranda* warning where the element of coercion does not exist. If, for example, the police place a plainclothes officer with an arrestee within a jail cell and the arrestee is unaware that

the person with whom he or she is speaking is a police officer, no *Miranda* warnings are necessary provided the plainclothes officer does not actually question the arrestee about the crime for which he or she is in custody.[43]

In *Perkins*, police placed an undercover officer in a cell with Perkins, who was incarcerated on charges unrelated to homicide. The undercover officer engaged in small talk and banter until the two men began to talk of their criminal careers. Perkins made damaging admissions about a homicide, which he readily admitted committing. According to the Court, the prosecution could use Perkins' admissions against him because there was no chance of coercion or overreaching by the government, since Perkins was unaware of the status of his cellmate. The *Perkins* Court held that "an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response."[44]

10. Necessary Condition for *Miranda* Warnings: Custody

To determine when *Miranda* warnings become mandatory, an understanding of the legal definition of custody proves essential. Although the concept of custody would appear to be quite clear, court definitions have failed to provide a complete model of clarity.[45] In *Miranda*, the Court considered custody to exist when the individual had been restrained of his freedom of movement in any significant manner or otherwise deprived of freedom of action in any significant way. While a formal arrest clearly meets this standard, other situations with murky fact patterns fail to offer a bright line for determination. In *California v. Beheler*,[46] a suspect with information about a homicide had responded to a police invitation to discuss the matter at the station house. At the interview and prior to offering any *Miranda* warning, police informed Beheler that they believed he had been involved in the crime. During the discussion, Beheler admitted his presence and some participation in the homicide, at which point the police informed him of his *Miranda* rights. Although Beheler was released without charge at that time, he contended that he had been in actual custody at the time of his inculpatory statements. The Court ultimately stated that as "a determination of whether a suspect is 'in custody' for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement'."[47] Applying this standard, Beheler was not in custody when he voluntarily met with and spoke to the investigators. The key to *Beheler* may have been the fact that he was freely permitted to leave at the end of the questioning, indicating a lack of custody.

While an arrest accompanied by the use of handcuffs while the subject is in complete control of an officer would indicate that custody exists, other situations similar to *Beheler* may not be so clear, even when the individual freely leaves the police station following an interview. In *Thompson v. Keohane*,[48] police asked a murder suspect to voluntarily come to the station to answer some questions. At their headquarters, several Alaska state troopers interrogated Thompson for two hours. Thompson's ex-wife had been missing for a while, and the police had been notified of a suspicious death of a woman. The police had invited Thompson to come to headquarters and discuss the

case, but they did not tell him that he was a prime suspect. Thompson was not given any *Miranda* warnings, and he was told he was free to leave at any time while or after talking with police. Police told him that he was a suspect in a murder, and Thompson subsequently admitted killing his ex-wife. He was allowed to leave the station because he was not under arrest. Following his conviction for murder, he contended that he had been in custody during the interrogation and that his confession should have been excluded from evidence because his rights under *Miranda* had been violated. According to the *Thompson* Court, for custody purposes, two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation, and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave?[49]

Most individuals would consider themselves in custody following a confession to murder, and most police officers would not allow such a person to leave the police station, but Thompson appeared not to be in custody, and *Miranda* may not have been required.[50]

In a case where custody was the issue, a police officer was suspected of possessing computer-based child pornography.[51] Federal agents arranged to meet with the suspect officer in a police conference room, where they repeatedly told him he was free to leave. Without offering any *Miranda* warning, the officers informed him that his house was being searched pursuant to a warrant in connection with a child pornography investigation, and they asked him about his use of some peer-to-peer software. During the entire encounter, both federal agents used a friendly and non-confrontational tone of voice, and the subject officer was told that he did not have to speak with the agents. The targeted officer appeared stressed, but he downplayed his use of the software while admitting that he occasionally came across some prohibited photographs that he immediately deleted. The agents then showed him some child porn screenshots that they had captured from the Internet investigation of his peer-to-peer software activity. Throughout the encounter, they told him he was free to leave and that he was not then under arrest, although the federal officers positioned themselves in front of the conference room door during the conversation. At the conclusion of the interview, the federal agents arrested the subject police officer based on an instruction by the United States attorney. A federal court of appeal reversed the trial court pre-trial determination that the police officer was in custody for *Miranda* purposes and held that the officer was not in custody during the questioning. The reviewing court indicated that there were four factors to consider in determining whether custody existed: the location of the interview, the length and manner of the interrogation, whether the suspect individual's freedom of movement was restricted, and whether the individual was told he or she did not need to answer any questions. The court indicated that the suspect officer was told nine times that he was meeting with the officers voluntarily and could leave at any time, and he had been informed that he had the right to speak to an attorney. After the interview concluded and prior to the arrest decision, the subject was allowed to use his cell phone and to go to the bathroom unescorted, factors that helped the reviewing court conclude that he was not in custody until the formal arrest occurred. The reviewing court noted that it was an "error to conclude that [Officer] Martinez's freedom of movement was restricted to the degree associated with a formal arrest. Considering the absence of physical restraints and Martinez's ability to communicate via cell phone, a reasonable person would not have

felt significantly restrained."[52] The reviewing court held that the interview statements should be admissible when the case went to trial, since he was not in custody.

In some situations, an individual may believe that the police have taken custody when, in fact, they have made no such decision.[53] In such a case, "a person who honestly but unreasonably believes he is in custody is subject to the same coercive pressures as one whose belief is reasonable; this suggests that such persons also are entitled to warnings."[54] Alternatively, a detainee may feel free to leave when, in reality, police would not permit the individual to leave if an attempt were to be made. Another view of when custody exists focuses on the point in time when a reasonable officer would believe that custody has been taken of the individual, but this view does not appear to be the controlling opinion.

A federal court of appeal offered additional factors that could be relevant considerations in making a decision of whether a person is in custody and should be given the *Miranda* warnings.[55] In making a determination involving custody, police and courts should consider the location of the questioning, the number of police officers who were present during interrogation, the degree of physical restraint, and the length and character of the questioning that occurred. The court further noted that the factors should be viewed objectively to decide whether the restraint on freedom of movement of the subject is of the type and degree that are typically associated with a formal arrest. In the case that the court was adjudicating, the suspect had voluntarily entered the police station and was told at the beginning of the interview, and again about half an hour into the interview, that he was free to terminate the interview and to leave. The fact that other police officers were around in the vicinity of the interrogation room did not create a condition of custody. The defendant was free to leave at any time prior to a police interrogation officer telling him that he was no longer free to leave. At that point, additional interrogation required that the police offer the *Miranda* warnings and obtain a waiver by the subject to continue questioning.

Custody for *Miranda* purposes may involve some slightly different considerations when the subject is already serving time in a correctional facility. The argument could be made that an incarcerated individual is clearly in custody, but the Supreme Court has determined that *Miranda* custody may involve some different considerations. In *Howes v. Fields*,[56] the Supreme Court indicated that a prisoner was not in *Miranda* custody when he was removed from the general jail population and taken to a conference room where officers interrogated him for several hours about a different crime for which he was not then jailed. They did not read him his *Miranda* warnings but indicated to him that he was free to return to his cell at any time. In addition, the inmate was not threatened or restrained or made to feel uncomfortable and was offered food and water, while the door of the conference room remained open at times. The key to determining *Miranda* custody was whether, under the circumstances, the subject would have felt free to curtail the interrogation and leave the presence of the police officers. The Supreme Court determined that inculpatory statements made by the inmate could be used against him, even in the absence of *Miranda* warnings, because a reasonable person would have felt free to end the interview with the police officers and return to his usual accommodations. Under the circumstances of this type of interrogation, an inmate would not be presented with the same coercive effects that the *Miranda* court desired to eliminate.

Custody of minor suspects may involve a consideration of the relative youth of the detainee because the age of a child is a relevant consideration when determining custody for *Miranda* purposes. In one North Carolina case,[57] police removed a thirteen-year-old juvenile from his seventh-grade class because he was suspected of involvement in residential burglaries. He was questioned in a closed room by officers and a school administrator for at least thirty minutes without being given *Miranda* warnings prior to his confession. The Supreme Court reversed his eventual adjudication of delinquency on the theory that a child will often feel bound to submit to official interrogation when an adult in a similar situation would feel free to terminate the conversation and leave. Justice Sotomayor indicated that children do not possess the same capacity to make critical decisions as would adults placed in a similar situation. On remand, the Court directed the state courts to address the issue of custody for the juvenile, taking into consideration all of the relevant circumstances of the encounter, including the juvenile's age at the time of the events.

11. Necessary Condition for *Miranda* Warnings: Interrogation

The second factor to be considered in determining whether *Miranda* warnings need to be administered concerns the question of whether police officers have initiated interrogation. Most interrogation takes the form of the officer asking direct questions and the arrestee answering, refusing to answer, or being evasive in the response. While the existence of interrogation can generally be discerned from the conduct of the participants, the act of interrogation may not always be composed of interrogatory sentences. Subtle communication may disguise a question, making it appear as a declarative sentence where the pressure is on the subject to make a response. If, in the presence of the arrestee, police officers talk among themselves about the case at hand and make derogatory remarks about the crime, the suspect, or the manner in which the crime was committed, the arrestee may be prompted or feel obligated to say something that could be incriminating. If police reasonably expected a response under the circumstances, many courts will hold that the act of speaking in the presence of the arrestee constitutes the functional equivalent of interrogation and will be considered a violation of the principles of *Miranda*. In a slightly different context, police may not interrogate a person who is in custody and obtain an unwarned confession and then read the warnings, hoping to have the subject repeat an earlier admission or confession that would now follow the *Miranda* warnings.

12. *Miranda* Interrogation: The Functional Equivalent

Interrogation may take many different forms and may be so subtle that the one being interrogated may not always be aware that questioning is actually happening. In *Rhode Island v. Innis* (Case 5.3),[58] the Court held that the term *interrogation*, for *Miranda*

purposes, not only includes direct and unequivocal questions but also encompasses "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (see Case 5.3).[59] In *Innis*, the police officers were talking to themselves but in front of an arrestee concerning the missing firearm belonging to the arrestee. One of the officers stated that there were quite a few handicapped children running around and playing near the crime scene because a school for such children was located nearby. The officer noted, "God forbid one of them might find a weapon with shells and they might hurt themselves."[60] Innis told the officers to turn the car around and that he would show them the location of the gun. A practice that the police reasonably should know is likely to motivate a suspect to make an incriminating response possesses the same legal effect as overt interrogation. In the *Innis* case, the Court clearly indicated that the definition of interrogation focuses on the reasonable intentions of the police rather than on the individual in custody. For example, if two police officers were to speak with each other in front of an arrestee and comment that if one of them had been arrested, he certainly would have denied guilt or explained his innocence, courts would likely hold that the arrestee had been interrogated under *Miranda*. However, merely asking a subject prior to a pat-down whether he had any sharp objects that could hurt the officer does not constitute custodial interrogation under *Miranda*, even if it produces incriminating verbal or physical evidence. Since the officers' question serves the noncriminal purpose of officer safety, it falls squarely within the class of questions that typically accompany arrest and custody.[61] Police conduct constitutes interrogation or its functional equivalent where it is intended to motivate an arrestee to initiate conversation that the police desire to hear.[62]

Case 5.3. LEADING CASE BRIEF: CREATIVE CONDUCT BY POLICE OFFICERS MAY CONSTITUTE CUSTODIAL INTERROGATION

Rhode Island v. Innis
Supreme Court of the United States
446 U.S. 291 (1980).

CASE FACTS:

Following a dispatch to pick up a fare, a Providence, Rhode Island, taxicab driver's body was discovered. A day later, another taxicab driver reported that he had been robbed at gunpoint by a man wielding a sawed-off shotgun. At the police station, the taxi driver noticed a photograph of Mr. Innis on the mug board and identified him as the robber. Police initiated a search in the area in which the taxi driver robbery occurred.

A police officer discovered Mr. Innis walking on the public street, placed him under arrest, and read him the standard *Miranda* warnings. While waiting for backup officers, the arresting officer did not converse with Innis. Subsequently, a police captain read the *Miranda* warnings to Mr. Innis a second time. Innis indicated that he wished to speak with an attorney, so the police ceased efforts to interrogate him and

began to transport Innis to the police station.

Three officers rode with Innis to the central station. The police captain instructed the officers not to question Innis or intimidate or coerce him in any way. En route to the jail, two officers conversed about what a tragedy it would be if one of the children from the handicapped children's school near the point of arrest happened to find a loaded shotgun and it would be too bad if a little girl would pick up the gun and be harm herself.

Patrolman Gleckman later testified at Innis's trial:

> A. At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol [and that, because a school for handicapped children is located nearby] there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.
>
> App. 43–44.

Officer Gleckman also indicated that, in the conversation with Officer McKenna, he intimated that it would be a tragedy if some little girl would find the gun and accidentally kill herself.

Mr. Innis interrupted the conversation of Officers McKenna and Gleckman and told them that he would reveal where he had hidden the missing shotgun if they would return to the scene of his arrest. Upon arrival, the police captain read the *Miranda* rights to Mr. Innis again. Innis noted that he wanted to show the police the gun because of the danger to the handicapped school children. He pointed out the shotgun under some rocks by the side of the road.

The prosecutor introduced the shotgun as evidence after the trial court refused Innis's efforts to suppress the shotgun under *Miranda*. Following the return of a guilty verdict, Innis filed a successful appeal based on the alleged *Miranda* violation. The Rhode Island Supreme Court agreed with his contention concerning the *Miranda* violation and reversed his conviction. According to the Court, the police officers in the vehicle had "interrogated" the respondent without a valid waiver of his right to counsel when they spoke in front of him. The Rhode Island Supreme Court believed that Innis had been subjected to "subtle coercion" that was the functional equivalent of interrogation.

The Supreme Court of the United States granted certiorari to address the meaning of "interrogation" under *Miranda v. Arizona*, 440 U.S. 934.

LEGAL ISSUE:

Where police officers discuss an arrestee's case where the arrestee can hear the police and where the officers' conversation has not been specially tailored to motivate or coerce the arrestee to speak on the facts of the case, does such conduct by police officers constitute the functional equivalent of interrogation under *Miranda*?

THE COURT'S RULING:

The officer's conversation did not involve interrogation. The Court could find no reason to believe that the

officers were talking between themselves with an intention to get the arrestee to incriminate himself, and the officers had no special knowledge of any special sensitivities of the arrestee. Therefore, their conversation was not determined to be the functional equivalent of interrogation.

ESSENCE OF THE COURT'S RATIONALE:

* * *

II

In the present case, the parties are in agreement that the respondent was fully informed of his *Miranda* rights, and that he invoked his *Miranda* right to counsel when he told Captain Leyden that he wished to consult with a lawyer. It is also uncontested that the respondent was "in custody" while being transported to the police station.

The issue, therefore, is whether the respondent was "interrogated" by the police officers in violation of the respondent's undisputed right under *Miranda* to remain silent until he had consulted with a lawyer. In resolving this issue, we first define the term "interrogation" under *Miranda* before turning to a consideration of the facts of this case.

A

The starting point for defining "interrogation" in this context is, of course, the Court's *Miranda* opinion. There the Court observed that,

> [b]y custodial interrogation, we mean *questioning* initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id*. At 44 (emphasis added).

This passage and other references throughout the opinion to "questioning" might suggest that the *Miranda* rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody.

* * *

The Court in *Miranda* also included in its survey of interrogation practices the use of psychological ploys, such as to "postulate" "the guilt of the subject," to "minimize the moral seriousness of the offense," and "to cast blame on the victim or on society." It is clear that these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation.

* * *

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

* * *

Moreover, it cannot be fairly concluded that the respondent was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that Patrolmen Gleckman and McKenna should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.

* * *

It is our view, therefore, that the respondent was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him.

* * *

For the reasons stated, the judgment of the Supreme Court of Rhode Island is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

CASE IMPORTANCE:

The *Innis* litigation indicated that interrogation can include speech by police officers that does not seem to constitute questioning and may involve sentences that do not have a question mark at the end. Police conduct constitutes interrogation or its functional equivalent where police intend it to motivate an arrestee to make incriminating conversation that the police desire to hear.

Thus, the Court held that a practice that the police should understand would be likely or is intended to provoke an incriminating response from an arrestee amounts to custodial interrogation. In *Nix v. Williams*, 467 U.S. 431 (1984), an officer who knew a mental patient was deeply religious did not interrogate in the usual sense. He played upon the sensitivities of the arrestee to get the prisoner to tell him where a murdered girl's body was located in order to give her a proper burial. While in the police cruiser, one office suggested that with the snow coming that night and the passage of time, even the arrestee might not be able to locate the girl's body later, a fact that would deprive the parents or a proper Christian burial for the body. The Supreme Court held this approach to constitute the functional equivalent of interrogation under *Miranda*, which required suppression of his words, but determined that the physical evidence of the girl's body and her personal items would have been inevitably discovered and were properly admitted against defendant Williams. However, if police asked a question of the handcuffed owner of a house being lawfully searched if there were any things that could harm searching officers, a volunteered answer by her handcuffed husband, sitting next to her, that indicated where firearms were located did not constitute interrogation of the husband under the concept of "the functional equivalent of interrogation." The police had not initiated the conversation with the wife in order to get the husband to speak, and his answer was properly admitted against him in court.[63]

Private, nongovernmental questioning and conversation do not implicate the protective warnings of *Miranda*. In one case for *Miranda* purposes, interrogation did not occur where a wife, in the presence of an officer, was allowed to speak with her husband, who was under arrest for murder of their son. In *Arizona v. Mauro*,[64] police had arrested Mauro following his confession to the murder of his own son. Subsequent to receiving his *Miranda* warnings, he told the officers he did not wish to speak further until he had seen an attorney. With some reluctance, police allowed his wife to speak with Mauro in the presence of a police officer and in full view of an operating tape recorder. Mauro answered his wife's questions concerning why he had killed their son. The information on the audio recording and related police testimony was properly admitted at his murder trial despite Mauro's contention that the tape recording constituted custodial interrogation. Although the police might have expected that some incriminating information might be elicited between husband and wife, the police officers were not conducting an interrogation, even though they openly recorded the conversation. The Court refused to follow language from *Innis* where the Court stated that interrogation includes a "practice that the police should know is reasonably likely to evoke an incriminating response from a suspect."[65] Crucial to the Court's decision in *Mauro* was the fact that the police did not conduct the interrogation; Mauro's spouse questioned him about his role in the death of their son.

In a similar manner in a case involving drugs and firearms, *United States v. Kimbrough*,[66] police arrested a son who lived with his mother and who had been sitting on a basement bed, apparently dividing cocaine on a plate with a razor blade. Police brought the son into the presence of his mother at her home. The *Miranda* warnings had not been completed when the mother began to interrogate her own son concerning drugs and guns. The police stood by as the mother asked questions of her son without direction or involvement by the police and listened as he gave incriminating information to his mother that the police duly noted. The federal district court ordered the incriminating answers suppressed from defendant Kimbrough's trial because the judge concluded that Ms. Kimbrough's involvement in the questioning of her son was the same as official police custodial interrogation. However, on the prosecution's appeal, the Court of Appeals reversed and held that the son's statements were not the result of express police interrogation and did not qualify as a functional equivalent of police questioning. The statements made to his mother in front of police officers should be admitted against defendant Kimbrough when and if the case proceeded to trial.

13. Exigent Circumstances Exception to *Miranda* Interrogation

Although the Court initially required that *Miranda* warnings be offered in every situation in which law enforcement officials desired to conduct custodial interrogation of an arrestee, the Court has recognized a public safety or emergency exception. In *New York v. Quarles*,[67] the officer had reason, based on a complaint, to believe that the arrestee had hidden a loaded gun in a store near the officer, which could have been used to harm

the officer or the public. Presumably, the arrestee could have lunged to gain dominion and control of the gun, or a confederate could have acquired it and attempted to harm the officer or frustrate the arrest. Under the circumstances, the *Quarles* Court held that the officer was free to inquire about the weapon prior to offering any *Miranda* warning and that the prosecution was permitted to introduce both the weapon and the oral answers against the defendant. In contrast to the usual requirements, due to the emergency situation, the *Quarles* Court permitted the admission of the words and the gun despite the absence of *Miranda* warnings prior to custodial interrogation.

Under *Quarles*, the rule emerged that where an immediate danger to the safety of the public or a police officer appeared to exist, police can delay offering the *Miranda* warnings and may question the suspect in an effort to alleviate the imminent danger. The questions asked of a subject should be directed toward discovery of a dangerous weapon and must be reasonably directed to ending a police or public danger rather than focused on the collection of evidence. Emergencies could conceivably include the location of explosives, the location of a kidnapping victim, discovery of poisons directed at the public, or other terror-type situations in which time is crucial to life and health. The exact limits of the public safety exception to *Miranda* have not been fully developed in state and federal litigation, and the Supreme Court of the United States has not accepted a second case concerning the doctrine. Since the number of public safety exception cases remains small, the full development of this doctrine will be a long time coming. Notwithstanding the failure to offer the *Miranda* warnings where the public safety exception has application, verbal and physical evidence obtained by delaying the *Miranda* warnings will be admissible at trial against an arrestee and will not normally be subject to evidentiary exclusion.

In applying the public safety exception recognized in *Quarles*, an Illinois appellate court approved a trial court's admission of statements taken from a person in custody in a trial involving a firearm.[68] Police had received reports of a specifically described individual shooting a gun at a particular address. When they arrived, they observed three male adults and three to five children present. Police isolated the described individual, placed him in handcuffs, and patted him for weapons. The officer then asked if the subject had been shooting a gun, and if so, where it was located in the backyard. Based on information provided by the detained subject, the officers recovered a 9-mm handgun that was loaded and unsecured and in close proximity to the children. At that point, the defendant was placed under arrest and given his *Miranda* warnings. Following his conviction, he contended that the trial court erred in denying his motion to suppress his statements to police because the officer's question regarding whether defendant had been firing a gun constituted custodial interrogation in violation of *Miranda*. The prosecution conceded that the defendant was in police custody at the time he made the responsive statements but argued that the *Quarles* public safety exception to *Miranda* allowed the questions and admission of the firearm. The appeals court noted that the officers were responding to a shots fired call where there were people present and children involved, and no one knew where the firearm was located. There was an immediate need to neutralize the situation and locate both the shooter and the weapon. According to the reviewing court, the *Quarles* exigent circumstances exception to *Miranda* allowed the officers to question

the subject in custody because of the emergency situation, and both the statements and the firearm were properly admitted in court.[69]

14. Routine Booking Exception to *Miranda* Interrogation

Not every question that a police officer might ask of a person in custody is subject to rejections from evidence based on *Miranda* principles. With virtually every stop that a police officer makes that involves custody, the officer as a matter of course needs to discern the identity of the individual with whom he or she is involved. When a subject is to be taken to a jail facility, subsequent police questions concerning personal information fall outside the usual protections of the *Miranda* warnings and fit under a routine booking information exception to *Miranda*. It is an elementary principal that a detained person may be asked questions concerning his or her identity, address, and other personal information that would allow the officer to determine identity and other basic facts concerning the person he or she has stopped.[70] As the Supreme Court of Delaware recently noted,

> Law enforcement officers must advise a person in custody of his *Miranda* rights prior to interrogation about matters that may tend to incriminate him. There is however, an exception to *Miranda* for booking type information. Pedigree information, such as names and dates of birth, falls within the ambit of booking type information. Pedigree information, thus, is a recognized exception to *Miranda*, even though it also furthers the police's investigation.[71]

In originating the routine booking exception to *Miranda*, the Supreme Court noted that questions concerning name, address, height, weight, eye color, date of birth, and current age constitute custodial interrogation, but the routine booking question exception allows such questions as reasonably necessary to complete the booking process.[72] Such questions, when asked during custody, are not to be excluded from trial use under the dictates of *Miranda*.

15. Right to Counsel Under *Miranda* Is Personal to the Arrestee

The *Miranda*-derived right to counsel is personal to the accused and cannot be asserted by a member of the detainee's family or even the arrestee's attorney. In *Moran v. Burbine*,[73] the police arrested Burbine on a burglary charge but quickly focused on him as a possible homicide suspect wanted in another jurisdiction. Burbine's sister, who was unaware that police had Burbine under suspicion for murder, arranged for a public defender to render legal assistance for her brother on the burglary charge. When the attorney phoned the police, they informed her that Burbine would not be interrogated on the burglary charge that evening. Significantly, the police did not tell the attorney that

another jurisdiction's law enforcement officials were planning to question Burbine on the homicide. Burbine did not know that he was represented by counsel.

When the police from the second jurisdiction orally gave him new *Miranda* warnings, Burbine waived his rights and also signed three written warning acknowledgments. Subsequently Burbine signed three incriminating statements admitting to the murder. Burbine was unaware of his sister's efforts to retain counsel and of the attorney's telephone call to police, but at no time did he request an attorney.

Following his conviction for murder, Burbine appealed, contending that his rights under *Miranda* and his right to due process had been violated by the police practice. The Supreme Court held that police deception of the defendant's attorney—by not telling her that her client was a homicide suspect and by actively misinforming her that her client would not be interrogated that evening—did not violate the protections of *Miranda*. Similarly, when the police did not inform the suspect that his attorney wished to speak with him, such subterfuge did not affect the voluntariness of his statements to police or alter his lack of desire to have an attorney present. The *Burbine* Court held that the trial court ruled correctly by allowing the confessions into evidence and that Burbine had waived his right to counsel and his Fifth Amendment privilege against self-incrimination. Requiring police to inform an arrestee that an attorney wishes to consult with him or her would create an inappropriate shift in the careful balance struck in *Miranda* between the needs of law enforcement and the constitutional protections accruing to the accused.

The *Burbine* Court clearly held that the constitutional rights enforced by *Miranda* are personal to the accused and cannot be asserted by a family member, an attorney, or any other individual. In a different case that supported this concept, a prosecution for marijuana smuggling on the high seas, a federal court of appeals held that a co-defendant could not object to the admission of another co-defendant's confession on the ground that the confessing co-defendant did not properly understand the *Miranda* warnings concerning the self-incrimination clause of the Fifth Amendment.[74]

16. Procedure for Waiver of *Miranda* Protection

In order to relinquish the protections offered by *Miranda*, an individual may indicate the decision to waive *Miranda* rights by an oral statement, a written statement, or both, or by other unambiguous conduct. In *Miranda v. Arizona*, the Court held that a suspect's waiver of the Fifth Amendment privilege against self-incrimination is valid only if it is made voluntarily, knowingly, and intelligently. In determining the standards for a *Miranda* waiver, the Court in *Moran v. Burbine* held that a two-step approach was required:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice, rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.
>
> 475 U.S. 412, at 421 (1975)

Waivers are not effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause. In determining whether a defendant has chosen to give up his *Miranda* rights, courts look to all the attendant circumstances. In *Miranda*, the Court noted that the rules for custodial interrogation did not include any change from prior practice when an arrestee volunteered statements. A waiver may exist where the arrestee initiated the conversation with police or requested that an officer come to the cell and speak with the arrestee or where the arrestee confessed without any intervention by police. For example, in *Colorado v. Connelly*, 479 U.S. 157 (1986), Connelly walked up to a police officer and confessed to murder; after being advised of his *Miranda* warnings and indicating that he understood them, he stated that he still wished to talk about the murder. The Court approved Connelly's waiver by affirmative conduct and by voluntary consent. The Court did not suggest that the officer should have stopped Connelly's speech and warned him under *Miranda* before allowing him to continue his confession to murder. However, once the officer had heard sufficient information that he or she would not permit the subject to freely leave, asking a substantive question concerning the crime would run counter to *Miranda* principles because the subject would then be in custody.

Typically, investigators prefer to obtain a written statement of waiver, but during the initial phases of an investigation, such practice may prove difficult, and the lack of a written waiver is not fatal to admissibility.[75] For example, if an arrestee purportedly makes a valid waiver and subsequently denies so doing, a heavy burden of proof rests with the government to demonstrate that the decision to waive the constitutional rights was made knowingly and intelligently.[76]

A waiver of the *Miranda* warnings may be implied rather than expressed in many contexts so long as the warnings have been properly administered. If an arrestee fails to state that he or she is waving his or her rights but does so by words and/or conduct and begins talking to police, sometimes asking officers questions and generally engaging them in conversation, a waiver under *Miranda* may exist. As a general rule, a valid waiver cannot be inferred from silence or a period of silence of an arrestee after warnings are given, but waiver may be deduced from the fact that the arrestee eventually offered a confession. However, in one case where the warnings had been offered and there was no reason to believe that they were not understood and where the subject never stated that he wanted to remain silent or to assert his right to counsel or never indicated that he did not want to talk with police, continued interrogation was a permissible approach. In *Berghuis v. Thompkins*,[77] the defendant was being questioned following his murder arrest. During the first three hours of the interrogation, arrestee Thompkins said little and did not formally waive his *Miranda* warnings. However, when asked if he prayed to God for forgiveness for shooting the victim, he started to cry and answered in the affirmative. With his conduct indicating waiver, Thompkins' response to a question with an incriminating statement was properly introduced by the prosecution. Silence with an understanding of one's rights does not constitute a determination to assert the rights mentioned in the *Miranda* warnings, so when the subject spoke, he was not relying on any of the *Miranda* rights.[78]

Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or

gives some information on his own prior to invoking his right to remain silent when interrogated. In most cases, if law enforcement officers did not violate an arrestee's constitutional rights or practice coercion, an individual's personal motivation to waive the protections of *Miranda* to make an admission or a confession does not create an involuntary confession. A confession has not been received in violation of *Miranda* and is not considered coerced even if it has been prompted by a mental illness,[79] a desire to please family members, or an overwhelming religious experience.[80] On issues of alleged waiver of *Miranda* rights, the prosecution has the burden of proof by a preponderance of the evidence.[81]

A prosecutor may not successfully argue that a person who was never read the *Miranda* warnings nevertheless properly understood them and has effectively waived any claims under the *Miranda* doctrine. According to the *Miranda* Court,

> [A] warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury.[82]

Such language appears to close the door to any prosecutor making the argument that the warnings, in a specific situation, were unnecessary given the arrestee's education or experience.

17. Congressional Challenge to the *Miranda* Warnings

From the initial decision in *Miranda v. Arizona*, members of Congress, among others, were neither happy with the result nor willing to allow a guilty person to go free because of a defective warning provided by a police officer. In the wake of that decision, Congress enacted 18 U.S.C. § 3501,[83] which provided that the admissibility of such statements taken in violation of the *Miranda* warnings should turn only on whether they were voluntarily made and not be thrown out of court because of a defective *Miranda* warning. Under Section 3501, the Congress directed federal courts to determine if the confession or other inculpatory statements were voluntarily made, according to traditional analysis, taking into consideration the time when the suspect made a confession, whether the suspect had been warned of the use of his or her statement, whether the individual had been made aware of the right to counsel, and whether counsel was present when the statement was made. According to congressional intent, if the statement or confession were made voluntarily, then such evidence should be admitted in federal courts even if the *Miranda* warnings had never been offered. In other words, the evidence should be admitted if voluntarily offered where there was an absence of coerciveness. The design of Congress was to override the Court's decision in *Miranda v. Arizona* and replace it with traditional voluntariness of confession standard[84] rather than following *Miranda*'s conclusive presumption of coerciveness and exclusion where the warnings had not been given properly.

18. *Miranda* Warnings: Required by the Constitution

In *Dickerson v. United States*, 530 U.S. 428 (2000) (Case 5.4), the Supreme Court determined that the case of *Miranda v. Arizona* was of constitutional dimension, which meant that the decision could not be nullified or overturned by an act of Congress (see Case 5.4). It is a rule of constitutional construction that if a decision of the Supreme Court has as its basis the interpretation of the Constitution, the Congress cannot tell the Court that a different meaning must be used. In the United States, the Supreme Court is the final arbiter of what the Constitution means and how it may be interpreted. Even before the Court gave the definitive answer in *Dickerson*, every trial court ignored the congressional statute purporting to supersede *Miranda*. For the first time, the *Dickerson* case held that the federal statute passed to overturn the *Miranda* case was of no force and effect and was actually unconstitutional.

In the case involving an alleged bank robbery, one Dickerson had been interrogated and made incriminating statements at an FBI field office, at which time he was in custody and had not received the traditional *Miranda* warnings. He filed a motion to suppress his statements, and the trial court granted the motion. The United States attorney appealed this decision, which suppressed evidence voluntarily taken but which was taken in violation of *Miranda* and that ignored the statute, to the Court of Appeals for the Fourth Circuit. That court reversed the trial court decision and concluded that despite the lack of *Miranda* warning, the statements should be admitted against Dickerson, since his statements had been voluntarily given consistent with 18 U.S.C. § 3501. The court of appeals based its decision on a determination that Section 3501 superseded the decision of *Miranda v. Arizona* and that the *Miranda* decision was not of constitutional dimension and, therefore, could be overruled by an act of Congress.[85]

When the Supreme Court decided to hear the case, it noted that it possessed supervisory authority over the federal courts, and it could use that authority to prescribe rules of evidence and procedure that are binding in federal tribunals. But the Court noted that it possessed no supervisory authority over state and local courts. The Court observed that Congress may not supersede court decisions interpreting and applying the Constitution and that the *Dickerson* case turned on whether the *Miranda* decision announced a constitutional rule or merely served as an example of the Court's exercise of its supervisory authority to regulate the admission of evidence in federal courts. The Supreme Court held that since *Miranda* and its companion cases applied the *Miranda* warnings to state courts and that the Court has no general supervisory authority over state courts and that since the United States Supreme Court's authority over state courts is limited to enforcing the commands of the United States Constitution, the *Miranda* decision must have been of constitutional dimension. According to the *Dickerson* Court, the *Miranda* decision and its requirements could not be overturned by an act of Congress because the Supreme Court had announced a rule of procedure required by the United States Constitution when it decided the case of *Miranda v. Arizona*. Thus, the congressional attempt to overturn the rule of *Miranda* and substitute it with a traditional standard of voluntariness ended with a stronger reaffirmation of the principles and practice that have grown up around the case of *Miranda v. Arizona*.

Case 5.4 LEADING CASE BRIEF*: MIRANDA* WARNINGS ARE REQUIRED UNDER THE CONSTITUTION

Dickerson v. United States
Supreme Court of the United States
530 U.S. 428 (2000).

CASE FACTS:

Subsequent to the decision of *Miranda v. Arizona*, law enforcement officials were required to read to persons in custody warnings against self-incrimination and to advise concerning the availability of the right to counsel as well as to inform the person that if the individual spoke, the information could be used against the person in court. These Supreme Court required these warnings if police planned to attempt to interrogate an arrestee. A breach of the warning process followed by incriminating statements resulted in the otherwise voluntary statements being excluded for proof of guilt in state and federal criminal trials. Displeased with the *Miranda* warning requirement, Congress enacted 18 U.S.C. § 3501 which, in essence, made the admissibility of statements taken in violation of the *Miranda* warnings turn solely on whether they were made freely and voluntarily under traditional understandings of the words.

Dickerson, under indictment for bank robbery and allied crimes, filed a petition to suppress incriminating statements he made following a custodial, non-*Mirandized* interrogation. The trial court granted his motion and ruled that his statements would be excluded from trial; the prosecution appealed to the Court of Appeal for the Fourth Circuit, citing the requirements of 18 U.S.C. § 3501. In reversing the trial court, the Court of Appeal conceded that petitioner had not received proper *Miranda* warnings but held that Section 3501 was satisfied because his statement was voluntary and not the product of duress. It concluded that *Miranda* was not a constitutionally required holding and that Congress could by statute have the final say on the admissibility question by overruling the Supreme Court by statutory law.

LEGAL ISSUE:

Was the original decision of *Miranda v. Arizona* mandating warnings of the rights of silence and of counsel considered of constitutional dimension and required by the United States Constitution and, therefore, not susceptible of being overturned by legislation passed by the United States Congress?

THE COURT'S RULING:

The Supreme Court determined that the Constitution required the offering of the *Miranda* warnings in order to give force and effect to the Fifth Amendment privilege against self-incrimination. The original *Miranda* decision applied to a state case, and unless the *Miranda* decision was required by the Constitution, the Supreme Court would have been powerless to make the ruling, since it has no supervisory power over state courts.

ESSENCE OF THE COURT'S RATIONALE:

* * *

In *Miranda*, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion. Because custodial police interrogation, by its very nature, isolates and pressures the individual, we stated that,

> [e]ven without employing brutality, the "third degree" or [other] specific stratagems, . . . custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. *Id*. at 455.

We concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be "accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself." Accordingly, we laid down "concrete constitutional guidelines for law enforcement agencies and courts to follow." Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. These warnings (which have come to be known colloquially as "*Miranda* rights") are:

> a suspect has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. *Id*. at 479.

Two years after *Miranda* was decided, Congress enacted Sec. 3501. That section provides, in relevant part:

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been

> advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

Given Sec. 3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and the instruction for trial courts to consider a nonexclusive list of factors relevant to the circumstances of a confession, we agree with the Court of Appeals that Congress intended by its enactment to overrule *Miranda*. . . . Because of the obvious conflict between our decision in *Miranda* and Sec. 3501, we must address whether Congress has constitutional authority to thus supersede *Miranda*. If Congress has such authority, Sec. 3501's "totality of the circumstances" approach must prevail over *Miranda*'s requirement of warnings; if not, that section must yield to *Miranda*'s more specific requirements.

* * *

Congress may not legislatively supersede our decisions interpreting and applying the Constitution. This case therefore turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction.

* * *

We disagree with the Court of Appeals' conclusion, although we concede that there is language in some of our opinions that supports the view taken by that court. But first and foremost of the factors on the other side—that *Miranda* is a constitutional decision—is that both *Miranda* and two of its companion cases applied the rule to proceedings in state courts—to wit, Arizona, California, and New York. Since that time, we have consistently applied *Miranda*'s rule to prosecutions arising in state courts. It is beyond dispute that we do not hold a supervisory power over the courts of the several States.

The *Miranda* opinion itself begins by stating that the Court granted certiorari

> to explore some facets of the problems . . . of applying the privilege against self-incrimination to incustody interrogation, and to give concrete *constitutional guidelines for law enforcement agencies and courts to follow*. 384 U.S. at 441–442 (emphasis added).

In fact, the majority opinion is replete with statements indicating that the majority thought it was announcing a constitutional rule. Indeed, the Court's ultimate conclusion was that the unwarned confessions obtained in the four cases before the Court in *Miranda* "were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege."

* * *

In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively. Following the rule of *stare decisis*, we decline to overrule *Miranda* ourselves. The judgment of the Court of Appeals is therefore

Reversed.

CASE IMPORTANCE:

This court decision enshrines the *Miranda* warnings in American federal and state criminal procedure for the foreseeable future because the Court believes that the result is dictated by the Constitution, and longstanding practice makes a reversal in the future unlikely.

19. Summary

Although every person is presumed to know the law, when a person is arrested and becomes subject to interrogation, this presumption no longer applies, and law enforcement officers must present warnings to those in custody. The warnings were believed necessary so that law enforcement agents would be less likely to overcome or overreach the will of the person in police custody. The warnings must convey that the individual has a right to remain silent and has a right to an attorney and that if the individual chooses to speak with police, anything said may be used against him or her in a court of law. If a person wishes to speak and later decides not to speak further, the request will be respected. If the person in custody would like to speak with an attorney, one will be made available before any questioning and will be available without cost if the person cannot afford legal representation. While there may be questions concerning precisely when a person enters police custody and precisely what constitutes interrogation, where both custody and interrogation are determined to be present, the *Miranda* warnings must be offered to the individual or any evidence obtained will not be affirmatively admissible against the arrestee. Where a person in custody wishes to exercise the right of silence, the right to consult legal counsel, or both, interrogation must cease until the individual, by conduct, indicates that he or she wishes to speak further. A person may be subject to new *Miranda* warnings where police want to interrogate about a crime unrelated to the reason the person is in custody. Failure to respect the constitutional rights of the arrestee will result in excludable evidence. An exception to the *Miranda* warnings exists in the context of an emergency where safety of the officer or other individuals nearby may be compromised if the warnings were given prior to immediate interrogation.

REVIEW EXERCISES AND QUESTIONS

1. What factors appear to have led the Supreme Court of the United States to decide the case *Miranda v. Arizona*, which requires police to offer legal warnings to persons in custody?
2. What rights must police include in their warnings to persons under arrest

in order to comply with the requirements under the *Miranda* case?

3. Consider the situation where a police officer has stopped a motorist for a traffic violation and has asked questions related to the observed offense. Must the officer offer the motorist the *Miranda* warnings under most situations? If the motorist responded to the officer's roadside questions, should the answers be suppressed from a criminal trial? Why or why not? See *State v. Djisheff*, 2006 Ohio 6201, 2006 Ohio App. LEXIS 6155 (2006).
4. What are the two triggering events or situations that mandate that a police officer offer a subject the *Miranda* warnings?
5. A detained person may be interrogated by an officer who does not actually ask questions of the detained person but who talks in full view and within the hearing range of the detainee. Give an example of such a situation in which a court would probably rule that interrogation has taken place under the concept of "functional equivalent" of interrogation.
6. Assume that police have lawfully detained a person and that an officer has read the *Miranda* warnings to that person. What are two ways that the detainee may waive his or her rights under *Miranda* and choose to submit to police questions?

1. How Would You Decide?

In the Court of Appeals of Idaho.

A police officer on routine patrol validly stopped a female driver for exceeding the speed limit. The driver appeared extremely nervous, and the officer initiated an inquiry concerning both her destination and the reason for her nervousness. The driver presented her license in good order but did not have proof of valid insurance. At seven minutes into the stop, the officer returned to his cruiser to run a driver's license check and to write a citation for not having proof of insurance. He also requested that a K-9 unit be sent to the scene for a walk around for a sniff test of the driver's automobile. When the driver appeared to make strange movements within her car, the officer activated a searchlight to further illuminate the driver's automobile.

When the drug-sniffing dog arrived with a police officer, that officer engaged the driver in conversation and asked if there were any drugs in the car. At that point she admitted having marijuana and handed the new officer, a plastic baggie containing recreational marijuana. The K-9 officer had his dog walk around the car, which caused the dog to alert to the presence of more drugs. With search probable cause, the officers searched the car to reveal some methamphetamine, for which the driver was then arrested.

She filed a motion to suppress the evidence obtained during the traffic stop, arguing that the stop was unlawfully extended by the officer's conversation and that her *Miranda* rights were violated when she was questioned during the stop. The district court granted the motion to suppress the drug evidence, finding that although the initial stop of the driver was lawful, her detention was impermissibly extended (by unnecessary conversation and by the officer's slowness in writing the citation) in violation of the Fourth Amendment.

The District Court held that the driver had been seized for *Miranda* purposes because she was seated in her car with the K-9 officer at the driver side window, the other officer had her driver's license and registration, it was near midnight, and there were two officers and a police dog. Clearly, the driver was not free to leave or go about her business. The District Court held that she had been interrogated in violation of the principles of *Miranda*.

How would you rule on the defendant's contention that her rights under *Miranda* were violated because the officer interrogated her during a traffic stop while she was being detained by the officer?

The Court's Holding:

The State also challenges the district court's conclusion that Hays was in custody [for *Miranda* purposes] during the traffic stop when Deputy Osborn questioned her regarding drugs, and that Hays should have been *Mirandized*. The requirement for *Miranda* warnings is triggered by custodial interrogation. *State v. Medrano*, 123 Idaho 114, 117, 844 P. 2d 1364, 1367 (Ct. App. 1992). Initially, the United States Supreme Court equated custody with a person being deprived of his or her freedom by the authorities in any significant way. *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). However, this test has evolved to define custody as a situation where a person's freedom of action is curtailed to a degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); *State v. Myers*, 118 Idaho 608, 610, 798 P. 2d 453, 455 (Ct. App. 1990). Persons temporarily detained pursuant to a traffic stop are not "in custody" for the purposes of *Miranda*. *Berkemer[v. McCarty]*, 468 U.S. at 440. The burden of showing custody rests on the defendant seeking to exclude evidence based on a failure to administer *Miranda* warnings. *State v. James*, 148 Idaho 574, 577, 225 P. 3d 1169, 1172 (2010).

The district court determined that because Hays was "seated in her car with [Deputy] Osborn standing at the driver's side window, [Officer] Koch had her driver's license and registration, it was nearly midnight and there were two officers and a K9 on the scene," she was in custody for purposes of *Miranda*. These factors relied on by the district court are consistent with a routine traffic stop, but are not akin to a formal arrest. Because Hays has failed to demonstrate that at any time between the initial stop and her arrest she was subjected to restraints comparable to those associated with a formal arrest, the dictates of *Miranda* do not apply and her statements are admissible. [The appellate court also rejected defendant's Fourth Amendment claims that she had been detained for an unreasonable time.] See *State v. Hayes*, 2015 Ida. App. LEXIS 97 (2015).

2. How Would You Decide?

In the Supreme Court of Colorado.

After lawfully pulling over Kimberlie Verigan's car for running a stop sign, police noticed a marijuana pipe and an unmarked pill bottle in plain view within her car. The driver, a man named Smith, had no driver's license and was placed into the

rear seat of the cruiser. Police did not allow Verigan to leave their presence. After police moved Verigan away from her car, they then searched her car and questioned her without providing the warnings required in *Miranda v. Arizona*. In response to police questioning, Verigan admitted to having a baggy of methamphetamine on her person as well as a box cutter. Neither Verigan nor the prosecution challenged the lower court division's conclusion that Verigan was subject to custodial interrogation at the scene. Additional recreational drugs were discovered within a backpack in the vehicle. The police arrested her and brought her to a police station, where she received the *Miranda* warnings for the first time and waived her rights and again confessed to possessing methamphetamine.

Prior to trial, Verigan moved to suppress her pre-*Miranda* statements, as well as her post-*Miranda* statements at the police station, on the strength of *Oregon v. Elstad* (pre-*Miranda* interrogation excluded but later *Miranda* warning cured later statements) and *Missouri v. Seibert* (police purposefully delayed *Miranda* warning and questioned, then offered warning but post-warning statements that were excluded under Supreme Court *Miranda* interpretation). This case involves the scenario in which a suspect in custody is interrogated and confessed before receiving *Miranda* warnings, then is later offered the warnings, and then confesses a second time. The Supreme Court of the United States has twice addressed (*Elstad* and *Seibert*) this type of two-step interrogation.

The trial court held a hearing on Verigan's motion to suppress and denied it, concluding that because Verigan was not in custody when the officers first questioned her at the scene, the officers were not required to provide *Miranda* warnings. As a result, the suppression court concluded that Verigan's pre- and, indisputably voluntary, post-*Miranda* voluntary statements were admissible against her, and she was convicted of various drug offenses. She appealed, contending that both of her statements should have been suppressed, and the Colorado Supreme court granted certiorari.

How would you rule on the defendant's appeal contending that her unwarned statements at her car and her post-Miranda stationhouse statement should both have been suppressed from her trial?

The Court's Holding: (Some citations omitted.)

* * *

As a preliminary matter, we note that no party challenges the division's conclusion that Verigan was subject to custodial interrogation at the scene. We therefore assume that the officers should have administered *Miranda* warnings to Verigan at the scene and that her pre-warning statements were inadmissible. The question thus remains whether Verigan's post-warning statements are inadmissible as the product of a deliberate two-stage interrogation aimed at undermining the "meaning and effect" of the Miranda warnings. [*Missouri v.*] *Seibert*, 542 U.S. at 621 (Kennedy, J., concurring in the judgment).

To decide this question, courts have looked to "the totality of the circumstances," including both objective and subjective evidence. See*, e.g., United States v. Capers*,

627 F.3d 470, 479 (2d Cir. 2010) ("[W]e join our sister circuits in concluding that a court should review the totality of the objective and subjective evidence surrounding the interrogations in order to determine deliberateness, with a recognition that in most instances the inquiry will rely heavily, if not entirely, upon objective evidence."); Nightingale, 58 A.3d at 1068 (noting that in determining whether the two-step interrogation was deliberate, courts must consider the totality of the objective and subjective evidence). Such evidence may include the officer's testimony, as well as objective evidence such as "the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements." *Williams*, 435 F.3d at 1159; see also *Street*, 472 F.3d at 1314 ("[W]e consider the totality of the circumstances including 'the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and post-warning statements.'") (quoting Williams, 435 F.3d at 1159).

* * *

Here, we conclude that the totality of the circumstances does not support a determination that the officers deliberately engaged in a two-step interrogation procedure with the intent to undermine the *Miranda* warnings. The officers found themselves in a rapidly developing situation evolving from an initial traffic stop for a minor infraction to an arrest for possession of methamphetamine within a very short amount of time. Specifically, the record shows that only twenty minutes passed between the time of the initial stop and Verigan's arrest and that the officers detained and questioned Verigan for only a portion of that time. The record further reveals that the officers' questions were narrowly aimed at determining how to proceed once the officers discovered contraband and did not evince an attempt to coerce a confession prior to arresting Verigan and providing the *Miranda* warnings. In stark contrast, the pre-warning interrogation in *Seibert* lasted for thirty to forty minutes and took place in the police station after arresting Seibert and pursuant to a concededly deliberate effort to engage in a two-step interrogation technique aimed at undermining the efficacy of the *Miranda* warnings. [*Missouri v.*] *Seibert*, 542 U.S. at 604 (plurality opinion).

Additionally, although Officer Brewer asked Verigan questions both at the scene and at the police station, indicating some continuation of police personnel, Officer Mitchell asked Verigan the majority of the questions at the scene, while Officer Brewer conducted the interrogation at the police station. The record contains no evidence that Officer Mitchell discussed his interrogation with Officer Brewer, and significantly, it does not appear that Officer Brewer referred in the stationhouse interrogation to the statements that Verigan had made to Officer Mitchell at the scene, a fact that distinguishes this case from Seibert. Indeed, Verigan admitted a number of things during the stationhouse interrogation that were not part of her statements at the scene. For example, at the stationhouse, Verigan conceded that she had been using methamphetamine for years and that the "brownish crystal-type substance" that the officers had recovered was methamphetamine. Finally, the two interrogations occurred in different locations, with the first being conducted somewhat informally at the scene and the second being

conducted more formally at a police station. This allowed Verigan to distinguish the two contexts and appreciate that her interrogation had taken a new turn.

Viewing all of these facts in their totality, we conclude that the record does not support a finding that the police acted deliberately to undermine the efficacy of the Miranda warnings provided to Verigan.

* * *

Conclusion

For these reasons, unlike the division below, we conclude that *Seibert* created a precedential rule, namely, the rule articulated in Justice Kennedy's concurring opinion in that case, which established an exception to the *Elstad* rule for cases involving a deliberate two-step interrogation aimed at undermining the efficacy of the Miranda warnings. Applying that rule here, we conclude that the record does not establish a deliberate two-step interrogation. Therefore, *Elstad* applies, and under *Elstad*, because Verigan's pre- and post-*Miranda* statements were voluntary, the post-*Miranda* statements were admissible.

Accordingly, we affirm the division's judgment. See *Verigan v. People*, 2018 CO 53, 420 p. 3d 247, 2018 Colo. LEXIS 464 (2018).

3. How Would You Decide?

In the United States District Court for the Eastern District of Michigan.

Police officers from the Detroit Violent Crime Task Force were conducting surveillance on a home in the city of Detroit. They were looking for a man named Riley who was wanted for armed robbery, and they soon observed two men enter the residence that police had under surveillance. Law enforcement agents obtained both search and arrest warrants for the home and for the men. Police forcibly entered the home after obtaining no response to their knock and announce. The officers searched the house and came to a room that was locked and in which Riley and another had barricaded themselves. One of the officers asked if there were any drugs or weapons in the home, which was answered by Riley, who identified himself as "Livertis." Riley indicated that there were no narcotics, but "maybe a gun" was in the home. After some back-and-forth negotiations, during which the officers indicated that no one had to get hurt if they would surrender, noises came from the locked room which were consistent with a gun falling to the floor and heavy furniture being moved. Riley and the other man exited the room and surrendered to police. The room contained a veritable arsenal, including two handguns, assault rifles, and a machine gun, as well as some ammunition. Defendant contended that his statement that there was "maybe a gun" in the house should be suppressed from his criminal trial because the officers violated the principles of *Miranda* by not reading him his *Miranda* rights prior to asking questions through the door.

How would you rule on the defendant's contention that his statement from within the barricaded room was taken when he was in custody and that he was interrogated in violation of the principles of Miranda when, prior to the defendant's surrender, one of the officers asked the defendant if any weapons were in the home?

The Court's Holding:

Defendant contends that his statement that there was "maybe a gun" in the house should be suppressed because the officers did not read him his Miranda rights. Miranda safeguards apply if the suspect is (1) subject to interrogation; (2) while in custody. *United States v. Crowder*, 62 F.3d 782, 785–86 (6th Cir. 1995). In this case, Defendant was neither in custody nor was he subject to interrogation. See *United States v. Mesa*, 638 F.2d 582, 584–89 (3d Cir. 1980) (armed suspect barricaded in hotel room surrounded by FBI agents not in custody because FBI could not control his actions); *United States v. Kelly*, 2008 U.S. Dist. LEXIS 115723, *23, 2008 WL 5382272 at *7 (D. Minn. Dec. 23, 2008) (suspect barricaded in home not in custody and police attempts to engage defendant in conversation were not intended to elicit an incriminating response); *Manzella v. Senkowski*, 2004 U.S. Dist. LEXIS 30103, 2004 WL 1498195 at *24–25 (W.D.N.Y. July 2, 2004) (same).

In addition, the public safety exception to Miranda applies. See *New York v. Quarles*, 467 U.S. 649, 657–58, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984). This exception applies "when officers have reasonable belief based on articulable facts that they are in danger." *United States v. Talley*, 275 F.3d 560, 563 (6th Cir. 2001). A police officer has reasonable belief that he is in danger if (1) the defendant has or might have a weapon and (2) someone other than the police might obtain the weapon and inflict harm with it. *United States v. Williams*, 483 F.3d 425, 428 (6th Cir. 2007). If this test is satisfied, statements of a defendant are admissible even in the absence of a Miranda warning.

Here, the officers had a reasonable belief that they were in danger. They could infer that Riley had a weapon, given that they were there to arrest him for armed robbery. Riley did not answer the door, but barricaded himself in a locked room. Courts have held that the public safety exception applies in these circumstances. See Kelly, 2008 U.S. Dist. LEXIS 115723, 2008 WL 5382272 at *7 n.4 (armed standoff); Manzella, 2004 U.S. Dist. LEXIS 30103, 2004 WL 1498195 at *25–26 (same).

Because there is no material issue of fact and the issues presented are legal, the court will deny Defendant's request for an evidentiary hearing.

ORDER: IT IS HEREBY ORDERED that Defendant's motion to suppress is DENIED.

See *United States v. Riley*, United States District Court for the Eastern District of Michigan, Southern Division, 2015 U.S. Dist. LEXIS 122349 (2015).

Notes

1. *Miranda v. Arizona*, 384 U.S.436, at 467 (1966).
2. See *Berkemer v. McCarty*, 468 U.S. 421 (1984).
3. See *Berghuis v. Thompkins*, 560 U.S. 370 (2010). In this habeas corpus case, subsequent to receiving the *Miranda* warnings, defendant Thompkins remained largely silent for three hours of questioning before responding to a "breakthrough" question concerning whether he believed in God. The Supreme Court held that this constituted a waiver of *Miranda* protections.
4. Amendment Five: "No person . . . shall be *compelled in any criminal case to be a witness against himself,* nor be deprived of life, liberty, or property, without due process of law" (emphasis added).
5. 385 U.S. 436 (1966).

6. See *Brown v. Mississippi,* 297 U.S. 278 (1936), for an especially egregious case of in-custody interrogation that totally transgressed any constitutional boundary, even though at that time, the Fifth Amendment did not apply against the states, and the Court decided the case on due process grounds of the Fourteenth Amendment.
7. The Fifth Amendment did not originally apply against the states but only limited the federal government. Following *Malloy v. Hogan*, 378 U.S. 1 (1964), the amendment had the same effect on the states. As Justice Brennan stated in the lead opinion, "We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."
8. 378 U.S. 1 (1964).
9. The right to request counsel under *Miranda* is personal to the arrestee and cannot be asserted by any third party or even a family member. An attorney has no right to demand to see a "client" where a "client" has not asked to be represented by an attorney. See *Moran v. Burbine*, 475 U.S. 412 (1986).
10. 378 U.S. 478 (1964).
11. 384 U.S. 436 (1966).
12. Arizona retried Miranda for his felonies without using his confession as evidence, and he was convicted a second time and sentenced to prison. After his release, an assailant killed him in a barroom brawl, and police read the *Miranda* warnings to Miranda's alleged killer. "Death of Ernesto Miranda." Carl Stern, correspondent. *NBC Nightly News*. NBCUniversal Media. 31 Jan. 1976. *NBC Learn*. Web. 16 Jan. 2015.
13. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).
14. *Rhode Island v. Innis*, 446 U.S. 291, 297, 101 S. Ct, 2806, 69 L. Ed, 2d 696 (1981). See also *Florida v. Powell*, 559 U.S. 50, 60, 130 S. Ct. 1195, 1204, 175 L. Ed. 2d. 1009, 1018, 2010 U.S. LEXIS 1898 (2010).
15. The Court required that the warning be given to everyone who was subject to custodial interrogation. In *Miranda v. Arizona*, 384 U.S. at 468, the Court stated, "[A] warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning, and will bode ill when presented to a jury." And at 384 U.S. 471, 472, the *Miranda* Court stated, "No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead."
16. 468 U.S. 420 (1984).
17. See 570 U.S. 178, 133 S. Ct. 2174, 186 L. Ed. 2d 376, 2013 U.S, LEXIS 4697 (2013).
18. See *People v. Tom*, 59 Cal. 4th 1210 (2014).
19. *Ibid*.
20. *Id*. at 440.
21. See *State v. Smith*, 2007 Ohio 3182, 2007 Ohio App. LEXIS 2981 (2007).
22. *State v. Davidson*, 509 S.W.3d 156, 192, 2016 Tenn. LEXIS 913 (2016), *cert. denied*, 2017 U.S. LEXIS 5551 (2017).
23. A rigid reading of the warnings as suggested in *Miranda* is not absolutely required to meet the warning requirements. In *California v. Prysock,* 453 U.S. 355 (1981), the Court held that *Miranda* warnings need not be a virtual incantation of the precise language contained in the original opinion.
24. 492 U.S. 195 (1989).
25. The marginally defective warning approved by the Court as minimally adequate in *Duckworth v. Eagan,* 492 U.S. 195 at 198 (1989), did not add to the clarity of how the warnings should be administered. The *Duckworth* warning is as follows: "You have the right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court*. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer" (emphasis added). The *Duckworth* Court noted

that the warning actually given touched all the bases required by Miranda, since the subject had been substantially given a warning that alerted him to his rights to silence, counsel, and the effects if he chose to speak. So long as the warnings offered contain the essentials of the right to silence and the right to counsel (free if the subject is indigent), the *Miranda* requirements have been satisfied.

26. *Benton v. State*, 302 Ga. 570, 807 S.E.2d 450, 2017 Ga. LEXIS 932 (2017).
27. *Id*. at 573.
28. *Id*. at 574.
29. 470 U.S. 298 (1985).
30. *Wong Sun v. United States,* 371 U.S. 471 (1963), held that where a person's Fourth Amendment rights have been violated by police, evidence obtained directly or indirectly from exploitation of the illegal search or seizure cannot be introduced to prove guilt at a criminal trial. This principle involved an extension of *Mapp v. Ohio,* 367 U.S. 643 (1961) (which excluded evidence illegally seized by police from state trials) to evidence that can be called derivative of the original wrongdoing by law enforcement agents. The police are not permitted to benefit from wrongdoing and are placed in the same evidentiary position as if no wrongdoing had occurred. Note that *Mapp* and *Wong Sun* involved violations of the United States Constitution, not transgressions of a prophylactic or remedial legal rule developed by the Court like the *Miranda* warnings. The waters get more murky since in *Dickerson v. United States,* 530 U.S. 428 (2000), the Court held that the *Miranda* warnings were of constitutional dimension and were required by the Constitution. The *Dickerson* case may require the Court to revisit *Elstad* in the future because such conduct may violate the Constitution.
31. *Charleston v. Gilmore*, 305 F. Supp. 3d 612 (2018).
32. See *Harris v. New York,* 401 U.S. 222 (1971).
33. *Id*. at 225.
34. 451 U.S. 477 (1981).
35. See *Shelly v. State*, 2018 Fla. LEXIS 2454 (2018). *Accord, Aquice v. State*, 2020 Md. App. LEXIS 31 (2020), where the reviewing court reversed a murder conviction involving the functional equivalent of interrogation. Police understood that the subject wanted an attorney but continued to tell him information given by his accomplices in an effort to get him to speak concerning the merits of the case.
36. *Scanland v. State*, 139 N.E.3d 237, 2019 Ind. App. 561 (2019).
37. *Id*. at 244.
38. *Michigan v. Moseley,* 423 U.S. 96 at 106, 107 (1975).
39. 486 U.S. 675 (1988).
40. See *McNeil v. Wisconsin,* 501 U.S. 171 (1991).
41. 559 U.S. 98 (2010).
42. *Id*. at 110. Shatzer was in *Miranda* custody once he was brought from the general prison population to an interrogation room but was not considered in custody for *Miranda* purposes while he resided in the prison population.
43. See *Illinois v. Perkins,* 496 U.S. 292 (1990).
44. *Perkins* at 300.
45. Custody, for *Miranda* purposes, has not been deemed to occur when a traffic stop has been made, even though the driver is not free to leave and is under the control of the police officer. *Berkemer v. McCarty,* 468 U.S. 420 (1984). Stopping a car is a Fourth Amendment "seizure," but the driver is not considered in custody according to *Delaware v. Prouse,* 440 U.S. 648 (1979).
46. 463 U.S. 1121 (1983).
47. *California v. Beheler,* 464 U.S. 1121 at 1125 (1983). In a case similar to *Beheler, Oregon v. Mathiason,* 429 U.S. 492 (1977), the subject agreed to meet with police at the patrol office. After they informed him that he was a suspect in a burglary and falsely told him that his fingerprints were found at the scene, Mathiason confessed but was not held at that time. The Supreme Court held in *Mathiason* that "a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment'." 429 U.S. at 495.
48. 516 U.S. 99 (1995).
49. *Id*. at 112.

50. The Court in *Thompson* sent the case back to the lower courts for a determination of whether, under the two-step test, outlined earlier here, Thompson was really in custody. 516 U.S. 99 at 117 (1995).
51. *United States v. Martinez*, 795 Fed. Appx. 367, 2019 U.S. App. LEXIS 33940 (6th Cir. 2019).
52. *Id*. at 376.
53. See *Oregon v. Mathiason,* 429 U.S. 492 (1977), where the defendant had been invited to the police station for discussions concerning a burglary. The police initially told Mathiason that he was not under arrest and allowed him to leave the station following his interview, where he made inculpatory statements. The Court held that Mathiason was not in custody or otherwise deprived of his freedom of action in any significant way, and it approved the trial court's admission of his police station statement.
54. *Oregon v. Mathiason,* 429 U.S. 492, 496 (1977), Justice Marshall, dissenting.
55. *United States v. Hinkley*, 2007 U.S. App. 803 F.2d 85, 90, 2015 U.S. App. LEXIS 17215 (1st Cir. 2015).
56. See *Howes v. Fields*, 564 U.S. 499, 132 S. Ct. 1181, 182 L. Ed 2d 17, 2012 U.S. LEXIS 1077 (2012).
57. See *J.D.B. v. North* Carolina, 564 U.S. 261 (2011).
58. 446 U.S. 291 (1980).
59. *Innis* at 301.
60. *Id*. at 316.
61. *Oregon v. Cunningham,* 179 Ore. App. 498; 40 P. 3d 535 (2002).
62. Not all unwarned custodial interrogation by police will be suppressed from introduction at trial. Questions asked of an arrestee that are for record-keeping purposes, that are routine booking questions, and that request biographical data necessary for booking or pretrial purposes are exempt from exclusion under *Miranda*. See *Pennsylvania v. Muniz,* 496 U.S. 582 at 601 (1990). Also consider *New York v. Quarles,* 467 U.S. 649 (1984), which permitted an emergency interrogation from which evidence was not suppressed. Illegally seized evidence under *Miranda* may be used for impeachment purposes in some situations, according to *New York v. Harris,* 401 U.S. 222 (1971).
63. See *United States v. Bell*, 901 F.3d 455, 2018 U.S. App. LEXIS 24335 (4th Cir. 2018).
64. 481 U.S. 520 (1987).
65. *Innis* at 301.
66. 477 F.3d 144, 2007 U.S. App. LEXIS 3488 (4th Cir. 2007).
67. 467 U.S. 649 (1984).
68. *People v. Cuevas*, 2020 IL App (1st0163401-U, 2020 Ill. App. Unpub. LEXIS 472 (2020).
69. *Id*. at *P26.
70. See *People v. Manizak*, 2014 Mich. App. LEXIS 959 (2014).
71. *Stinsman v. State*, 2015 Del. LEXIS 433 (2015). (Internal punctuation marks omitted.)
72. *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990).
73. 475 U.S. 412 (1986).
74. See *United States v. Robinson-Munoz*, 961 F.2d 300 (1st Cir. 1992).
75. According to the Court in *North Carolina v. Butler,* 441 U.S. 369 (1979), the absence of a written *Miranda* waiver of rights is not necessarily determinative of waiver. As the Butler Court stated, "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver."
76. *Ibid*.
77. See *Berghuis v. Thompkins*, 560 U.S. 370 (2010).
78. *Ibid*., 385.
79. See *Colorado v. Connelly,* 479 U.S. 157 (1986).
80. *Ibid*.
81. *Ibid*.
82. *Miranda v. Arizona*, 384 U.S. 436, 468 (1966).
83. 18 U.S.C. § 3501 provided, among other things, that: "(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant

evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances."

84. The Supreme Court agreed with the Court of Appeals for the Fourth Circuit that the Congress intended to overrule *Miranda*. In *Dickerson v. United States,* 530 U.S. 428 at 436 (2000), the Court noted, "Given § 3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and the instruction for trial courts to consider a nonexclusive list of factors relevant to the circumstances of a confession, we agree with the Court of Appeals that Congress intended by its enactment to overrule *Miranda*."
85. *Dickerson v. United States,* 166 F.3d 667 (4th Cir. 1999).

Obtaining and Using Search Warrants: Practice, Execution, and Return 6

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Learning Objectives

1. Know and be able to articulate the definition of probable cause to search.
2. Understand why the Fourth Amendment requires specificity when describing property to be seized and give an example of a description of personal property that would meet the specificity requirements.
3. Be able to explain what a search warrant does and what powers and limitations a warrant gives to police officers.
4. Explain how warrants for electronic eavesdropping or wiretapping can be obtained.
5. Describe some of the challenges in establishing probable cause using informant testimony and information.
6. List two of the factors that are considered under the "totality of the circumstances" test that is often used in determining the probable cause value of an informant's information.
7. Trace the process followed by a police officer from an initial investigation to obtaining a search warrant.
8. Distinguish between the requirement of knock and announce and the reality that it may not be necessary and be able to give an example where the knock and announce requirement may be excused.
9. Analyze the factors that determine the scope of a search and give an example where the type of object would dictate the scope of the search.
10. Explain why probable cause to search can become stale and be able to offer a clear example where probable cause has ceased to exist through the passage of time.

Chapter Outline

KEY TERMS

1. Affidavit for a warrant
2. Knock and announce
3. Particularity of description
4. Probable cause
5. Scope of search
6. Stale probable cause
7. Totality of the circumstances test
8. Two-pronged test
9. Warrant

1. The Fourth Amendment: Probable Cause to Search

"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."[1] The language of the Fourth Amendment describes rights possessed by people, but it does not define all its terms, and it is not self-enforcing. While basically describing some sort of a right of privacy, it does so without mentioning the word *privacy*. As a general rule, all people are guaranteed the right to keep objects and personal effects from governmental inquiry and scrutiny unless powerful reasons exist for the government to intrude on our personal lives. When governmental agents believe that these powerful reasons are present that are indicative of criminal wrongdoing, procedures have evolved to test the validity of the reasons and to allow searches and seizures in many cases where the governmental need outweighs our right to expect, for lack of a better term, our right of privacy. According to *Carroll v. United States*, 267 U.S. 132, 162 (1925), in a case involving transportation of untaxed alcoholic beverages, probable cause to search existed when police officers possessed

> facts and circumstances within their knowledge and of which they had reasonably trustworthy information [that those facts] were sufficient, in themselves, to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.[2]

Case 6.1 LEADING CASE BRIEF: THE LEGAL STANDARD OF PROBABLE CAUSE TO SEARCH

Carroll v. United States
Supreme Court of the United States
267 U.S. 132 (1925).

CASE FACTS:

Evidence presented in a federal court in Michigan convicted George

Carroll and John Kiro for transporting intoxicating liquor in violation of the National Prohibition Act. The defendants appealed their convictions, and the Supreme Court of the United States granted certiorari. Carroll and Kiro alleged that the search and seizure of their motor vehicle were in violation of their rights under the Fourth Amendment. A motion to suppress the evidence was made by the defendants that all the liquor seized be returned to the defendant. This motion was denied.

Carroll and a friend of his had made an earlier attempt to sell intoxicating liquors to law enforcement agents, but because the identity of law enforcement agents may have become known to Carroll, the sale was never completed. During this encounter, the law enforcement agents observed the physical characteristics of Mr. Carroll, the make and model of his motor vehicle, and the identity of one of his associates. Carroll had a reputation as a bootlegger who sold and trafficked in distilled spirits in violation of federal law. A month or so later, the same agents observed the Oldsmobile roadster containing Carroll and John Kiro headed eastward from Grand Rapids, Michigan, toward Detroit, a well-known liquor smuggling route. Officers followed but lost sight of the vehicle. Two months later, officers spotted the same vehicle traveling westward toward Grand Rapids and were successful in stopping it. With the reputation as bootleggers that Carroll and Kiro possessed, the fact that they were using the same Oldsmobile which was used in the aborted earlier sale, the fact that they were driving the same vehicle seen several months earlier traveling along the smuggling route, and the fact that they were once again traveling along a liquor trafficking highway route gave the officers probable cause to stop the automobile. The same facts generated probable cause to believe that the motor vehicle contained contraband. A warrantless search of the motor vehicle revealed sixty-eight bottles of intoxicating liquor carried in violation of federal law. The officers were not anticipating that Carroll and Kiro would be driving down the highway at that time, but when they observed them in the same car, they believed they were carrying liquor, and as a result, the officers made the stop, search, seizure, and arrest of Carroll and Kiro.

LEGAL ISSUE:

Where a person has a reputation for illegal activity of a specific type and has attempted to commit a crime involving a federal officer, and where the same government agent observes the person apparently plying his trade openly, does such conduct meet the standard of probable cause to search under the Fourth Amendment?

THE COURT'S RULING:

The justices concluded that the amount of evidence known to the officers allowed them to conclude that seizable materials were hidden within the automobile.

ESSENCE OF THE COURT'S RATIONALE:

* * *

Finally, was there probable cause? In *The Apollon*, 9 Wheat. 362, the

question was whether the seizure of a French vessel at a particular place was upon probable cause that she was there for the purpose of smuggling. In this discussion, Mr. Justice Story, who delivered the judgment of the Court, said (page 374):

It has been very justly observed at the bar that the Court is bound to take notice of public facts and geographical positions, and that this remote part of the country has been infested, at different periods, by smugglers, is a matter of general notoriety, and may be gathered from the public documents of the government.

We know in this way that Grand Rapids is about 152 miles from Detroit, and that Detroit and its neighborhood along the Detroit River, which is the International Boundary, is one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior. It is obvious from the evidence that the prohibition agents were engaged in a regular patrol along the important highways from Detroit to Grand Rapids to stop and seize liquor carried in automobiles. They knew or had convincing evidence to make them believe that the Carroll boys, as they called them, were so-called "bootleggers" in Grand Rapids, i.e., that they were engaged in plying the unlawful trade of selling such liquor in that city. The officers had soon after noted their going from Grand Rapids half way to Detroit, and attempted to follow them to that city to see where they went, but they escaped observation. Two months later, these officers suddenly met the same men on their way westward, presumably from Detroit. The partners in the original combination to sell liquor in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whisky to the officers which was thus identified as part of the firm equipment. They were coming from the direction of the great source of supply for their stock to Grand Rapids, where they plied their trade. That the officers, when they saw the defendants, believed that they were carrying liquor we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so. Emphasis is put by defendants' counsel on the statement made by one of the officers that they were not looking for defendants at the particular time when they appeared. We do not perceive that it has any weight. As soon as they did appear, the officers were entitled to use their reasoning faculties upon all the facts of which they had previous knowledge in respect to the defendants.

The necessity for probable cause in justifying seizures on land or sea, in making arrests without warrant for past felonies, and in malicious prosecution and false imprisonment cases has led to frequent definition of the phrase. In *Stacey v. Emery*, 97 U.S. 642, 645, a suit for damages for seizure by a collector, this Court defined probable cause as follows:

If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.

* * *

[I]t is clear the officers here had justification for the search and seizure. This is to say that the facts and

circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient, in themselves, to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.

* * *

The judgment is Affirmed.

CASE IMPORTANCE:

The level of proof contained in this case offers a benchmark with which to measure the amount of evidence needed to establish probable cause to search. Probable cause exists when the facts and circumstances presented to a person of reasonable caution would lead that person to conclude that seizable property will be found at a particular place or on a particular person.

With some exceptions,[3] probable cause must exist before any search may lawfully occur, whether the search is pursuant to a warrant or otherwise. To paraphrase *Carroll v. United States*, 267 U.S. 132, 162 (1925), probable cause has been said to exist when the facts and circumstances within the officers' knowledge are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found in a particular place or on a particular person. This standard of belief rises above a mere hunch but falls far short of proof beyond a reasonable doubt. Probable cause is based on an objective standard and not on the subjective belief of the particular police officer. While a police officer may believe that probable cause to search exists, further steps are required to be analyzed prior to making a lawful search. Although some searches may be conducted with probable cause but without a warrant,[4] the general rule is that warrantless searches inside a home are presumed to be unreasonable, in violation of the Fourth Amendment.[5]

Since the Fourth Amendment protects against unreasonable searches and seizures, reasonable searches are permitted. As a general rule, where a judicial official has issued a search warrant, the search conducted pursuant to it is presumed to be reasonable. Case law permits warrantless searches of motor vehicles given probable cause to search on the theory that such searches are reasonable under the circumstances. Similarly, an open field, where there is little or no expectation of privacy, may be searched without a warrant, whether or not probable cause exists.[6] As additional exceptions to the general rule, searches incident to arrest, searches based on consent, inventory searches, and emergency searches may be conducted without warrants.

When determining whether sufficient evidence reaches the level of belief to equal probable cause, police officers must carefully weigh and evaluate the facts that each case presents. In a case from Michigan[7] in which a police officer was investigating drug trafficking, he rode in a car with a suspected drug dealer who had agreed to sell the officer some cocaine. The suspect told the officer to drive to a particular house and to park in the rear. The suspected dealer left the officer and entered the home, only to return and deliver three grams of cocaine. Forty days later, the officer again requested

to purchase cocaine, and the suspect directed the officer to an alley near the original home's location. The suspect was observed by other officers leaving his car and entering and leaving the original home. The suspect then delivered additional cocaine to the undercover officer. Within forty-eight hours after the second sale, officers applied for and received a search warrant for the home based on their observed information. The Sixth Circuit Court of Appeal upheld the validity of probable cause and the search warrant upon the defendant's appeal. In an Alaska state case, in order to establish probable cause for a search of the house of a suspected methamphetamine manufacturer, police gathered information that a particularly described person had purchased denatured alcohol and 2000 books of matches and was suspected of stealing four boxes of cold medicine containing pseudoephedrine. Later evidence disclosed that a person matching the suspect's description often purchased quantities of cold medicine containing pseudoephedrine and Coleman stove fuel at a convenience store. When an officer questioned the suspect outside of his home, he noticed a gas can modified in a manner that is often used as hydrogen chloride gas generator as part of the methamphetamine cooking process. An Alaska court held that the evidence was sufficient to warrant a person of reasonable caution to believe that seizable property would be found on the particular property occupied by the suspect and the search warrant that had been issued was properly based on probable cause.[8]

In a different drug case,[9] officers stopped a vehicle for speeding and, after smelling an odor of marijuana, asked for permission to search the car. When lawful consent was given by the driver, Morton, the vehicle search revealed a recreational quantity of ecstasy pills, some marijuana, and a glass pipe. Also discovered were children's school supplies, a lollipop, sex toys, and many pairs of women's underwear, which led the officers to think that the arrestee might be a pedophile. After arresting the driver for the drug offenses, the officers prepared an affidavit for a warrant to search the arrestee's three cell phones. The warrant application *did not mention* any concerns about child exploitation but focused on a search of the phone designed to reveal more evidence of the drug activity of the arrestee. A judge issued a cell phone search warrant that revealed 19,270 images of minors who had been exploited. On appeal, the reviewing court found that there was probable cause to search parts of the cell phones' contents to look at his contacts, call records, and text messages, but that there was no information that could support probable cause to look through his pictures, including those that revealed child pornography. Police provided the warrant issuing court absolutely no information that would have established probable cause to believe that the pictures contained on the phones would have revealed any information of drug trafficking or possession. In suppressing the evidence, the appellate court noted that the inference since the arrestee had some drugs that he would be a drug trafficker who also had photographs of his crimes sufficient to support probable cause to search the phone photographs did not provide adequate grounds for the extensive search. In short, the syllogism (offered by police) is (1) Morton was found with personal-use quantities of drugs, and (2) drug dealers often take photos of drugs, cash, and co-conspirators; it therefore follows that (3) the photographs on Morton's phones will provide evidence of Morton's relationship to drug trafficking. The fallacy of this syllogism is that it relies on a premise that cannot be established, namely that Morton was dealing drugs.[10]

Although some drug traffickers might have incriminating photographs, there was no evidence to show that this arrestee was a trafficker or that he might have photographs of drug trafficking on his phone. The reviewing court found that there was no probable cause to search the phones for photographs of the arrestee's illegal drug possession and ordered the child pornography pictures suppressed from any retrial of that cause.[11]

2. Specificity of Search; Particularity of Description

Under the Fourth Amendment, to obtain a search warrant, the person applying for a warrant must include sufficient specificity to identify the property when describing the object to be seized and specifically describe the location of the object. The specificity of description requirement can be satisfied where "the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended."[12] One court upheld a probable cause-based search warrant that specifically described child pornography as sufficient to cover searches of computers or digital storage within the defendant's home over which he exercised control.[13] A warrant for which the supporting documentation indicates probable cause to search the garage and the area of the home used for business purposes is specific enough to allow a search of the entire building.[14] In a case[15] where police officers obtained and executed a search warrant for a search of a described person as well as premises known as "2603 Park Avenue third floor apartment" for drugs was held to be sufficiently specific, even though, unknown to officers, there was more than one apartment on the third floor. Minor errors in a warrant's description of real property are not normally fatal to the validity of a search warrant. For example, one court upheld as properly specific a description of a rural trailer home where the warrant contained some errors but the remaining description was sufficiently detailed to direct law enforcement officials to search the proper structure.[16] Where a building or real estate is the subject of the search, proper description such as the mailing address and its location at the corner of specific streets will generally be specific enough to withstand a court challenge to the validity of the search. A description of an object needs to be as specific as possible; it need not be perfect, just sufficiently detailed given the nature of the object of the search. Obviously, a serial number would not be expected for a search for a quantity of drugs, and gambling records do not allow precise description, but a search for a stolen firearm might well include a serial number, caliber, type of weapon, and manufacturer.

(A copy of the federal warrant form follows. This form is used when the probable cause has been based on an affidavit.)[17]

3. Requirement of a Warrant: Physical Searches

As a strong general rule, a search warrant from a neutral and detached judicial official is required under the dictates of the Fourth Amendment in order to conduct a legal search. In addition, as a practical matter, where a search is conducted pursuant to a warrant, the warrant ensures the individual whose property is being searched or being seized

AO 93 (Rev. 11/13) Search and Seizure Warrant

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Search of
(Briefly describe the property to be searched or identify the person by name and address)

Case No. _____

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the _____ District of _____
(identify the person or describe the property to be searched and give its location):

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property described above, and that such search will reveal *(identify the person or describe the property to be seized)*:

YOU ARE COMMANDED to execute this warrant on or before _____ *(not to exceed 14 days)*
❑ in the daytime 6:00 a.m. to 10:00 p.m. ❑ at any time in the day or night because good cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to _____.
(United States Magistrate Judge)

❑ Pursuant to 18 U.S.C. § 3103a(b), I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized *(check the appropriate box)*
❑ for ____ days *(not to exceed 30)* ❑ until, the facts justifying, the later specific date of _____.

Date and time issued: _____ _____
Judge's signature

City and state: _____ _____
Printed name and title

FIGURE 6.1 Example of Search Warrant Used by a Federal District Court. www.uscourts.gov/sites/default/files/ao093.pdf

of the lawful authority of the law enforcement officer, the need to search, and the limits of the officer's power to search. The procedure to obtain a warrant to search must begin with a police officer making a determination, based on facts and circumstances known to the officer, that probable cause exists. The officer, sometimes with assistance from a prosecutor's office, prepares an affidavit for a search warrant in which the operative facts

AO 93 (Rev. 11/13) Search and Seizure Warrant (Page 2)

Return		
Case No.:	Date and time warrant executed:	Copy of warrant and inventory left with:
Inventory made in the presence of :		
Inventory of the property taken and name of any person(s) seized:		
Certification		

I declare under penalty of perjury that this inventory is correct and was returned along with the original warrant to the designated judge.

Date: _____

_____
Executing officer's signature

_____
Printed name and title

FIGURE 6.1 (Continued)

and details are recited. The officer (affiant) must swear that the facts are true as far as he or she knows. Since the Fourth Amendment requires specificity concerning the object and location of the search, detailed information concerning the location and a precise description of the objects of the search prove facts that are essential to the process of obtaining a search warrant. If an informant has been used to establish or help establish probable cause, the facts elicited from that person will be recounted, along with reasons the judge should believe the informant's conclusions. The role of the judge is not to

AO 93A (Rev. 11/13) Search and Seizure Warrant on Oral Testimony

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Search of
(Briefly describe the property to be searched or identify the person by name and address)

) Case No.

SEARCH AND SEIZURE WARRANT ON ORAL TESTIMONY

To: Any authorized law enforcement officer

I have received, and recorded electronically or by handwriting, sworn testimony communicated to me by *(name the officer)* _____, who requests the search of the following person or property located in the _____ District of _____ *(identify the person or describe the property to be searched and give its location)*:

I am satisfied that circumstances make it reasonable to dispense with a written affidavit and that the testimony establishes probable cause to search and seize the person or property, described above, and that such search will reveal *(identify the person or describe the property to be seized)*:

YOU ARE COMMANDED to execute this warrant on or before _____ *(not to exceed 14 days)*
❑ in the daytime 6:00 a.m. to 10:00 p.m. ❑ at any time in the day or night because good cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to _____ .
(United States Magistrate Judge)

❑ Pursuant to 18 U.S.C. § 3103a(b), I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized *(check the appropriate box)*
❑ for _____ days *(not to exceed 30).* ❑ until, the facts justifying, the later specific date of _____ .

Date and time issued: _____ _____
Judge's signature

City and state: _____ _____
Printed name and title

I certify that the judge named above authorized me to sign his or her name.

_____ _____
Applicant's printed name *Applicant's signature*

FIGURE 6.2 Example of Search Warrant, Based on Oral Testimony, Used by Federal District Courts. www.uscourts.gov/sites/default/files/ao093a.pdf

"rubber-stamp" the conclusions of police but to exercise independent legal judgment in rendering a decision concerning the existence of probable cause. If the judge concurs with police that probable cause exists to believe that seizable property will be found at a

AO 93A (Rev. 11/13) Search and Seizure Warrant on Oral Testimony (Page 2)

Return		
Case No.:	Date and time warrant executed:	Copy of warrant and inventory left with:
Inventory made in the presence of :		
Inventory of the property taken and name of person(s) seized:		

Certification

I declare under penalty of perjury that this inventory is correct and was returned along with the original warrant to the designated judge.

Date: _____

_____
Executing officer's signature

_____
Printed name and title

FIGURE 6.2 (Continued)

particularly described place or on a particular person, he or she will sign a warrant to search. The search warrant issued by a neutral and detached judicial official upon a finding of probable cause is a court order to law enforcement officials to search and seize specifically described and located property and return the property to the court. The following warrant form illustrates how a federal search warrant appears when the probable cause is received upon an oral statement.[18]

4. Requirement of a Warrant: Electronic Eavesdropping

Warrants are generally required in order to wiretap or electronically eavesdrop on private conversations, to install tracking devices on vehicles,[19] and to obtain historical cell phone location data.[20] Therefore, a state or federal law enforcement officer must obtain warrants to lawfully obtain this information. Warrants to conduct electronic eavesdropping and similar searches are based on the same standard of probable cause that is required to enter and search a home or an office. Under the Federal Wiretap Act,[21] people are prohibited from intentionally intercepting, using, or disclosing any wire or other communications unless the intercept is done according to the requirements of the federal law. The statute does note that nothing contained within the law is to be construed to affect or limit the acquisition of the federal government of foreign intelligence information from international or foreign communications facilities.

For specified criminal violations of federal law that are broadly encompassing of federal crimes,[22] the Attorney General of the United States or a deputy properly designated may apply for an order that authorizes the interception of wire or oral communications. The federal statute also authorizes the principal prosecuting attorney in any state or the prosecutor of any subdivision of that state to apply to a state court judge in the jurisdiction to obtain an electronic search warrant, provided state law allows electronic eavesdropping.[23] Every affidavit for an electronic warrant under federal law must be made in writing and under oath to a judge of competent jurisdiction, and it must include the statutory authority under which the applicant is requesting an electronic warrant. As is the case in standard warrant practice, the applicant must offer a complete statement of the facts and circumstances that justify a probable cause to issue a warrant for electronic eavesdropping. Details considering the offense that is suspected must be included in the particular description of the nature and location from which the electronic communication is desired to be obtained must be included.

In accordance with traditional warrants, the application for an electronic intercept warrant must include a specific description of the type of communications that are to be seized and the identity of the person believed to be committing the offense or offenses. According to the statute, the applicant for the warrant must give full information as to why other methods of obtaining the evidence have not worked or will not work as a prerequisite to obtaining a warrant. Warrants are good for a reasonable time when physical objects are to be seized, and a similar provision applies in the federal wiretap act because it requires a statement in the application concerning the length of time that the intercept will be required to be maintained and whether the intercept should cease at the first moment that the evidence has been obtained or should be continued in order to obtain additional data. According to the statute, when the applicant has met all the requirements, the judge is permitted to enter an *ex parte* order that authorizes the interception of wire or oral or electronic indications within the jurisdiction of that particular court. In addition, the search warrant may allow interception of mobile devices outside the federal judge's jurisdiction so long as the device is within the United States.[24] The judge's approval of the search warrant must be based on a determination that probable cause exists to believe

that a person has committed or is committing a crime and that there's probable cause for believing that criminal communications will be intercepted and that normal methods of investigating had failed or will not work under the circumstances.[25]

Upon the approval of a federal judge, the warrant will issue and shall identify the subject is communications the government desires to intercept, identify the nature and location of the facilities of the place where the interceptions are expected, include a description of the communications expected to be intercepted, include the identity of the agency authorized to intercept the communication, and include the period of time during which the wiretap or other interception may be made,[26] not to exceed thirty days.[27] State warrants must follow the dictates of state law and comply with federal law governing electronic eavesdropping.

The Federal Wiretap Act contains its own version of the exclusionary rule in § 2515 where it provides that where wire or oral communications have been intercepted in violation of the law, the evidence cannot be admitted in any trial, hearing, or other proceeding, including any court, grand jury, or any other legislative and regulatory body in the United States, a state, or a political subdivision of a state.

The intent of the statute regulating eavesdropping was to mirror, as closely as circumstances permit, the procedures that are used for ordinary physical warrants to ensure that wiretapping and electronic eavesdropping are carefully monitored. Federal and state electronic eavesdropping warrants should not be issued unless the judge is satisfied that other traditional methods of collecting evidence have been tried and failed or would never have worked.[28] One obvious reason for limiting electronic eavesdropping is because other persons who are not targets will inevitably have some of their conversations monitored as a natural consequence of gaining information from the target of the investigation.

Years ago, following the September 11, 2001, terrorist attacks on the United States, the federal government initiated a variety of steps and initiatives directed toward discovering what potential future terrorists might be planning. Consistent with this effort, different federal agencies allegedly began collecting data through a variety of eavesdropping techniques. Then President Bush authorized the National Security Agency to begin counter-terrorism operations directed at surveillance of suspected terrorist organizations. One program came to be known as the Terrorist Surveillance Program (TSP) and involved some interceptions of communications without the use of warrants to eavesdrop on e-mail and telephone conversations where one of the parties to the communication was located outside of the United States and was believed to be linked with the terrorist organization al Qaeda.[29] Several organizations sued the federal government, contending that they were victims of this warrantless wiretapping, and succeeded in obtaining an injunction from a federal district court based on their injuries.[30] The plaintiffs alleged several causes of action based on the First Amendment, the Fourth Amendment, the Administrative Procedures Act, and the Foreign Intelligence Surveillance Act, among others. On appeal, the case was reversed due to a lack of jurisdiction based on the fact that none of the plaintiffs had standing to sue.[31] While there may or may not have been merit to the plaintiff's allegations, they failed to bring an action that could prove individual injury occurred, and therefore, the plaintiffs had no standing and the federal courts had no jurisdiction to hear the cause of action.

The Foreign Intelligence Surveillance Act,[32] updated several times since 1978, set up a court to oversee government requests under the statute. Over the years, many private litigants have attempted to have the Foreign Intelligence Surveillance Court (FISA Court) reveal some of its decisions and their respective rationales. One such action requested that the FISA Court of Review (FISCR) release records in the wake of publicity about the federal government's bulk collection of data under the Foreign Intelligence Surveillance Act. As the FISCR noted in refusing to reveal requested opinions of the FISA Court's private adjudications:

> This Court is now convinced that exercising jurisdiction over the pending motion in this matter would be inconsistent with the Foreign Intelligence Surveillance Court of Review's decision. The FISCR determined that it lacked statutory subject-matter jurisdiction because Congress did not empower the federal courts established under FISA to consider constitutional claims, a freestanding motion asserting a qualified First Amendment right of access did not fall within any of the FISCR's jurisdictional categories enumerated in the statute, and the movants were not among the parties authorized by the statute to seek FISCR review.[33]

The net result is that much of the business of the Federal Intelligence Court remains secret and will not likely be revealed unless a litigant has a provable personal stake in the outcome of a ruling by the court. In the previous case, *In re Propublica, Inc*., the FISA Court rejected any right of the litigant or any person to have any right to access to compel the FISA Court to publish its opinions that had been previously cited in a different FISA Court case.

In dealing with electronic surveillance under a variety of federal statutes and programs, adversely affected litigants will continue to fight an uphill battle whether they are thrown out of court based on jurisdictional grounds or on the merits or are frustrated due to the invocation of the state secrets privilege or other statutory protections that belong to the federal government. Although not likely, there is always the possibility that the Congress might change some of the statutes or roll back some of the governmental privilege that relates to secrecy where foreign terrorist interdiction operations are ongoing.

5. Sources of Probable Cause: The Informant

Where the foundation of probable cause rests completely or partially upon information from an informant, earlier case law from the Supreme Court of the United States suggested that police and judges use a two-pronged test[34] to determine whether that information demonstrates probable cause. The police officers in *Aguilar v. Texas*[35] obtained a warrant based on a defective affidavit in which they swore that they had "received reliable information from a credible person and do believe that heroin, marijuana, barbiturates" were located within a residence. The *Aguilar* Court noted (1) that the officers failed to state facts or circumstances from which the magistrate could have independently concluded that probable cause existed, *and* (2) they neglected to offer any evidence that could have given credibility to the informant's conclusion that drugs were located in a particular place. To establish probable cause using an informant, the two-pronged test had to be met, or police risked obtaining a defective warrant.

Under the *Aguilar* test, an informant's veracity and reliability had to be determined prior to considering whether the informant's information was sufficient to supply probable cause. The police had to prove that the informant was a believable person. An informant might be believed to be truthful if he or she had given reliable information in the past or had implicated him- or herself in a crime by conveying the information to the police. If the informant were the local priest, mayor, or another police officer, his or her believability would not likely be questioned. The second prong required that police present facts to the judge or magistrate that demonstrated that the informant possessed a basis from which one could reasonably conclude that probable cause existed.

Subsequent to deciding *Aguilar*, the Supreme Court, at first, reaffirmed the two-pronged test in *Spinelli v. United States*.[36] In *Spinelli*, officers investigating interstate gambling relied partly on information supplied by an informant and partly on personal investigation. In preparing the affidavit for a search warrant for Spinelli's apartment, the officers neglected to state facts that could have permitted the magistrate to independently conclude that the informant was reliable. The Court held that the officers neglected to state facts that would lead one to believe that probable cause existed, and they failed to state facts that supported the reliability of the informant. On the face of the affidavit, the officers should have noted why they concluded that the informant should have been believed. In overturning the search pursuant to the warrant, the Court reaffirmed the continued validity of the *Aguilar* decision.

Subsequently, the *Aguilar-Spinelli* two-pronged test was overruled in *Illinois v. Gates*,[37] where the Court indicated that a "totality of the circumstances test" should be followed when a probable cause determination must be based only on informant information. According to *Gates*,

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstance set forth in the affidavit before him [or her] including the "veracity "and "basis of knowledge of the persons supplying the hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.[38]

However, the two factors announced in *Aguilar* remain relevant and important factors that many judges will consider in determining whether probable cause exists based on an informant's information.[39] An informant may be deemed believable if he or she offers hearsay information from sources whose believability has a separate foundation.[40] There also is reason to believe an informant when some or all of the statements have been independently corroborated by police investigation.[41] Under circumstances where an informant has implicated himself or herself in a crime, the informant's veracity is enhanced and sometimes assumed.[42] An informant's information alone may be sufficient to establish search probable cause even under circumstances when the application for the warrant fails to contain information about the informant's reliability from past cases.

In summary, to demonstrate probable cause based on an informant's information, the government must establish the basis of knowledge of the informant. First, police must understand the particular means by which the informant came by the information; second, there must exist supporting facts that prove either the veracity of the informant or the specific reliability of the information in the particular case. Unacceptable to establish

probable cause are facts that involve bald and unilluminating conclusions offered by an informant that were not supported by the facts he or she provided.[43] For judicial approval, the police officer must include some of the underlying circumstances that would allow the judicial official to independently assess the validity of the informant's conclusions.

6. Informant Probable Cause: The Totality of the Circumstances Test

In attempting to follow the dictates of the *Aguilar* and *Spinelli*, cases, state courts generated significant litigation centering on application of aspects of the two-pronged test. Convinced that the *Aguilar-Spinelli* test was not being applied properly in a number of cases, and deciding to revisit the issue of informant production of probable cause, the Court overruled the *Aguilar-Spinelli* two-pronged test in *Illinois v. Gates*, 462 U.S. 213 (1983), and adopted a totality of the circumstances test (Case 6.2). Under the totality of the circumstances approach, a judge must look at the information offered by the informant and consider all relevant information, including facts supporting the believability and truthfulness of the informant, in reaching a decision. The *Gates* Court noted that under the totality of the circumstances analysis, "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability."[44] What the Court was attempting to avoid was a mechanical application of the two-pronged test. Under the totality of the circumstances test, if an informant had no past record of reliability or honesty but gave a detailed account of facts that indicated probable cause, the wealth of detail should overcome the lack of a proven record of honesty. In addition, information given by an unproven informant may provide probable cause when it has been independently verified by police.[45] Following *Gates*, a judicial officer may look at all the evidence pointing toward probable cause and come to a determination without having to satisfy unrealistic pigeonhole standards. An informant's evidence may meet the probable cause standard by virtue of his or her past record as an informant, the extensive detail of the information conveyed, the surrounding circumstances, or any combination of these.

Case 6.2 LEADING CASE BRIEF: RELIABILITY OF INFORMANT'S INFORMATION WILL BE JUDGED ON THE TOTALITY OF THE CIRCUMSTANCES

Illinois v. Gates
Supreme Court of the United States
462 U.S. 213 (1983).

CASE FACTS:

On May 3, 1978, the police received an unsolicited anonymous letter that contained statements alleging that Mr. and Mrs. Gates were engaged in the selling of drugs and that they possessed a quantity of drugs worth over $100,000 in the basement of their dwelling. Police received the following letter:

> This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flys [*sic*] down and drives it back. Sue flys [*sic*] back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> They brag about the fact they never have to work, and make their entire living on pushers.
>
> I guarantee if you watch them carefully you will make a big catch. They are friends with some big drug dealers, who visit their house often.
>
> Lance & Susan Gates
> Greenway

Subsequent to some preliminary inquiries, police contacted an informant and discovered that Lance Gates had an airplane reservation to Florida near the date mentioned in the anonymous letter. Bloomingdale police contacted the Drug Enforcement Administration, which observed Lance Gates. The DEA surveillance disclosed that Lance Gates took a flight to Florida, stayed overnight in a motel room registered in his wife's name, and left the following morning with a woman in a car bearing an Illinois license plate issued to Lance Gates. The automobile started north on an interstate highway used by travelers to the Bloomingdale area. Numerous facts mentioned in the letter received corroboration by state and federal agents. On this basis, the police procured search warrants for the condo and the Gates' cars. Police recovered quantities of drugs.

The Gates appealed their drug convictions on the ground that the informant's information was not properly corroborated and probable cause did not exist.

LEGAL ISSUE:

When probable cause is based on an informant, must the two-pronged test of *Aguilar v. Texas* always be met?

THE COURT'S RULING:

In reviewing the way the two-pronged test operated, the Court determined that the better way to evaluate probable cause based on an informant was to consider the totality of the circumstances.

ESSENCE OF THE COURT'S RATIONALE:

The Illinois Supreme Court concluded—and we are inclined to agree—that, standing alone, the anonymous letter sent to the Bloomingdale Police Department would not provide the basis for a magistrate's determination that there was probable cause to believe contraband would be found in the Gates' car and home. The letter provides virtually nothing from which one might conclude that its author is either honest

or his information reliable; likewise, the letter gives absolutely no indication of the basis for the writer's predictions regarding the Gates' criminal activities. Something more was required, then, before a magistrate could conclude that there was probable cause to believe that contraband would be found in the Gates' home and car. See *Aguilar v. Texas*, 378 U.S. 108, 109, n.1 (1964); *Nathanson v. United States*, 190 U.S. 41 (1933).

* * *

We agree with the Illinois Supreme Court that an informant's "veracity," "reliability" and "basis of knowledge" are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case, which the opinion of the Supreme Court of Illinois would imply. Rather, as detailed below, they should be understood simply as closely intertwined issues that may usefully illuminate the common-sense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place.

* * *

Moreover, the "two-pronged test" directs analysis into two largely independent channels—the informant's "veracity" or "reliability" and his "basis of knowledge." There are persuasive arguments against according these two elements such independent status. Instead, they are better understood as relevant considerations in the totality of circumstances analysis that traditionally has guided probable cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. [Citations omitted.]

* * *

[W]e conclude that it is wiser to abandon the "two-pronged test" established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*.

Reversed.

CASE IMPORTANCE:

By overruling the cases that supported the two-pronged test for measuring probable cause when based on an informant, the Court allowed a wider consideration of relevant facts in making a determination of probable cause. When some facts are so strong and other factors are weak, probable cause may logically still be determined.

Although *Gates* abandoned strict adherence to the two-pronged test in determining informant-based probable cause under the Fourth Amendment, some state jurisdictions continued to apply the old *Aguilar* rule requiring a reason to believe the informant and dictating close scrutiny to deciding whether the substance of what the informant offered equaled probable cause. If state courts rely on their individual interpretation of state law and continue to apply *Aguilar*, there is no constitutional problem, since the *Aguilar* test appears to give potential search targets greater rights than the minimum required under the *Gates* interpretation. Although *Gates* demolished the *Aguilar* test, many federal courts continued to consider some aspects of it, as if it remained good federal case law.[46] In an effort to bury the *Aguilar* two-pronged test, the Supreme Court, in 1984, in no uncertain terms, reaffirmed the *Gates* decision and the demise of the two-pronged test in *Massachusetts v. Upton*.[47]

In *Upton*, the state court had continued to interpret the Fourth Amendment as requiring the two-pronged test of *Aguilar* when making determinations on whether an informant's information equaled probable cause. According to the *Upton* Court:

> Prior to *Gates*, the Fourth Amendment was understood by many courts to require strict satisfaction of a "two-pronged test" whenever an [informant helps supply probable cause] . . . in the particular case. The Massachusetts court apparently viewed *Gates* as merely adding a new wrinkle to this two-pronged test: where an informant's veracity and/or basis of knowledge are not sufficiently clear, substantial corroboration of the tip may save an otherwise invalid warrant.
>
> We do not view the *Gates* opinion as decreeing a standardless "totality of the circumstances" test. The informant's veracity and basis of his knowledge are still important but, where the tip is adequately corroborated, they are not elements indispensible [*sic*] to finding of probable cause. It seems that, in a given case, the corroboration may be so strong as to satisfy probable cause in the absence of any other showing of the informant's "veracity" and any direct statement of the "basis of [his] knowledge."
>
> 390 Mass. At 568, 458 N.E.2d at 721

> We think that the Supreme Judicial Court of Massachusetts misunderstood our decision in *Gates*. We did not merely refine or qualify the "two-pronged test." We rejected it as hypertechnical and divorced from "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."
>
> Quoting *Brinegar v. United States*, 338 U.S. at 175 (1949)[48]

Consistent with principles of federalism, state courts relying on their individual state constitutional provisions are free to continue to use the two-pronged test to determine probable cause under their respective state constitutions or state legal interpretations, but they can no longer use the test as a determinative for probable cause under the Fourth Amendment.

7. Sources of Probable Cause: Police Officers and Others

Knowledge that establishes probable cause may be obtained by police officers through personal observation, investigation, and research. Social media postings on the Internet that include photographs, videos, and commentary as well as data from

confidential informants may provide information to be included within an affidavit for a search warrant. Even when considering all the information presented in an affidavit, significant portions of information supporting the existence of probable cause do not necessarily come from an officer's personal knowledge but may be based on facts presented from fellow officers. For example, in a case of personal observation, officers searched a confidential informant to be sure that the informant had no drugs on his/her person prior to an observed entrance and exit from inside the defendant's home for the purpose of buying drugs. When the informant returned to police without the buy money and with what appeared to be illegal drugs, this fact pattern that the offices personally observed seemed to indicate probable cause existed that drugs were being sold by the subject sufficient to obtain a search warrant for the soon to be defendant's home.[49] Since courts assume that a sworn affidavit of personal knowledge offered by a police officer contains the truth, the problems associated with the use of anonymous or questionable informants do not arise. When the text of the affidavit for a search warrant includes information provided by fellow officers, the credibility of those officers does not come into question unless factually incredible evidence has been included. Generally, the judge need only consider the information contained within the four corners of the affidavit to make an informed judgment concerning whether the facts support the existence of probable cause. If the judge determines from the affidavit that probable cause exists, he or she will sign the warrant authorizing the search of particularly described premises or person.

8. The Affidavit for a Warrant: Written or Electronic

A prerequisite for the issuance of a search warrant requires that an application for the warrant be presented to a judicial official. This application for the warrant is called an affidavit; it must include the person, place, or thing to be searched; and there must be specificity concerning the identity of the subject of the search and specificity concerning its location. When the search involves real or personal property, the affidavit must properly describe the object of the search and its location with specificity. In addition, the officers who are requesting a warrant through the affidavit are required to explain what facts are known to prove that probable cause exists to make the search or seizure. If an informant's information is involved, it must specifically include what the informant has told police as well as the facts and reasons the informant should be believed. Finally, the officer must swear that the facts stated in the affidavit are true to the best of the officer's knowledge. When the judge or magistrate reviews the affidavit for the search warrant, the judge must make an independent assessment of the information that is contained within the document. A search warrant will not be issued until the judge or magistrate has considered the facts contained within the written affidavit and determined that probable cause exists to believe that seizable property will be found in a particular place or on a particular person. In addition to a description of why probable cause exists, the affidavit must particularly describe the place,[50] person, or property to be searched or the object to be seized. In most jurisdictions, the affiant must state the offense to which the seized property is believed to relate. The judicial official may agree with the officer's

probable cause conclusions and sign the paper warrant. Alternatively, the judge or magistrate may require additional evidence before being convinced that probable cause exists. If the evidence must be added to the affidavit, generally it must be provided in writing as an amended affidavit or as an addendum to the original.

In some form or manner, all American jurisdictions provide for warrants to be issued upon sworn oral testimony taken by the judicial official over the telephone or by electronic transmission via fax or computer. With the presence of the Internet and the ease of communication facilitated by that medium, it appears that all American jurisdictions allow the use of telephone or electronic affidavit application and electronic issuance of warrants. States generally permit the affidavit for a search warrant to be based on sworn testimony offered to the judge communicated by telephone or other electronic means. The person requesting the warrant by the affidavit must prepare a duplicate original of the affidavit and read it to the judge or magistrate verbatim. The judge or magistrate will take down the wording on paper or electronically receive the affidavit for judicial consideration. Representative of the practice in many states, North Dakota permits a warrant to issue over a phone or reliable electronic communication in a situation where the judicial official is satisfied by an oral or electronic affidavit that probable cause exists. The judicial official can direct that the applicant for the warrant sign the judicial official's signature on the face of the warrant that has been prepared by the affiant at the remote location.[51] Generally, an electronic transmission of the documents has the same effect as the original documents have.[52]

The state of Georgia provides that, "Search warrant applications heard by video conference shall be conducted in a manner to ensure that the judge conducting the hearing has visual and audible contact with all affiants and witnesses giving testimony."[53] The Georgia judge hearing a video conference application for a search warrant is required to administer oaths by means of the electronic video connection.[54] Additional rules exist for the return to the court of the documents once they have been reduced to written form. Alternatively, a police officer may submit an affidavit by electronic means to the judge or magistrate. The magistrate shall orally place the police officer under oath, and the affidavit for the warrant will be sent to the magistrate or judge by any reliable electronic means. If the judicial official agrees that probable cause exists, the judge or magistrate will sign the warrant, noting the time and date of issuance, and indicate that the affidavit was sworn during the video or phone conference. In Georgia, a video recording of the application for a warrant hearing and all documents offered in support of the issuance of a warrant are to be maintained as part of the court record.

Similarly, Indiana allows warrants to be issued even in the absence of an affidavit where the officer orally by telephone, radio, fax, or electronic mail offers information that would otherwise be included in an affidavit. An officer seeking a search warrant is permitted to send a probable cause affidavit electronically and is allowed to use an electronic signature on the affidavit. The substance of the affidavit as to be recorded in some fashion, and, if the judge finds probable cause, the judge may direct that the officer sign the judge's name to a warrant recorded by the judge that can be served to search property or to arrest specific individuals.[55] These newer methods of sending affidavits and issuing warrants take advantage of modern means of communication but do not change the legal standards that must be met with an affidavit or a warrant.

Federal judges and federal magistrate judges have power to issue search warrants based on either paper affidavits or a request by telephonic or other means. According to Rule 41(d)(3) of the Federal Rules of Criminal Procedure, "A magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means." Pursuant to a section of Rule 41, the applicant must prepare a proposed duplicate original warrant and must read or transmit the document verbatim to the judicial official.[56] The judge must place the applicant under oath and make an accurate record of the conversation with a proper recording device and file the transcript with the court clerk. If the federal judicial official finds probable cause, the federal judge or magistrate may issue a search warrant.

9. The Search Warrant: A Court Order

A search warrant is a court order that can only be issued by a neutral and detached judicial official directed to a law enforcement official, or class of officials, that recites the material facts alleged in the affidavit and carefully describes the place to be searched and particularly describes the objects to be seized. The warrant is a court order that commands the officer to search the place, person, or described property and to bring any items seized to the court. The warrant requires the person or persons in control of the particular premises to allow the search to be conducted, and there is no legal right to impede the search or the searchers. Since a warrant is a lawful court order, no one possesses any right to resist the execution of a search warrant, but there is no duty to affirmatively assist in the search. The officer or officers executing the warrant give the person in control of the premises a copy of the warrant and, later, a list or inventory of items seized. If no one is present at the site of the search, the inventory is affixed to the premises that have been searched. Generally, the person executing the warrant must return it to the issuing judge along with a copy of the inventory.

Law enforcement officers must follow several rules and requirements during the execution of the warrant. The warrant must be executed within a reasonable time or within the time limits dictated by state or federal law or rule,[57] if it specifies a time limit. A warrant executed later than what is considered as reasonable, outside of the required time limits, or not as specified is invalid and does not produce good evidence.[58] The general preference for executions of warrants is that they be served during daytime hours, but most jurisdictions allow requests for night executions, and, significantly, most states do not invalidate a night search whether or not it had been requested pursuant to state law.

10. Fourth Amendment: Knock and Announce Requirement and Permissible Detention of Persons Present

Within the context of executing a search warrant, the Supreme Court determined in *Wilson v. Arkansas* that, based on history and past practice, the Fourth Amendment contains a "knock and announce" requirement that must be followed before forcing entry.[59]

In *Wilson*, officers entered a home with a search warrant after they found the main house door open and proceeded through an unlocked, but closed, screen door. Although they identified themselves as law enforcement officers, the entry occurred without first knocking and announcing their presence and purpose.

When executing a search warrant, the knock and announce principle may be ignored if following it would subject the officers to greater danger or if the police possess a "no-knock" warrant.[60] Some state laws allow the affiant to request in the affidavit approval for a nonconsensual entry where the officer has reason to believe that a knock and announce procedure would pose a greater danger to the officers executing the warrant. Nonconsensual or dynamic entries to execute search warrants have been approved[61] by the United States Supreme Court as being consistent with the Fourth Amendment. A violation of the knock and announce requirement normally does not result in the suppression of evidence even when police admit that they failed to comply with the knock and announce requirement. The Court sent the *Wilson* case back to the state courts to determine whether there was a proper excuse to enter with a warrant in the absence of knocking and announcing.

In a case originally thought to be controlled by *Wilson v. Arkansas, Hudson v. Michigan*,[62] police had a warrant to search for guns and drugs at the defendant's home but failed to properly knock and announce. In violating the principles of *Wilson*, police in *Hudson* waited only three to five seconds after announcing their purpose and intention before forcing an entry.[63] The prosecution admitted that police violated the principles of *Wilson v. Arkansas* when they intentionally failed to properly knock and announce. However, the Supreme Court indicated that suppression of evidence was not always the remedy for a Fourth Amendment violation and exclusion of evidence could not be premised on the mere fact of the constitutional transgression. According to the Court, in *Hudson*, the police would have inevitably obtained the guns and drugs lawfully even if they had properly or improperly announced their presence and intention, so the Court determined not to use the suppression of evidence as a remedy for a violation of the *Wilson* knock and announce requirement.

The reality in this situation is that even though there is a knock and announce requirement in the Fourth Amendment, it will not normally be enforced and will not affect the admission of evidence, unless a state court wants to take a different view on knock and announce under a local law, constitution, or judicial interpretation. Demonstrative of this concept is the view taken by the top court in Pennsylvania in *Commonwealth v. Fredreick* in 2015, where the court determined that compliance with the state knock and announce requirement would always result in suppression unless the prosecution is able to satisfy an exception to the rule. Exceptions include silence within the premises for a period of time, the residents being virtually certain to know of the purpose of the police, reasons to believe that announcement would imperil police safety, or reason to believe that evidence is about to be destroyed.[64]

However, in the case of an arrest warrant only, where police enter a defendant's home without using a knock and announce procedure, a different rule may apply and the exclusionary rule may be enforced. In a case from the District of Columbia,[65] federal agents violated the knock and announce requirement when they failed to announce the purpose of their presence in serving an arrest warrant. By failing to announce, police

offered the defendant no chance to step outside his home and protect the privacy of his home by surrendering outside of the residence. The Court of Appeals noted

> An individual subject to an arrest warrant accordingly retains a robust privacy interest in the home's interior. That privacy interest is protected by requiring law enforcement officers executing an arrest warrant to knock, announce their identity and purpose, and provide the arrestee with the opportunity to come to the door before they barge in. And, where evidence is obtained because officers violated the knock-and-announce rule in executing an arrest warrant at the arrestee's home, the exclusionary rule retains its remedial force.[66]

In such a case, the reviewing court distinguished finding evidence inside a home when a search warrant allowed police to enter at some point with an arrest warrant where a target inside a home has a remaining expectation of privacy within the home and may step outside to protect the home's privacy. The requirements for search warrants and arrest warrants protect different privacy interests, and each warrant authorizes officers to take different actions. It appears that the knock and announce rule protects different interests in different circumstances. Under the circumstances of executing an arrest warrant, officers armed with only an arrest warrant may only break open the home to take the described person if upon demand he will not come out and surrender or no response is obtained when it is believed the target is within the home.

Case 6.3 LEADING CASE BRIEF: EXCLUSIONARY RULE DOES NOT APPLY TO VIOLATIONS OF KNOCK AND ANNOUNCE PRINCIPLE

Hudson v. Michigan
Supreme Court of the United States
547 U.S. 586, 126 S.Ct. 2159, 165 L.Ed.2d 56, 2006 U.S. LEXIS 4677 (2006).

CASE FACTS:

Police obtained a warrant that authorized a search for drugs and guns at Hudson's home. They uncovered large amounts of drugs and some firearms. In addition, Hudson possessed rock cocaine on his person. In the location where he had been sitting, police discovered a loaded firearm lodged between the cushion and armrest of his chair. The prosecutor charged Hudson under state law with unlawful drug and firearm possession.

The prosecution admitted that, in executing the search warrant, the police violated the Fourth Amendment's requirement of "knock and announce" since they waited three to five seconds after announcing before they forced their way into Hudson's abode. Prior to trial, defendant Hudson filed a motion to suppress all evidence seized from his home on the ground that the police conduct violated his Fourth Amendment rights. The state trial court granted his motion to suppress. The Michigan Court of Appeals reversed because it felt suppression was not the proper remedy. The Supreme Court granted certiorari.

LEGAL ISSUE:

Although the Fourth Amendment has a recognized knock and announce requirement, in executing a search warrant, does

the failure to follow approved knock and announce directive require that all evidence seized during the search be suppressed from the guilt phase of a trial?

THE COURT'S RULING:

The evidence of drug and gun possession should have been admitted at his trial because the knock and announce requirement was not a but-for case for obtaining the evidence; it would have been obtained in any event, and suppression takes too high of a social cost.

ESSENCE OF THE COURT'S RATIONALE:

II

The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one. See *Wilson v. Arkansas*, 514 U.S. 927, 931–932, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995). Since 1917, when Congress passed the Espionage Act, this traditional protection has been part of federal statutory law, see 40 Stat. 229, and is currently codified at 18 U.S.C. § 3109. . . . [I]n *Wilson*, we were asked whether the rule was also a command of the Fourth Amendment. Tracing its origins in our English legal heritage, 514 U.S., at 931–936, 115 S. Ct. 1914, 131 L. Ed. 2d 976, we concluded that it was.

We recognized that the new constitutional rule we had announced is not easily applied. *Wilson* and cases following it have noted the many situations in which it is not necessary to knock and announce. . . . It is not necessary when "circumstances presen[t] a threat of physical violence," or if there is "reason to believe that evidence would likely be destroyed if advance notice were given," id., at 936, 115 S. Ct. 1914, 131 L. Ed. 2d 976, or [*2163] if knocking and announcing would be "futile," *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997). We require only that police "have a reasonable suspicion . . . under the particular circumstances" that one of these grounds for failing to knock and announce exists, and we have acknowledged that "[t]his showing is not high." *Ibid.*

When the knock-and-announce rule does apply, it is not easy to determine precisely what officers must do. How many seconds' wait are too few? Our "reasonable wait time" standard [citation omitted] is necessarily vague.

* * *

III A

***

Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates "substantial social costs," *United States v. Leon*, 468 U.S. 897, 907, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), which sometimes include setting the guilty free and the dangerous at large.

* * *

In this case, of course, the constitutional violation of an illegal manner of entry was not a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred or not, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house. But even if the illegal entry here

could be characterized as a but-for cause of discovering what was inside, we have "never held that evidence is 'fruit of the poisonous tree' simply because 'it would not have come to light but for the illegal actions of the police.'" *Segura v. United States*, 468 U.S. 796, 815, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984).

* * *

Until a valid warrant has issued, citizens are entitled to shield "their persons, houses, papers, and effects," U.S. Const., Amdt. 4, from the government's scrutiny. Exclusion of the evidence obtained by a warrantless search vindicates that entitlement. The interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government's eyes.

* * *

What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.

* * *

[The Court rejected Hudson's contention that without suppression there would be no deterrence to police conduct. The Court noted that civil suits would be one remedy despite Hudson's assertion that no attorney would want to take a civil case based on a knock and announce violation.]

In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* [*v. Ohio*] was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.

[The Court affirmed the Michigan Court of Appeals holding that the evidence should not be suppressed.]

CASE IMPORTANCE:

Following this case, police have very little incentive to adhere to the requirements of the knock and announce principle that is part of the Fourth Amendment. It remains to be seen whether the possibility of civil suits will keep police officers from conducting more unannounced entries under the Fourth Amendment.

In addition to the general knock and announce requirement, police may detain persons who are present or who come to the premises during the execution of the search warrant.[67] Police officers may detain persons connected to the place of search, but they may not search the persons[68] of the seized individuals unless some other legal theory permits a search or searches. In some situations, when police have probable cause and are awaiting the arrival of a search warrant, they may prohibit unaccompanied reentry to premises by the occupant. Such brief seizure of the property until a judge issues a warrant has been deemed reasonable under the Fourth Amendment.[69] In an investigation into a gang-related shooting, the Supreme Court approved the handcuff detention in a

garage of persons found on the premises being searched by police officers.[70] During a two- to three-hour search of a home where guns and drugs were the target of a warrant-based search, occupants of the home could be lawfully restrained in handcuffs in their own home without violating the Fourth Amendment. The officer's use of force in the form of handcuffs was reasonable because the warrant included a search for weapons, a wanted gang member lived on the premises, and the police reaction to the uncertain situation minimized the danger to the police officers.

11. Scope of Search

The extent of a search, or its scope, as it is often called, is dictated by the size and type of object that is the goal of the search, as well as the location where the search is to occur. Obviously, powdered recreational pharmaceuticals might be hidden in any location; thus, a warrant ordering the search and seizure of illegal drugs would allow police officers to search virtually anywhere in a motor vehicle or residence. On the other hand, because a larger object such as a computer or a rifle could not be stored in an automobile console or a bathroom medicine chest in a residence, a search for such an object in those areas would exceed the lawful scope of the search. As Justice Stevens explained the concept of the scope of a lawful search in the context of a container search:

> The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.
>
> *United States v. Ross*, 456 U.S. 798, 824 (1982)

Generally, once the object of the search has been described, the scope of the search is limited to areas and places where that object or person might reasonably be located. However, in executing an arrest warrant in a home or building, based on specific and articulable facts and other inferences, police may make a cursory search or protective sweep of the premises to be sure that persons who might try to frustrate the arrest are not present.[71] If police search areas where the object or person might not reasonably be located, such a search could be considered an unreasonable search under the Fourth Amendment and might result in the object, or evidence from a person, being excluded from use in evidence at trial.

12. Return of the Warrant

In serving a warrant, typically, the officer delivers a copy of the original warrant to the person whose property is about to be searched for the purpose of giving that person notice of what property the police may legally seize. After the search, as a general rule, the officer removing the property must give a copy of the warrant as well as a receipt for the property being taken to the person in charge of the premises or leave a copy of the

warrant and the inventory receipt at the location from which the property was removed.[72] The return occurs when the officer delivers the warrant and the property to the custody of the court or the issuing judicial official along with a written inventory of the property seized pursuant to the warrant. In federal searches, Rule 41(f) of the Federal Rules of Criminal Procedure commands that the searching officer promptly return the warrant along with a copy of the inventory of seized property to the judicial official who authorized the warrant. Alternatively, the officer has the opportunity to return the warrant by electronic means. If no seized property has been taken, that fact is communicated to the authorizing judge or magistrate in the return. Generally, a judge will cause a copy of the inventory to be delivered to the person from whom the property has been seized when the judge receives a request.[73] Ohio rules are representative of many states and provide that until the property is returned to the rightful possessor, the property seized will be stored for use as evidence by the court that issued the warrant or by the law enforcement agency that served the warrant.[74] Following is a sample return of inventory that is

RETURN AND INVENTORY

I received the attached Search Warrant on _____, _____, and executed it on the ____ day of _____, _____, at _____ [a.m.] [p.m.]. I searched the person or premises described in the Warrant and I left a copy of the Warrant with

_____

_____

(name the person searched or owner at the place of search) together with a copy of the inventory for the items seized.

The following is an inventory of property taken pursuant to the warrant: *(attach separate inventory if necessary)*

_____

_____

_____

This inventory was made in the presence of _____ *(name of applicant for the search warrant)* and _____ *(name of owner of premises or property). (If not available, name of other credible person witnessing the inventory.)*

This inventory is a true and detailed account of all the property taken pursuant to the Warrant.

_____

Signature of Officer

_____

Signature of Owner of

Property or Other Witness

Return made this ____ day of _____, _____, at ____ [a.m.] [p.m.].

_____

(Judge) (Clerk)

After careful search, I could not find at the place or on the person described, the property described in this warrant.

_____

Officer

_____

Date

FIGURE 6.3 Typical Example of a Return and Inventory Form Filed after Search Has Been Executed.[75]

representative of many jurisdictions concerning the information contained on the return form transmitted to the court that issued the warrant.

13. Stale Probable Cause

Federal search warrants must be executed or served within fourteen days from the time the judge authorized the warrant.[76] Some state search warrants are valid for a reasonable time or for a set duration[77] following the judge's signature unless facts have dramatically changed and the officer knows of those facts that degrade probable cause. Such a situation involves the problem of stale probable cause, which may undercut the validity of a warrant-based search conducted after probable cause has ceased to exist. The objects of many searches possess ready mobility or involve situations that are subject to rapid change so that what is true today will not necessarily be true at a later time. The business practice of a seller of recreational pharmaceuticals requires that the dealer must turn over the inventory rather than hoard or store the product. An important factor in determining whether probable cause may have become stale involves whether the suspect is engaged in a continuing course of criminal conduct.[78] Where the police have presented probable cause to believe that a particular home contains illegal drugs, the situation may change within a short time so that probable cause quickly becomes stale,[79] but an ongoing criminal enterprise argument may keep the information current.

In a Minnesota drug trafficking prosecution,[80] the defendant contended that probable cause to search had grown stale during the time after the warrant was issued and prior to its execution. Police had reliable informant information that the suspect and an associate were selling illegal drugs. The original suspect was in a car driven by a second suspect when police lawfully stopped and searched the pair's vehicle. They were arrested for possession and sale of illegal drugs after contraband items were found in the car. A later trash pull at their residence revealed the soon-to-be-defendant's mail and a snort-tube pen that tested positive for methamphetamine. A warrant-based house search occurred less than six days later, and the reviewing court held that probable cause was not stale because the drug sales and possession were not a one-time event but a course of continuing criminal activity that was likely to exist for an appreciable time after probable cause initially developed.

An Ohio federal district court found that probable cause did not exist when some of the information contained in the affidavit for the search warrant was too stale to help support probable cause.[81] In this case, police had some suspicions that an individual, who used to sell drugs, remained involved in criminal drug activity. Periodically, officers drove past the home of the target and noticed his parked car, but did not observe anything remotely criminal in twenty-two months, though they had their suspicions. In the affidavit for the search warrant, police falsely noted that they were involved in an "ongoing/open narcotics investigation," but driving past the home was the extent of the investigation. Since drug dealing often is an ongoing enterprise, the reviewing court noted that the officers should have been able to observe criminal activity, if any, that was occurring; they saw nothing. A trash pull two years earlier when the defendant lived at a different location revealed some suspected raw or loose marijuana and some

paraphernalia, but not sufficient to indicate trafficking. The fact that the defendant's new address was in a law enforcement database added nothing to an allegation in the affidavit of ongoing drug dealing. The knowledge that the defendant had at least two prior felonies did not assist in a finding of present probable cause to search his home. The defendant's motion to suppress evidence derived from a search of his residence was granted because the officers were not honest about the circumstances involving the trash pull; it was two-year-old information, and the court found the information stale, and the officers were not truthful about the existence of an ongoing investigation. The federal district court judge concluded that for many reasons, including stale information, probable cause to search did not exist.[82]

Probable cause to believe that a stolen forty-ton punch press has been installed in an industrial building would remain for quite some time, since the press is not readily movable without obvious expenditure of observable effort. Similarly, business records required for everyday transactions at an ongoing commercial enterprise are not likely to be moved between the time probable cause matures and the time the warrant is executed. In these and similar situations, stale probable cause should not pose a problem for law enforcement or the prosecution.

Whether probable cause continues to exist must be determined by an examination of the facts of each case.[83] Staleness cannot be determined by any mechanical formula such as the passage of time alone. Whether a tip equaling probable cause may be said to be stale depends on the nature of the tip and the time it is used to procure a warrant. A tip about repetitive and continued criminal behavior may last for an extended period, especially when some of the conduct may be readily observable. The lapse of time is least important when the suspected criminal activity is continuing in nature and when the property or contraband is not likely to be destroyed, consumed, or dissipated.

14. Warrantless Searches: Exceptions to the General Rule

As an exception to the general rule requiring warrants to conduct searches, police may conduct searches without warrants on abandoned property or for property over which no one has a legitimate expectation of privacy. When one throws away a soft drink can containing a sample of fingerprints, vacates a motel room and leaves behind incriminating evidence[84] in a trash can, or takes the license plates from a vehicle and leaves with no intent to have anything to do with the car in the future, such conduct indicates that the property has been abandoned. Property over which no one presently possesses any expectation of privacy or has any rights under the Fourth Amendment is subject to search and seizure at any time without probable cause and/or a warrant.

Even property over which a person possesses a general right of privacy may be searched without a warrant in some circumstances. In *United States v. Dunn*, 480 U.S. 294 (1987), the Supreme Court reaffirmed the doctrine that an occupier of fenced farm land does not have an expectation of privacy in fenced, but otherwise open, fields unless steps are taken to keep people out of the area or to keep others from observing the fields directly (see Case 1.5).

Demonstrative of the principle that no one has privacy rights in abandoned property is the case of *California v. Greenwood*, 486 U.S. 35 (1988), where the Court approved a warrantless police search of residential trash canisters that had been placed near the public street for a private trash hauler to pick up. A high volume of vehicle and pedestrian traffic around the residence had caused Greenwood's neighbors to complain to police that he might be dealing in recreational pharmaceuticals. Without a warrant, the police arranged for the private trash collector to pick up Greenwood's waste in an empty truck and to deliver the contents to the police. Inspection of the truck's contents indicated the presence and probable use of illegal drugs at the residence.

The police used the trash evidence as part of the basis for developing probable cause to search Greenwood's residence. A judge issued a search warrant, and the subsequent search revealed illegal drugs. The *Greenwood* Court approved the warrantless search of the trash on the theory that the act of placing the trash for pickup indicated that the occupants had abandoned the property and possessed no Fourth Amendment expectation of privacy[85] in connection with the contents of the trash container.

Although automobile searches are discussed in the next chapter, it must be noted that as a general rule, motor vehicle searches do not require warrants but must be based on search probable cause. In an old case that confirmed the constitutionality of warrantless vehicle searches, the Supreme Court, in *Chambers v. Maroney*, recognized that where probable cause exists to search a car, police may make an immediate search of the automobile or conduct a later search in the absence of a warrant.[86] In *Chambers*, there was probable cause to arrest Mr. Chambers and to search the vehicle for proceeds of an armed robbery. The Court reasoned that when there is probable cause to search a motor vehicle, consistent with the Fourth Amendment, a search would be considered reasonable in the absence of a warrant since a vehicle provides a lower expectation of privacy when compared to a home, and a vehicle has mobility. The Court observed:

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.[87]

15. Summary

As a strong general rule, for a police officer to conduct a search, the officer must have probable cause and possess a search warrant. Court cases have determined that probable cause exists where the facts and circumstances that have been presented to an officer of reasonable caution lead the officer reasonably to conclude that seizable property will be found on a particular person or in a particular place. The place or person who is the subject of a search must be particularly described, and the object that is the goal of

a search must also be carefully and particularly described. As a general rule, a warrant is required to search a home or a business unless consent or some other reasonable excuse exists. Where electronic surveillance may prove useful to law enforcement agents, as a strong general rule, probable cause must exist and police must obtain a warrant in order to make the search and seizure reasonable and lawful. Probable cause to search may come from an informant, a police officer's personal observations, a fellow officer, a complaining witness, or a combination of these sources. Where an informant's data must serve as the basis for probable cause, there must be sufficient reason to believe that the informant is telling the truth and that the substance of what the informant relates equals probable cause.

When a warrant is to be obtained, police or the prosecutor's office will prepare an affidavit [application] for a search warrant that will detail the facts and circumstances that the government believes constitute probable cause to search, and the officer/affiant will swear the information contained within the affidavit is true to the best knowledge of the officer. When a neutral and detached judicial official has reviewed the affidavit and agrees with the law enforcement official that probable cause to search exists, the judicial official will sign a prepared document that serves as a search warrant. As a general rule, the search warrant must be served within a statutorily designated time period or within a reasonable time if no statutory time limitation applies.

When police officers serve a search warrant, they must do so in a reasonable manner. Case law interpreting concepts of reasonableness holds that the Fourth Amendment includes a knock and announce requirement. The officers need to indicate their presence at the location of the search and indicate that they are law enforcement officers who are prepared to conduct a search. When the situation indicates that following the knock and announce principle would dramatically enhance the risk to police officers, this requirement may be excused, and many jurisdictions provide for a "no knock" warrant based on facts presented to the judicial official.

The object or goal of the search dictates the physical locations in a home or on a person where law enforcement officials may search. If an object could not be hidden within a particular location, it will be deemed unreasonable for an officer to search that location in a building or on a person. Once the property that is the subject of the search has been discovered and secured, the search must end and a return made to the court that issued the warrant. As a general rule, an inventory of the object or objects that have been seized will be left with person or persons who were present at the place of the search, and an inventory of that property will be returned to the court that issued the search warrant.

REVIEW EXERCISES AND QUESTIONS

1. Give the narrative legal standard known as probable cause to search.
2. Since the Fourth Amendment requires specificity when describing things to be seized, what would be a good description of a quantity of marijuana? Of a pistol?
3. A police officer has suspicions that a person had been using illegal drugs. A judge issued a search warrant for

the search of his home. The police officer overheard conversations of the defendant that could be interpreted in more than one way. The police officer's affidavit for the search warrant indicated that the defendant had engaged in acts that were indicative of drug activity, and the officer's drug dog alerted to abandoned drug packaging that defendant had discarded. This evidence was included in the affidavit. Do you think probable cause to search the defendant's home was established? Why or why not? See *People v. Martinez*, 2007 NY Slip Op 3480 (2007).

4. What are some of the basic steps that a federal law enforcement official must take to secure a warrant for electronic eavesdropping?
5. Explain how the totality of the circumstances test used to determine informant credibility operates (Case 6.2).
6. Why can it be stated that police officers really do not need to comply with the knock and announce requirement of the Fourth Amendment? Explain.
7. Explain how probable cause can become stale, even though this will not be a problem in most cases.
8. How does the type of evidence being sought determine the scope of the search permitted?

1. How Would You Decide?

In the Supreme Court of Hawai'i.

Defendant Naeole's house was entered forcibly by members of the Honolulu Police Department, and the dwelling was searched pursuant to a valid search warrant. In executing the warrant, the lead officer knocked and announced four times within twenty-five seconds but did not discernibly pause between the oral demands. According to court testimony, the announcing officer made a knocking sound on the door; uttered the word, "police"; announced the fact that they had a search warrant; and ordered the occupant to open the door immediately. After the third announcement, the officer heard some movement inside, but they immediately entered. Using a battering ram to breach the front door, they entered the home, where the search revealed a large quantity of illegal drugs, including methamphetamine, marijuana, and cash. The defendant testified at the suppression hearing that she was headed to the bathroom when she heard banging, and she saw police officers entering her home. She noted that she did not hear anyone knocking or hear any announcement that there were police officers at her front door. One of the defendant's neighbors testified that he came out to his front door after he heard his dogs barking and observed officers "messing with" the defendant's front gate. After obtaining his cell phone, he returned to his front door and saw the officers break down the front door of the defendant's home immediately after announcing that they were police. The neighbor recorded a video on his cell phone, which showed the officers ramming through the defendant's front door.

The trial court granted the defendant's motion to suppress, but the Intermediate Court of Appeal vacated the trial court's order on the basis that the defendant had a reasonable amount of time to respond for the police demand for entry to serve the warrant. The defendant, Naeole, appealed to the Supreme Court of Hawai'i.

The issue in this case is whether police officers gave the occupier of the home or any other occupants of her home a reasonable amount of time to respond to their demand for entry.

The Court's Holding:

[The Supreme Court of Hawai'i reviewed the purpose of the Fourth Amendment and considered other cases where evidence had been suppressed.]

* * *

III. DISCUSSION

The "knock-and-announce" procedure is not a mere formality or police tactic; it is an essential restraint on the power of the State which has deep roots in both the Anglo-American and Hawaiian legal systems. See Miller, 357 U.S. at 313 ("The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application."); Garcia, 77 Hawai'i at 465, 887 P. 2d at 675 (tracing the modern knock-and-announce statute back to the 1869 Penal Code of the Hawaiian Kingdom and *The King v. Ah Lou You*, 3 Haw. 393 (1872)). "The search warrant serves to protect individuals' constitutional right to be 'secure in their persons, houses papers, and effects, against unreasonable searches and seizures. . . .'" The purpose of the search and seizure provision of the Hawai'i constitution, and the fourth amendment to the United States Constitution, is to "safeguard individuals from the arbitrary, oppressive, and harassing conduct of government officials." The knock-and-announce rule is one mechanism that protects this right. Its purpose is to give the "person time to respond, avoid violence and protect privacy as much as possible." [Some citations omitted.]

* * *

"The protection against unreasonable searches would mean very little if the police, armed with a search warrant, were authorized to break down the door of someone's premises unless there was an 'instant' response."); Haw. Const. art. I, § 7. Thus, we have held that, "absent the existence of exigent circumstances, police must afford occupants of a place to be searched a 'reasonable time' to respond to an announcement before forcing entry." Allowing a reasonable time to respond gives an occupant "sufficient opportunity to respond to authority" and "to surrender his or her privacy voluntarily" "before a forcible entry is made." [Citations and brackets omitted.] Without it, the request for entry is meaningless. [Citations and brackets omitted.]

* * *

In [a different case] police officers executed a search warrant at an apartment at 11:05 a.m. Officers approached the closed front door of the apartment and an officer "knocked on the door and announced, 'police, search warrant,' but did not expressly demand entrance. The officers heard no suspicious sound or movement inside the apartment. Within two seconds of the announcement, [the officer] opened the unlocked door, and the officers entered the apartment." Id. This court, embracing the reasoning of

Garcia, reversed the circuit court's denial of the defendants' motion to suppress, holding that "the forced entry by police two seconds after the knock and announcement was constitutionally insufficient to give the occupants a reasonable opportunity to respond."

* * *

Considering the totality of the circumstances in the present case, we conclude that the amount of time HPD gave the occupants of Naeole's home to respond to their requests for entry was not reasonable. The circuit court found that Officer Roe conducted the knock-and-announce procedure four times within the span of about twenty-five seconds without any discernible pause between each one. This is not a reasonable amount of time to expect the occupant of a modestly-sized home to respond to an early morning demand for entry. At the time HPD executed the search warrant, most people would be expected to be asleep, just waking up . . . or to be indisposed by the customary activities of the early morning, such as showering, getting dressed, or eating breakfast. In other words, it was not reasonable to expect the occupants of Naeole's home to be "alert and responsive" during the early morning hours. Furthermore, Officer Roe did not "discernibl[y] pause" between each knock-and-announce procedure, even after hearing a voice that may have been directed at the HPD officers. Not pausing between announcements and not allowing additional time to respond after hearing a voice from inside the home would have made it difficult for an occupant of the home to indicate compliance and voluntarily submit to the officers' authority. We note that there was no evidence that the search of Naeole's home presented a risk to officer safety. We hold that giving an occupant only twenty-five seconds to respond at such an early morning hour is unreasonable.

* * *

IV. CONCLUSION

For the foregoing reasons, the ICA's memorandum opinion and judgment on appeal are vacated, the circuit court's order granting Naeole's motion to suppress is affirmed, and the case is remanded to the circuit court for further proceedings consistent with this opinion. [This reinstated the trial court decision that held the search and seizure was unreasonable due to the failure to knock and announce properly. See *State v. Naeole*, 148 Haw. 243, 470 P. 2d 1120, 2020 haw. LEXIS 172 (2020). *Cf. Wilson v. Arkansas*, 514 U.S. 927 (1995).]

2. How Would You Decide?

In the Court of Criminal Appeals of Alabama.

Citizens informed police that some men were attempting to break into a house. The break-in suspects told law enforcement officers that the owners of the targeted home stored large quantities of marijuana inside the residence and they were attempting to steal the weed. Police obtained a search warrant that covered all vehicles, people, and buildings located on or within defendant's residence where the marijuana was believed to be stored. In executing the warrant, police found over five pounds of marijuana. The trial court did not initially suppress the evidence but did suppress after reading

the defendant's brief on the motion to suppress. On appeal, the state contended that the trial court erred in granting defendant's motion to suppress based on the trial court's determination that there was no probable cause for the search since it had been based on the unreliable, unverified information from a confidential informant. The informant described how he regularly purchased an ounce of marijuana weekly from the defendant over a period of time.

How would you rule on the defendant's contention that there was no probable cause to believe that seizable property would be found in the defendant's home because the informant's evidence was not proven to be reliable and believable and that the evidence should have been suppressed?

The Court's Holding:

[The court reviewed the requirements for probable cause for a search when the basis depends on an informant and looked at the case, *Illinois v. Gates* (Case 6.2), and the totality of the circumstances test for determining when probable cause exists when it is based on an informant's story.]

This Court has previously stated:

> "The present test for determining whether an informant's tip establishes probable cause is the flexible totality-of-the-circumstances test of *Illinois v. Gates*, [Citations omitted]. The two prongs of the test of *Aguilar v. Texas* [citations omitted], and *Spinelli v. United States* [citations omitted], involving informant's veracity or reliability and his basis of knowledge, "are better understood as relevant considerations in the totality of circumstances analysis that traditionally has guided probable cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Gates* [citations omitted]. . . . Probable cause involves "a practical, common sense decision whether, given all the circumstances, . . . including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, [Citations omitted].
>
> *Pugh v. State*, 493 So. 2d 388, 392 (Ala. Cr. App. 1985), aff'd, 493 So. 2d 393 (Ala. 1986)

[The court noted that a prosecutor is not required to show that an informant has proven to be accurate any number of times and that every informant has to start with his or her first time as an informant. The informant admitted to purchasing marijuana numerous times over a fairly recent period of time, admitting to his own crimes, which should help bolster his credibility. Additionally, the informant had purchased drugs recently, so the probable cause could not be considered stale.]

Here, we believe that the trial court incorrectly determined that the search warrant authorized an unconstitutional "general search" for all drugs in Jenkins's apartment. We recognize that

> [g]eneral exploratory searches and seizures, with or without a warrant, can never be justified and are forbidden and condemned. *Marron v. United States*, 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231, Treas. Dec. 42528 (1927). The specific command of the Fourth Amendment to the Constitution of the United States is that no warrants shall issue except those "particularly describing the . . . things to be seized."

However, the description of things to be seized contained in the warrant under review is not so broad that the authorization constitutes a general exploratory search. Certainly, "an otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based." *Vonderahe v. Howland*, 508 F.2d 364 (9th Cir. 1974); W. LaFave, 2 Search and Seizure, Section 4.6, n. 11 (1978) (hereinafter Search).

> However, a less precise description is required of property which is, because of its particular character, contraband.
>
> If the purpose of the search is to find a specific item of property, it should be so particularly described in the warrant as to preclude the possibility of the officer seizing the wrong property; whereas, on the other hand, if the purpose is to seize not a specific property, but any property of a specified character, which by reason of its character is illicit or contraband, a specific particular description of the property is unnecessary and it may be described generally as to its nature or character. 2 Search, p. 101, citing *People v. Schmidt*, 172 Colo. 285, 473 P. 2d 698 (1970)
>
> *Palmer v. State*, 426 So. 2d 950, 952 (Ala. Crim. App. 1983)

Thus, in the instant case, the search warrant sufficiently described that law-enforcement officers were authorized. [The court held that the warrant was valid.] See *State v. Jenkins*, 2007 Ala. Crim. App. LEXIS 89 (2007).

Notes

1. Amendment Four, United States Constitution.
2. Probable cause may be said to exist when the facts and circumstances that have been presented to an officer of reasonable caution would cause the officer to conclude that seizable property would be found in a particular place or on a particular person.
3. Exceptions to the requirement of probable cause include brief stop and frisks under *Terry v. Ohio,* 392 U.S. 1 (1968); sweeps of real estate under *Maryland v. Buie,* 494 U.S. 325 (1990); and brief sobriety stops of motorists under *Michigan v. Sitz,* 496 U.S. 444 (1990).
4. See *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, 1970 U.S. LEXIS 19 (1970). See also, *United States v. Woodley*, 2021 U.S. Dist LEXIS 52736 (D.V.I. 2021).
5. See *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576, 584, 1967 U.S. LEXIS 2. 14 (1967). See also *Peyton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639, 1980 U.S. LEXIS 12 (1980), where evidence was suppressed when police entered a suspect's home without a warrant.
6. See *United States v. Dunn*, 480 U.S. 294, 1987 U.S. LEXIS 1057 (1987), where the Court permitted officers to enter private land for the purposes of a drug investigation and held that Fourth Amendment protections could not be extended from the house to include the area surrounding a farm barn. See also *Hester v. United States*, 265 U.S. 57 (1924), where federal officials were permitted to enter private land without a warrant and without probable cause.
7. *United States v. White,* 2021 U.S. App. LEXIS 6633 (6th Cir. 2021).
8. See *Moore v. State* 2007 Alas. App. LEXIS 133 (2007).
9. *United States v. Morton*, 984 F.3d 421, 2021 U.S. App LEXIS 195 (5th Cir. 2021).
10. *Ib*. at 428. In addition, the reviewing court rejected an argument that the officers acted in good faith in thinking that the probable cause extended to searching the photographs located on the defendant's phone because any reasonably well-trained officer would have known that probable cause to search for photographs of drug trafficking was lacking.
11. *Ibid*.

12. *Steele v. United States,* 267 U.S. 498, 503 (1925).
13. *Commonwealth v. Guastucci*, 486 Mass. 22, 154 N.E3d 893 (2020).
14. *Ibid*. According to the *Steele* Court and stated with approval, "A warrant was applied for to search any building or rooms connected or used in connection with the garage, or the basement or subcellar beneath the same. It is quite evident that the elevator of the garage connected it with every floor and room in the building, and was intended to be used with it."
15. *Maryland v. Garrison,* 480 U.S. 79 (1987).
16. See *Galin v. State*, 262 Ark. 485, 1988 Ark. LEXIS 1835 (Ark. 1977).
17. www.uscourts.gov/forms/AO093.pdf. September 13, 2007.
18. www.uscourts.gov/forms/AO093a.pdf September 13, 2007.
19. See *United States v. Jones*, 565 U.S. 400 (2012). Valid warrant required to install a GPS tracking device on investigative target's motor vehicle to record its movements.
20. See *Carpenter v. United States*, 585 U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507, 2018 U.S. LEXIS 3844 (2018), holding that obtaining a suspect's historical cell phone location data requires a search warrant.
21. 18 U.S.C. § 2511. Interception and disclosure of wire, oral, or electronic communications prohibited.
22. 18 U.S.C. § 2516 (1)(a-u).
23. 18 U.S.C. § 2516 (2).
24. 18 U.S.C. § 2518(3).
25. *Ibid*.
26. 18 U.S.C. § 2518(4).
27. 18 U.S.C. § 2518(5).
28. 18 U.S.C. § 2518(3)(c).
29. Gonzales, Attorney General. "Press Briefing by Attorney General Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence." Dec. 19, 2005. United States Government. Nov. 29, 2007, www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html.
30. *ACLU v. Nat'l Sec. Agency/Central Sec. Serv*., 438 F.2d 754, 2006 U.S. Dist. LEXIS 57338 (E.D Mich. 2006).
31. *American Civil Liberties Union, et al. v. National Security Agency, et al*., 493 F.3d 644, 2007 U.S. App. LEXIS 16149 (6th Cir. 2007).
32. 50 USC § 1801.
33. In re Propublica, Inc., 2020 U.S. Dist. LEXIS 188303 (2020).
34. The two-pronged test was developed in *Aguilar v. Texas,* 378 U.S. 108 (1964) and refined somewhat in *Spinelli v. United States,* 393 U.S. 410 (1969), before being dropped by the Court in *Illinois v. Gates,* 462 U.S. 213 (1983).
35. 378 U.S. 108 (1964).
36. 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637, 1969 U.S. LEXIS 2701 (1969).
37. See *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 78 L.Ed.2d 527, 1983 U.S. LEXIS 54 (1983).
38. *Id*. at 238.
39. See *State v. Finkle*, 209 Vt. 76, 201 A.3d 954, 2018 Vt. LEXIS 167 (2018).
40. *United States v. Veloz*, 948 F.3d 418, 426 (1st Cir. 2020).
41. *Ibid*.
42. See *State v. Campbell*, 2020 Tenn. Crim. App. LEXIS 522 (2020).
43. For a more detailed explanation of the history of the two-pronged test, see *Aguilar v. Texas,* 378 U.S. 108 (1964), and *Spinelli v. United States,* 393 U.S. 410 (1969). The two-pronged test was officially overruled in *Illinois v. Gates,* 462 U.S. 213 (1983), but courts still look to both factors in determining the value of an informant's information.
44. *Gates* at 233.
45. See *United States v. Martin*, 2021 U.S. Dist. LEXIS 41792 (2021). See also *Commonwealth v. Moore*, 2021 Pa. Super. Unpub. LEXIS 797 (2021).
46. See Alexander P. Woollcott, Abandonment of the Two-Pronged Aguilar-Spinelli Test *Illinois v. Gates*, 70 Cornell L. Rev. 316 (1985), https://scholarship.law.cornell.edu/clr/vol70/iss2/6.
47. 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721, 1984 U.S. LEXIS 81 (1984).
48. *Ib*. at 731, 732.
49. See *State v. Glynn*, 2020-Ohio-4763, 2020 Ohio App. LEXIS 3642 (2020).

50. Specificity concerning the place to be searched is a requirement under the Fourth Amendment according to the Court in *Maryland v. Garrison,* 480 U.S. 79, 84 (1987), where Justice Stevens, writing for the Court, stated:

    The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized." The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.
51. See N.D.R. Crim. P. Rule 41, North Dakota Rules of Criminal Procedure (2020). The rule provides that "the magistrate may issue a warrant based on information communicated by telephone or other reliable electronic means."
52. *Ibid*.
53. O.C.G.A § 17–5–21.1(b). Issuance of search warrants by video conference. (2020).
54. *Ibid*. (c).
55. See Burns Ind. Code Ann. § 35–33–5–8. (2021). Warrant issued without affidavit.
56. Fed Rules Crim Proc R 41(d)(3).
57. Demonstrative of the time limit is the Ohio Revised Code, § 2933.24, which requires the search to be completed within three days of the issuance of the warrant. Other states have similar statutes. Rule 41(e)(2)(A) of the Federal Rules of Criminal Procedure requires that the warrant be executed within fourteen days of its issuance.
58. See *United States v. Jones*, 565 U.S. 400, 132 S.Cti.945, 181 L.Ed.2d 911, 2012 U.S. LEXIS 1063 (2012).
59. 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976, 1995 U.S. LEXIS 34364 (1995).
60. *Ibid*. The Wilson Court also noted that an entry into a dwelling might be reasonable, even without a prior announcement, when an announcement would likely expose law enforcement officers to enhanced dangers. The Court sent Wilson back to be evaluated on the basis of whether there would have been more danger to officers if they knocked and announced in this particular case.
61. *Ibid*.
62. See *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159, 165 L.Ed.2d 56, 2006 U.S. LEXIS 4677 (2006).
63. *Id*. at 588.
64. 124 A.3d 748, 755, 120 Pa. Super. LEXIS 553 (2015).
65. *United States v. Weaver*, 808 F.3d 26, 404 U.S. App. DC 254, 2015 U.S. App. LEXIS 15763 (D.C.Cir. 2015). See also *United States v. Wray*, 2016 U.S. Dist LEXIS 79618 (D. Me. 2016), where the District Court took a different view of knock and announce involving arrest warrants, following the *Hudson v. Michigan* rationale and admitting the evidence.
66. *Id*. at 30.
67. See *Michigan v. Summers,* 452 U.S. 692 (1981).
68. See *Ybarra v. Illinois*, 444 U.S. 85 (1979).
69. See *Illinois v. McArthur,* 531 U.S. 326 (2001).
70. See *Muehler v. Mena*, 544 U.S. 93 (2005).
71. See *Maryland v. Buie*, 494 U/S/325, 110 S.Ct. 1093, 108 L.Ed.2d 276, 1990 U.S. LEXIS 1176 (1990). See also *State v. Minson*, 173 N.H. 501, 243 A.3d 24, 2020 N.H. LEXIS 141 (2020). Court approved sweep of motel room following warrant-based arrest outside open door of motel room.
72. N.D.R. Crim. P. Rule 41(d).
73. Fed Rules Crim Proc R 41 (f)(1)(D).
74. Ohio Crim. R. 41 41(D).
75. Adapted from a Warrant Packet from the Supreme Court of New Mexico. See www.supremecourt.nm.org/cgi-bin/download.cgi/supctforms/dc-criminal.
76. Fed Rules Crim Proc R 41 (e)(2)(A)(1). Federal search warrants are valid for fourteen days from date of issuance.
77. See Cal Pen Code § 1534 (2020). Search warrants in California are valid for ten days following issuance. See also Ohio Crim. R. 41(C)(2). Ohio search warrants are must be served within three days, and tracking devices must be installed within ten days from issuance of the warrant.

78. *People v. Randle*, 2020 Ill. App. Unpub. LEXIS 1592 (2020).
79. Continuing enterprises may keep probable cause from becoming stale. See, for example, *United States v. Greany,* 929 F.2d 523, 525 (9th Cir. 1991), where two-year-old information relating to an ongoing marijuana operation was not deemed stale, and *Rivera v. United States,* 928 F.2d 592, 602 (2d Cir. 1991), where that court noted that in drug-trafficking cases involving repeated conduct, information may be months old and not stale.
80. *State v. Fettig*, 2019 Minn. App. Unpub.LEXIS 577 (2019).
81. See *United States v. Swain*, 2021 U.S. Dist. LEXIS 46196 (N.D. Ohio 2021).
82. *Ibid*.
83. *United States v. Webster*, 734 F.2d 1048, 1056 (5th Cir. 1984).
84. See *Abel v. United States*, 362 U.S. 217 (1960), where the Court held that Abel had abandoned papers by placing them in a trash can in his motel room, which he later vacated, never to return.
85. A case could be made that Greenwood had an expectation of privacy under California law and case law. In *People v. Krivda*, 5 Cal.3d 357, 486 P. 2d 1262 (1971), the California Supreme Court previously held that warrantless trash searches violate the Fourth Amendment and the California constitution. Following *Krivda,* the California constitution was altered to bar the suppression of illegally seized evidence, but *Krivda* continued to allow suppression under the United States Constitution. Thus, one could have reasonably possessed an expectation of privacy in California trash.
86. 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, 1979 U.S. LEXIS 19 (1970).
87. *Id*. at 52, 429. It should be noted that the vehicle exception does not extend further than the vehicle itself and does not permit entry onto private property to search a motor vehicle parked on a private driveway or within the curtilage of a home. See *Collins v. Virginia*, 584 U.S. __, 138 S.Ct. 1663, 201 L.Ed.2d 9, 2018 U.S. LEXIS 3210 (2018).

Searches and Seizures: Houses, Places, Persons, and Vehicles

7

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Learning Objectives

1. Evaluate and describe why a person has the greatest expectation of privacy under the Fourth Amendment within that person's own home.
2. Be able to explain why police officers generally need a warrant to make an arrest within a suspect's home.
3. Evaluate and articulate the rationale that holds a thermal image scan for escaping heat from the outside of a home constitutes a search when having a drug dog sniff near luggage to detect escaping odors is not considered a search.
4. Justify why a search incident to a lawful arrest does not require an additional or separate showing of probable cause to search.
5. Be able to explain how the plain view doctrine operates and give a concrete example.
6. Understand the concept of consent searches and be able to explain how the totality of the circumstances test is used to determine whether a person has given free and voluntary consent.
7. Articulate the rationale of why most motor vehicles can be searched with probable cause in the absence of a warrant.
8. Explain how the nature of the object of a motor vehicle search informs the officer concerning the scope of the constitutionally permissible search and give an example of an object that limits where an officer might lawfully search.
9. List the three reasons suggested by the Supreme Court for allowing warrantless inventory searches of motor vehicles that have been lawfully seized.
10. Explain why no Fourth Amendment expectation of privacy exists in a forfeited vehicle.

Chapter Outline

KEY TERMS

1. Consent search
2. Infrared scan
3. Inventory search: motor vehicle
4. Inventory search: possessions
5. Plain feel search
6. Plain view seizure
7. Scope of search: home
8. Scope of search: motor vehicle
9. Search for arrestee
10. Search incident to arrest
11. Thermal imaging
12. Vehicle forfeiture search
13. Warrant exception for vehicles
14. Warrant requirement for house

1. Searches of Houses

In 1604, an English court made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." *Semayne's Case*, 5 Co.Rep. 91a, 91b, 195, 77 Eng.Rep. 194, 195 (K.B.).[1]

In his *Commentaries on the Laws of England*, William Blackstone noted that

> the law of England has so particular and tender a regard to the immunity of a man's house that it stiles it his castle, and will never suffer it to be violated with impunity, agreeing herein with the sentiments of [ancient] Rome. . . . For this reason no doors can in general be broken open to execute any civil process, though, in criminal causes, the public safety supersedes the private.
>
> 4 Commentaries on the Laws of England 223 (1765–1769)[2]

Since the Framers of the Fourth Amendment understood much of the legal philosophy of the English and shared many abusive experiences recent to them, one of the reasons for adopting the Fourth Amendment involved the security of one's home. Consistent with the British view, it would be reasonable to expect that the place where one resides should have a great level of protection from governmental intrusion. A strong general rule has developed through case law that a private home shall not be entered by a governmental agent unless he or she possesses a search or arrest warrant that allows the intrusion.[3] Subject to a few limited exceptions, the question of whether a warrantless search of a home is reasonable and, therefore, constitutional must be answered with a strong "no." When the police officer displays a court-approved search warrant, the occupier is on notice that proper procedure has been followed and that the officer possesses carefully delineated authority to search in a particular place while looking for particularly described objects. A warrant is a court order directed to an officer or officers to perform a search for particular objects and to seize them if they are discovered. The

home occupier has no right to resist the lawful probing of a police officer or officers when they operate pursuant to a search warrant.

When the Fourth Amendment has been interpreted to allow for a departure from the warrant requirement, there has usually been an exigency making an intrusion into a dwelling imperative to the health or safety of the police and/or community or other emergency. For example, in *Warden v. Hayden*, 387 U.S. 294 (1967), police were permitted to follow a felony suspect into a private dwelling without a warrant under the theory of "hot pursuit"; in *Michigan v. Tyler*, 436 U.S. 499 (1978), the Court approved a building search by law enforcement officials because the structure was burning and there was a dire need for official action; and in *Maryland v. Buie*, 494 U.S. 325 (1990), police, who had lawfully entered the dwelling, were permitted to warrantlessly sweep the house to make sure there were no other suspects present who might harm them. Similarly, in a case where police reasonably suspected that apartment occupants were destroying drug evidence, a warrantless entry was approved by the Supreme Court.

In *Kentucky v. King*, 563 U.S. 452 (2011), one officer communicated to others that, following a drug sale, the selling suspect entered into an apartment complex, but officers were not sure which unit the suspect entered. When responding officers, who were in a hallway, heard an apartment door slam and smelled burning marijuana from outside one apartment, they announced their presence, but did not indicate that they would forcibly enter. When no response was had, and after officers heard people moving about inside the apartment, they suspected that evidence was being destroyed, and officers forcibly entered.[4] Officers found drug evidence in plain view and other evidence during a sweep of the property. The emergency of probable destruction of evidence allowed the warrantless entry by police as well as the sweep, which was consistent with *Maryland v. Buie*. However, when no clear emergency has been presented, the approach must be different. In *Florida v. Jardines*,[5] officers acted on an unverified and unproven tip that a person was growing marijuana within his home by taking a drug dog onto the front porch. Officers had high hopes that the dog would alert to marijuana, but such police activity violated the Fourth Amendment by transgressing the curtilage of the home. The Supreme Court noted that, although society allows a person to approach a home as a general proposition, "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*."[6] The Court found that search was illegal and the evidence should have been excluded.

In private homes, police have been permitted to conduct warrantless welfare checks inside residences when alerted to the need under a "community caretaking" theory that is unrelated to criminal law enforcement. Under this theory, without a search warrant, police may be called to secure firearms located in seized vehicles.[7] When there is no need to intrude into a home under the welfare check aspect of "community caretaking," absent an emergency, police may not warrantlessly enter a private home. In a 2021 Supreme Court case, *Caniglia v. Strom*,[8] plaintiff Caniglia and his wife had a heated argument, and when she could not reach him at their home the next day, she requested a welfare check to see if Caniglia was all right. Police encountered him, within the curtilage, on the porch of his residence, but wanted him to be psychologically evaluated. He agreed, provided they would not seize his firearms inside his home. After Caniglia was removed, police

warrantlessly, and without his consent, entered his home and confiscated his firearms. Writing for the Court, Justice Thomas indicated emphasized the historical difference between privacy in a vehicle and the more substantial privacy interests in a home and held that, on the facts of this case, the police entry without a warrant or emergency constituted a violation of the Fourth Amendment.[9] Police entry into homes to check for the well-being of a resident are still permitted when based on a reasonable complaint that someone may need medical or other assistance but not when the person is alive and appears well when outside the home and within the curtilage.

The Supreme Court placed a new limitation on the doctrine of hot pursuit that had historically allowed officers who had a felony suspect in sight to follow suspects and to enter homes without a warrant to make arrests. In *Lange v. California*,[10] the Court held that that officers, under the hot pursuit doctrine, may not pursue a suspected misdemeanor law violator into his home without a warrant. The defendant Lange attracted the attention of a police officer as he drove past the officer by playing loud music and honking his car's horn. Lange ignored the officer's signals and did not stop, but continued from the street into the garage of his house. The officer entered the garage and had the defendant perform sobriety tests. Upon his conviction for intoxicated driving, he appealed his conviction contending that the officer violated his expectation of privacy by warrantlessly entering his home for a misdemeanor violation. The Court, in rejecting the argument that a suspect's flight always allows a warrantless home entry, held that the pursuit of a fleeing misdemeanor suspect does not always justify a warrantless entry into the subject's home. Justice Kagan explained

> The flight of a suspected misdemeanant does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so—even though the misdemeanant fled.[11]

2. Warrant to Search and Arrest Inside the Home

Demonstrative of the concept that police officers and other law enforcement personnel may not enter a private residence without an arrest or search warrant is the case of *Payton v. New York*, 445 U.S. 573 (1980) (see Case 7.1). Police officers developed probable cause that Payton had committed murder of a gas station attendant. Several officers went to Payton's apartment for the purpose of arresting him, but they failed to obtain either a search warrant or an arrest warrant, despite the fact that there was probable cause for his arrest. When neither Payton nor anyone else responded to the officers' repeated knocks on the door, the officers summoned assistance and brought down the door with a crowbar. When it became obvious that no one was home, police seized a .30-caliber shell casing that was later linked to the murder and was admitted against Payton at his homicide trial.

In rejecting Payton's motion to suppress the shell casing taken from his apartment, the trial judge cited two theories justifying the warrantless intrusion. The trial court held that exigent circumstances (an emergency) excused the officers' failure to announce their

presence prior to entry and that New York law permitted the warrantless probable cause entry into the apartment. Exigent circumstances were not argued as justification for the warrantless entry into Payton's residence. New York appellate courts upheld the admission of evidence, but the Supreme Court of the United States reversed Payton's conviction.

The *Payton* Court noted, "Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment."[12] According to the Court, the language of the Fourth Amendment applies equally to seizures of persons as to seizures of property, and a basic principle of the Fourth Amendment dictates that searches and seizures inside a home without a warrant are presumptively unreasonable. The purpose of the decision was not to protect the person of the suspect but to protect his home from entry in the absence of judicial finding of probable cause. Since there was an absence of proof of exigent circumstances for the arrest of Payton and because warrantless arrests inside the home are presumptively illegal, the Court reversed Payton's conviction.

Payton stands for the age-old principle that a person's home is his/her castle and should not have its walls breached by the government in the absence of some clear emergency or other recognized exception unless the government agent possesses a warrant to arrest or to search the private premises.

Case 7.1 LEADING CASE BRIEF: ARREST WITHIN THE ARRESTEE'S HOME GENERALLY REQUIRES A WARRANT

Payton v. New York
Supreme Court of the United States
445 U.S. 573 (1980).

CASE FACTS:

New York detectives gathered evidence sufficient to establish probable cause to believe that Theodore Payton had murdered the manager of a gas station several days earlier. Without a warrant for search or arrest, six officers went to the apartment rented by Mr. Payton. Although the sound of music could be heard playing from inside the apartment, no one answered the door. Eventually officers broke into the apartment but found no one home. In plain view, the officers observed a .30-caliber shell casing, which they seized and which the trial court later admitted into evidence at Payton's murder trial. The trial judge believed that the warrantless and forcible entry was authorized by New York law and that the shell had been lawfully seized. The trial resulted in a verdict of guilty. The Appellate Division and the New York Court of Appeals affirmed the admission of evidence and the verdict. Neither court relied on exigent, or emergency, circumstances for its decision.

Payton applied for a writ of certiorari from the Supreme Court of the United States and offered the argument that under the Fourth Amendment, a warrant to enter a home should be required in order to arrest or seize a person, unless there are exigent circumstances present. The Supreme Court of the United States granted certiorari to hear the case.

LEGAL ISSUE:

Must law enforcement agents possess either a search or an arrest warrant in order to make a lawful arrest inside a suspect's home or to search a suspect's home absent exigent circumstances?

THE COURT'S RULING:

The Fourth Amendment requires that police possess probable cause and obtain a warrant to arrest a person within his or her own home, unless a clear and immediate emergency exists.

ESSENCE OF THE COURT'S RATIONALE:

* * *

It is familiar history that indiscriminate searches and seizures conducted under the authority of "general warrants" were the immediate evils that motivated the framing and adoption of the Fourth Amendment. Indeed, as originally proposed in the House of Representatives, the draft contained only one clause, which directly imposed limitations on the issuance of warrants, but imposed no express restrictions on warrantless searches or seizures. As it was ultimately adopted, however, the Amendment contained two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause. The Amendment 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.

It is thus perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant. Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment.

The simple language of the Amendment applies equally to seizures of persons and to seizures of property. Our analysis in this case may therefore properly commence with rules that have been well established in Fourth Amendment litigation involving tangible items. As the Court reiterated just a few years ago, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313. And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort.

It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable.

* * *

The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a

zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that,

> [a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.
>
> *Silverman v. United States*, 365 U.S. 505, 511.

In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

* * *

[W]e note the State's suggestion that only a search warrant based on probable cause to believe the suspect is at home at a given time can adequately protect the privacy interests at stake, and since such a warrant requirement is manifestly impractical, there need be no warrant of any kind. We find this ingenious argument unpersuasive. It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

Because no arrest warrant was obtained in either of these cases, the judgments must be reversed and the cases remanded to the New York Court of Appeals for further proceedings not inconsistent with this opinion.

It is so ordered.

CASE IMPORTANCE:

A person may expect the greatest level of privacy in his or her private home that, absent rare exceptions, legally cannot be breached by police officers unless a judicial official has issued a warrant for an arrest or a search.

The Supreme Court reaffirmed the rationale of *Payton* in *Kirk v. Louisiana*, 536 U.S. 635 (2002), where police arrested the defendant without a warrant after entering his place of residence. After law enforcement officials observed drug purchases made out of Kirk's apartment and arrested a customer, they knocked on the door of the apartment, entered, and arrested defendant Kirk. A search incident to arrest revealed cocaine and money. Citing *Payton v. New York*[13] and its well-settled theory that, absent exigent or emergency circumstances, police may not enter a private dwelling without an arrest or search warrant, the Supreme Court reversed Kirk's conviction of possession of cocaine

with intent to distribute. However, where search probable cause coupled with the presence of exigent circumstances existed, the Supreme Court approved of a warrantless, emergency entrance into an apartment when police believed that evidence was being destroyed. In *Kentucky v. King*, 563 U.S. 452 (2011), an officer testified that noises from inside an apartment suspected of harboring drug activity led officers to believe that drug evidence was being destroyed. The Supreme Court held that it was proper for police to warrantlessly enter the apartment, where they discovered drug-related crimes, under exigent circumstances.

Even though a man's home may be his castle, neither the home nor all the surrounding objects are beyond the capacity of being searched under proper circumstances. Where police officers possessed a warrant to search a particular home, the warrant's authority may extend to include vehicles parked on the premises (within the curtilage of the structure) and, perhaps, to those parked nearby, if the objects of the search warrant could be hidden within the vehicle or vehicles. Since the goals of a search might be frustrated if vehicles were not searched and because vehicles can be used as storage areas, a vehicle on searched premises should be treated and searched just like other personal effects found on the searched premises that could contain the contraband or evidence. In a Michigan case, the officers searched a vehicle located on the premises and partially on the driveway as part of their search of the home. When the searching officers found drugs within the vehicle, the defendant moved to suppress the drugs from trial, alleging an unreasonable search and seizure under the Fourth Amendment. In approving a vehicle search, at least where the police had a search warrant for the home and found the vehicle on the searched premises, a Michigan court of appeals noted, "Although Michigan has not ruled on the precise issue raised by defendant, nearly all jurisdictions that have decided the question have held a search warrant for 'premises' authorizes the search of all automobiles found on the premises."[14] Part of the rationale for allowing a search anywhere on the premises where the object physically could have been hidden has as its basis some language from the Supreme Court in *United States v. Ross*.[15] In permitting the search of a motor vehicle for which probable cause existed, the *Ross* Court noted:

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. . . . A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search.[16]

By analogy, if the object could be hidden within the car on the premises, the car should be treated just like a medicine chest or a closet.

While police and other law enforcement agents may not enter private premises in the absence of a warrant to arrest or to search, mere presence on private apartment property will not give an individual an expectation of privacy while inside the property. In *Minnesota v. Carter*, 525 U.S. 83 (1998), pursuant to a citizen tip, an officer peered through an apartment window and observed Mr. Carter and some associates dividing cocaine into separate containers. The officer conducted a warrantless search by looking

through a street-level window, which contained a gap in the curtains. Upon observing sufficient information for probable cause to search the apartment, the officer procured a warrant and searched the apartment. The Supreme Court held that Carter had no expectation of privacy within the apartment because he did not live there; he had not stayed there overnight; and he was only using the apartment for a few hours for the purposes of drug repackaging into smaller units. Carter had paid for the short-term use of the apartment by giving the occupier/lessee some cocaine. Had the officers immediately entered the apartment without a warrant, at first blush, it would seem like Carter could make an argument similar to that made by Payton and with it successfully have the cocaine evidence suppressed. The difference here was that Carter had an insufficient connection to the apartment to claim a right of privacy under the Fourth Amendment, whereas Payton lived in his apartment and possessed a traditional expectation of privacy, which the Court recognized.

If Carter could have been lawfully arrested inside an apartment without a warrant because of insufficient expectation of privacy, some additional connection to real estate should arguably create an expectation of privacy close to that observed in *Payton v. New York*. The case of *Minnesota v. Olson*, 495 U.S. 91 (1990), provides a suitable benchmark for the minimum connection to property sufficient to produce an expectation of privacy under the Fourth Amendment. In *Olson*, police developed probable cause for Olson's arrest and discovered that he was believed to be in a particular home where he had been staying. Without permission or a warrant, but with probable cause for arrest, police entered the home and arrested Olson. During a subsequent interrogation, Olson made an inculpatory statement, which he argued should have been suppressed from his trial.

Prior to trial, the trial court refused to suppress Olson's statement on the ground that he possessed no expectation of privacy at another person's home. The Minnesota Supreme Court reversed[17] the murder and robbery convictions because it believed that Olson had an expectation of privacy as an overnight guest at the home, even though he was never left alone in the home or given a key. The Supreme Court of the United States affirmed the Minnesota court because it believed that Olson had a sufficient connection to the property to have a Fourth Amendment expectation of privacy, and, secondarily, there existed no emergency exception to allow the warrantless arrest within the home. According to the Court, Olson's arrest was illegal, and the evidence discovered incident to arrest should have been excluded from his criminal trial.

3. Modern Technology and Warrantless Home Searches: Thermal Imaging Searches

While physical intrusions into the home have historically been the focus of Fourth Amendment litigation, new methods to search humans, buildings, homes, and cars have recently been developed. In *Kyllo v. United States*, 533 U.S. 27 (2001) (Case 7.2), federal agents had become suspicious that marijuana was being cultivated with the use of high-intensity lamps in the residence of Mr. Kyllo. In order to determine whether the high-intensity lamps were actually being used, federal agents determined to conduct an

infrared scan, creating a thermal image of the outside of the home that could measure heat emanating from the interior. The scan of Kyllo's home took only a brief time to complete and was performed from across the street from the front of the house. The infrared scan showed that the roof over the garage and a side wall of the home were relatively hot compared with the rest of the home and substantially warmer than neighboring homes subjected to thermal imaging. The information from the scan along with other evidence produced probable cause for a search warrant. Evidence obtained from the search warrant was used against Kyllo at his trial for growing marijuana. The court of appeals affirmed the conviction, but the Supreme Court of the United States reversed.

At first blush, it would seem that there was no search of Kyllo's home because the agents did not enter the home in any form or fashion. In a case involving a similar principle, a luggage sniff by a drug-locating dog had been determined not to be a search of the interior of the luggage, since the dog reacted only to odors outside the luggage.[18] On those grounds, the government could certainly argue that there was no search of the interior of the home and that the only evidence collected from the infrared scan was heat that had escaped from within the home, which the agents collected and measured on the outside with thermal imaging equipment. Kyllo contended that the process constituted a search because details of his private life within the home became observable to the government due to the use of advanced technology to obtain evidence previously unknowable without a physical intrusion.

Justice Scalia, writing for the *Kyllo* Court, in reversing the lower federal courts, noted:

> Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.
>
> Since we hold the Thermovision imaging to have been an unlawful search, it will remain for the District Court to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause—and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced.[19]

Case 7.2 LEADING CASE BRIEF: THERMAL IMAGING SEARCH OF HOME'S HEAT SIGNATURE REQUIRES WARRANT

Kyllo v. United States
Supreme Court of the United States
533 U.S. 27 (2001).

CASE FACTS:

An agent of the Department of the Interior of the United States developed suspicions that one Danny Kyllo might have been growing and might continue to grow marijuana in one apartment of a triplex in Florence, Oregon. Indoor cultivation of marijuana typically requires high-intensity lamps that substitute for sunlight and which create a warmer atmosphere than is usually kept in private homes. In an effort to measure the

amount of excess heat that might be escaping from Kyllo's place of residence, the agent from the Department of the Interior, associated with another law enforcement agent, procured an Agema Thermovision 210 thermal imaging scanner to scan Kyllo's home. The image produced by the scanner portrayed shades of grey that represented relative temperatures of the residence. White portions of the image indicated warm surfaces, while black portions indicated cold surfaces. The agents performed the scan from across the street from Kyllo's home from an automobile and did not invade the home in any way. The machine read escaping heat and did not intrude into the home. The scan revealed that Kyllo's garage roof and the side wall were relatively hot compared to the rest of his home and substantially warmer than the signature offered by neighboring residential units.

The scan was done without a warrant and not under circumstances indicating an emergency but produced sufficient evidence to permit a federal judicial official to issue a warrant for a traditional search of Kyllo's home. The search pursuant to the warrant disclosed more than 100 marijuana plants growing inside the home.

Kyllo tendered a conditional guilty plea, reserving his right to appeal the search and seizure issue. The Ninth Circuit Court of Appeal remanded the case for a determination concerning the intrusiveness of the imaging machinery. The District Court found that the Agema 210 was not a device that intruded into the inside of a home, it did not show people or activity within the home, and it did not reveal intimate human conduct. The Ninth Circuit subsequently found that there had been no violation of the Fourth Amendment in the original scan of the home and that the warrant had been properly issued. The Court upheld the conviction.

The Supreme Court granted certiorari to Kyllo's petition for review of the decision of the Ninth Circuit Court of Appeal.

LEGAL ISSUE:

Where police make a warrantless scan of the exterior of a home using non-intrusive imaging devices that read only heat emanated from a residential structure, does such practice constitute a search of a home for which a warrant is traditionally required under the Fourth Amendment?

THE COURT'S RULING:

* * *

II

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. See *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *Payton v. New York*, 445 U.S. 573, 586 (1980).

* * *

In assessing when a search is not a search, we have applied somewhat in reverse the principle first enunciated in *Katz v. United States*, 389 U.S. 347 (1967). Katz involved eavesdropping by means of an electronic listening device placed on the outside of a telephone booth—a location not within the catalog ("persons, houses, papers, and effects") that the Fourth Amendment protects against unreasonable searches. We held that the Fourth Amendment nonetheless protected Katz from the warrantless eavesdropping because he "justifiably relied" upon the privacy of the telephone booth. *Id*. at 353. As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. See *id*. at 361. We have subsequently applied this principle to hold that a Fourth Amendment search does not occur—even when the explicitly protected location of a house is concerned—unless "the individual manifested a subjective expectation of privacy in the object of the challenged search," and "society [is] willing to recognize that expectation as reasonable." [Citation omitted.]

[The government argued that the conviction should be upheld, since the imaging only detected heat that radiated from the residence and was not an intrusive search of the interior of the home. The Court rejected the mechanical analysis, since more sophisticated equipment in the near future may be capable of "looking" inside the home without any physical intrusion. The Court rejected the government contention that the imaging of the home met constitutional standards, since it did not detect private activities occurring in private areas of the home. Additionally, were the Court to enter the labyrinth of determining which activities within the home deserve "private" protection, the door would have been opened to endless litigation.]

We have said that the Fourth Amendment draws "a firm line at the entrance to the house," *Payton*, 445 U.S. at 590. That line, we think, must be not only firm, but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.

The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens. *Carroll v. United States*, 267 U.S. 132, 149 (1925).

Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.

Since we hold the Thermovision imaging to have been an unlawful search, it will remain for the District Court to determine whether, without the evidence it provided, the search warrant

issued in this case was supported by probable cause—and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced.

* * *

The judgment of the Court of Appeals is reversed; the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

ESSENCE OF THE COURT'S RATIONALE:

Although the thermal imaging device only allowed police to view heat that had escaped from the home, the Court believed that the technology had the ability to observe details of life inside the home for which a warrant was normally required.

CASE IMPORTANCE:

The Court recognized that a distinction could be drawn between a dog sniff of luggage that only searched the air outside the luggage and an image assembled by an imaging device that could reveal details from inside a private home; the former was not a search, and the latter qualified as a Fourth Amendment search for which a warrant is generally required.

Even with newer technology that would allow the government access to information emanating from the home, the Supreme Court of the United States has seen fit to return to the philosophy and jurisprudence of the early Fourth Amendment. The Court, by giving protection to those individuals within homes and buildings who possess an expectation of privacy that society is prepared to recognize, gives effect to the original intent of the Framers of the Fourth Amendment. At that time, no one would have envisioned that a law enforcement official would be able to discern the interior of the house without looking in a window or walking through the entrance. Future developments involving emerging technologies that use sound waves or backscatter x-ray imaging to penetrate a home, personal property, or non-consenting person presumably will run afoul of the *Kyllo* case and similar reasoning.

4. Search Incident to Arrest

It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. This exception has its origins in *Weeks v. United States*,[20] a 1914 decision in which the Supreme Court acknowledged the federal government's right, which had always been recognized under both English and American law, to search the arrested person to discover and seize the fruits or evidences of crime. The arrest consists of the law enforcement officer taking physical control over the person and determining where, when, and how a person moves from or stays in a

particular location. As noted, when an arrest has been made, courts have universally considered it a permissible practice for the arresting officer to search the person of the arrestee. In addition, a search may be made of the area within the immediate dominion and control of the arrestee, sometimes referred as the lunge area. The search incident to arrest has been determined as reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is subordinate to legitimate and paramount governmental concerns. Courts have also considered it entirely reasonable for the arresting officer to seize any evidence of criminality on the arrestee's person and effects to prevent its concealment and/or destruction.[21] There are two historical rationales[22] for allowing the search incident to arrest exception to the search warrant requirement: the need to disarm the suspect in order to take him into custody and the necessity of preserving evidence for later use at trial.

A search incident to a lawful arrest would, by its definition, appear to require a valid arrest as a foundation for conducting a search following an arrest. In *Knowles v. Iowa*, 525 U.S. 113 (1998), a police officer conducted a search of a motor vehicle's interior with probable cause to arrest the driver but without making the actual arrest. The Supreme Court held that the search was invalid under the Fourth Amendment since there was no other rationale to justify the vehicle search other than a search incident to an arrest, and there had never been a valid arrest on which to base the subsequent vehicle search.[23] The clear lesson from *Knowles* is that an actual lawful arrest is a necessary step prior to conducting a search incident to an arrest. In a Washington case,[24] police officers were trying to arrest individuals who had outstanding warrants. One officer was aware that there had been a warrant for a subject individual and had preliminarily identified him and wanted to approach. In this case, the officer made no effort to verify whether the warrant was still valid or whether the subject had in some way taken care of the legal problem. When the subject attempted to leave the location, several other officers tackled him and subsequently searched him. Police discovered a handgun on his person. However, there was no indication that the officers had probable cause to arrest; under the circumstances, they only had the ability under *Terry v. Ohio* to stop and investigate. The defendant successfully contended that because the police failed to verify the existence of a warrant and instead acted on stale information that a warrant existed, they lacked probable cause for an arrest. The search incident to the "arrest" could not be sustained because he had not been validly arrested, and the reviewing court reversed his firearm conviction.

A warrantless search of a suspected drunk driver's blood may be conducted as incident to an arrest in a situation where the arrestee clearly needed medical attention due to alcohol consumption, even when the arrestee is unconscious or semi-conscious. In *Mitchell v. Wisconsin*, 588 U.S. ___ (2019), a plurality of the Court approved of a warrantless blood alcohol test because of a compelling need for testing drunk driving arrestees since the particular suspect was medically unable to have an opportunity to participate in a breath test. The Court noted, "[T]he exigent-circumstances rule almost always permits a blood test without a warrant. When a breath test is impossible, enforcement of the drunk-driving laws depends upon the administration of a blood test."[25] When a driver is unconscious, the general rule is that no warrant in needed to test blood for alcoholic content.

5. Search Incident to Arrest: No Warrant Requirement

A search incident to a lawful arrest has been recognized as an exception to the warrant requirement since 1914 and by actual practice prior to that time.[26] In *New York v. Belton*, 453 U.S. 454 (1981), the Supreme Court held that police may warrantlessly search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of a recent occupant's lawful arrest. The vehicle of a suspected intoxicated driver can be searched incident to arrest without a warrant for evidence related to the offense that supports the reason for the arrest. In a federal prosecution[27] that started out as a local matter, police made an arrest for intoxicated driving. The warrantless search incident to arrest revealed more beer, tequila, and a loaded .45 caliber handgun that the defendant was not able to possess due to prior felonies. In a federal prosecution for possessing a firearm improperly, the court noted that the search incident to arrest is an exception to the general requirement that a police officer must have a warrant supported by probable cause prior to making a search of a person.[28] No warrant is generally required to search a person and his or her immediate effects following either a warrantless or a warrant-based arrest.

6. General Scope of the Search Incident to Arrest

Whereas the *Weeks* Court approved of warrantless searches of the arrestee's person and effects, the exact extent of the exception to the warrant requirement was not discussed. In later court cases, the Court expanded the scope of the search incident to arrest in *Marron v. United States*, 275 U.S. 192 (1927). There, the Court enlarged the permitted scope of a search incident to an arrest to include personal effects, such as accounting ledgers, which were not described in the search warrant but seized on the premises as incident to the arrest. The *Marron* Court asserted that federal police had the authority to search incident to arrest that included all parts of the premises used for the unlawful purpose. The Court subsequently approved of an expanded warrantless search incident to arrest in *United States v. Rabinowitz*, 339 U.S. 56 (1950), where the police were permitted to search the entire premises that the suspect occupied at the time of the arrest. The police obtained a warrant for Rabinowitz's arrest, but they did not procure a search warrant. When they arrested him in his place of business, they searched not only his person but also the desk, safe, and file cabinets; they also seized 573 forged postage stamps as incident to arrest. The Court approved the search of the business premises without a warrant as incident to the warrant-based arrest. The rule derived from *Rabinowitz* allowed the complete warrantless search of business premises based on an arrest and could easily be applied to private homes. The almost limitless scope of the search allowed under *Rabinowitz* was severely limited by later cases.[29]

While *Rabinowitz* and *Marron* authorized an extensive search following arrest, the virtually unlimited search permitted under those two cases was subsequently restricted where searches of real property following an arrest are involved. In *Chimel v. California*,

395 U.S. 752 (1969), the Court reconsidered the extensive searches approved in *Rabinowitz* and *Marron* and effectively overruled both cases. According to *Chimel*, the scope of a search incident to an arrest was limited to the area over which the arrestee possessed dominion and control from which a weapon might be obtained. Such area was not reduced even if the arrestee was in handcuffs.

In *Chimel*, police went to the defendant's home to arrest him pursuant to a warrant, but they had to wait for defendant to arrive home from work. Mrs. Chimel allowed the officers to enter the home and wait for her husband. When Chimel arrived, police arrested him and conducted a warrantless search of his home. Accompanied by Chimel's wife, the officers looked through the entire three-bedroom house, including the attic, the garage, and a small workshop. The officers directed her to open drawers and to physically move contents of the drawers from side to side so that they might view any items that would have come from the burglary of which Mr. Chimel had been accused. The search revealed primarily coins but also several medals, tokens, and a few other objects. The entire search took less than an hour. The *Chimel* Court rejected the extensive scope of the search and held that the search conducted by the officers was unreasonable under the Fourth Amendment. To meet the requirements of the Fourth Amendment, the Court redefined the extent of a search incident to an arrest by limiting it to the area under the defendant's immediate dominion and control. The portions of the home that remained beyond Chimel's immediate control should not have been searched as incident to the arrest.

Chimel continued to recognize the principle that an arrest that occurs within a home allows a limited search of portions of the home that would not be permissible if the individual had been arrested on the public street. Under *Chimel*, an object indicative of criminality that comes into view during a search incident to arrest where the search has been appropriately limited in scope may be seized without a warrant. In the absence of any additional suspicion following an in-home arrest, police officers are permitted a limited search beyond the person of the arrestee. This ancillary search includes looking into closets, cabinets, and other spaces immediately adjoining the place the arrestee occupies following the arrest. This additional search is justified, since a weapon could be stored nearby, a confederate might exit a closet and attempt to frustrate arrest, or some other hidden danger could present harm to the officers or others within the home. This area around the arrestee has often been known as the "lunge area," the area from which an arrestee might abruptly grab a weapon or destroy evidence. The search should be limited to the area into which an arrestee might reach. As a practical matter, the lunge area encompasses the area within the arrestee's immediate dominion and control, but it generally would not include a basement,[30] an attic, or a separate room of the home inaccessible by the arrestee. According to the general rule, where police are lawfully searching incident to arrest, an object that comes into view which is indicative of criminality may be seized without a warrant.

Demonstrative of the scope of a search incident to arrest in a public intoxication case,[31] Texas officers encountered a man who was a passenger in an automobile that had been stopped due to reckless driving. When the passenger alighted from the car, it was clear that he was intoxicated; he was unsteady on his feet and could have been a danger to himself or others. Following an arrest for public intoxication, a search of

the subject's person revealed a small bag wrapped in tape, which the deputy believed contained narcotics. After placing the arrestee in a patrol car, it was discovered that there existed an arrest warrant for domestic violence. At that point, the bag was opened and revealed what appeared to be cocaine powder. The appeals court upheld the search of the subject's person and of the bag based on the permissible scope of a search incident to a lawful arrest. The reviewing court noted that, "[w]e first examine whether officers lawfully arrested a defendant for public intoxication rendering the search incident to arrest legal."[32] Under the Fourth Amendment, the scope of the search of an arrestee incident to a lawful arrest is limited to the area under the arrestee's immediate dominion and control. The scope of a search incident to arrest is not dependent upon probable cause to search but rests upon the validity of the arrest and the reasonable manner in which the search is conducted.

A jail booking search following an arrest allows a strip search of arrestees who are being prepared to enter a secure jail facility. In *Florence v. Board of Chosen Freeholders*,[33] the Supreme Court approved a complete strip search and visual inspection of arrestees to strike a balance between inmate privacy and the needs of a secure institution. The Court noted that the maintenance of safety and order at detention facilities depends upon the expertise of correctional officers, and they are allowed substantial discretion to devise reasonable solutions. Reasonable regulations, even if they impact an inmate's constitutional rights, may be upheld if they are closely related to legitimate penological interests. On a lesser intrusive level, as part of a routine booking for a serious offense, the Supreme Court has determined that obtaining a sample of an arrestee's DNA did not offend the Fourth Amendment expectation of privacy.[34] Maryland has a law that requires police to obtain a DNA sample from when a person has been arrested for an attempt at or successful commission of a crime of violence or for burglary or an attempt. According to the Court, using a mouth swab to obtain an arrestee's DNA was reasonable because it served legitimate government interests by supporting a safe and accurate way to identify persons taken into custody. The practice was much like fingerprinting and photographing an arrestee, which had long been determined reasonable.

A search incident to a valid arrest has often been called a full search of the person; it is not limited to a frisk of the suspect's outer clothing and removal of such weapons as the arresting officer may reasonably believe that the suspect has in his possession. The absence of probable fruits or further evidence of the particular crime for which the arrest is made does not narrow the permissible scope of the search. The officer not only may frisk the individual but also is entitled to conduct a complete search of the person, a complete search of clothing, and a complete search of the effects with the arrestee. Naturally, the search must be reasonable in the manner in which the officer conducts the quest. Clearly, an individual cannot be forced to completely disrobe on a public street corner to facilitate a clothing search without violating the Fourth Amendment's requirement that searches be reasonable. Similarly, a body cavity or other extensive personal search must have additional justification beyond the usual probable cause to arrest.

Some limitations have emerged on the scope of searches incident to arrest. When an arrestee has been taken into custody for an offense in which no evidence is likely to be found in his automobile, under circumstances where the arrestee has been immobilized in a police vehicle, a search of the interior of the vehicle may not be founded on the

search incident to arrest theory. In *Arizona v. Gant*,[35] the individual was arrested for driving on a suspended license, and police warrantlessly searched the interior of the automobile, finding drug possession evidence. The Supreme Court found that the vehicle search was unreasonable and could not be based on the theory of a search incident to arrest when there was no reason to believe that the arrestee could gain access to the car or that the vehicle contained evidence related to the offense on which the arrest was based. However, if there is reason to believe that evidence related to the reason for the arrest may be found within the vehicle under circumstances where the arrestee might gain access, the search incident to arrest theory may allow the search. A cell phone possessed by an arrestee cannot be searched for content as incident to the arrest absent probable cause and a search warrant.[36] Similarly, a warrantless blood test following an arrest for driving under the influence cannot be based on the search incident theory and requires a warrant or some other exception, but a breath test for alcohol may be conducted an incident to a lawful intoxicated driving arrest.[37]

7. Inventory of Arrestee's Property

Under an inventory search theory, in the absence of any warrant, police may lawfully search an arrestee's personal property that he or she closely possessed at the time of the arrest. This search may include purses and wallets as well as jackets and other clothing that may be on the person of the arrestee or in an automobile in which the arrestee had recently been riding. The property of an arrestee who has been removed from his vehicle is generally subject to search, and an inventory search of the vehicle may be conducted if it comes into the possession of police. In a federal case that arose in Massachusetts,[38] police lawfully stopped a driver for improper lane usage and determined that he did not have a valid operator license. Since the vehicle could not be driven and was to be towed, the officer followed Commonwealth law and departmental policy[39] and conducted a vehicle inventory search to determine whether valuables or dangerous instrumentalities might be present. The officer discovered what appeared to be heroin as well as a firearm and ammunition, which, as a previously convicted felon, the subject was not permitted to possess. The reviewing court found that the inventory search was reasonable since the vehicle had to be towed due to the fact that the driver could not legally continue to operate it and the officer complied with proper legalities. For vehicle inventory searches, the police agency must have a written inventory policy regulating how and under what circumstances a vehicle may be searched.[40]

Searching an arrestee's property, whether clothing, luggage, or motor vehicle, based on an inventory policy also produces admissible evidence. In a Texas case[41] where the defendant had been arrested for failure to display a front license plate and not having a valid driver's license, officers searched the defendant's pickup truck to reveal methamphetamine and a loaded revolver. The search was based on an inventory search requirement of the local police department, and the officers followed the policy for inventory searches appropriately. As a result, the drugs and firearm were properly admitted against the defendant. In *Illinois v. Lafayette*,[42] the Supreme Court held that a backpack possessed

by an arrestee could be searched without a warrant as incident to arrest, or incident to booking after an arrest, even if the police agency had no policy regulating how to secure, treat, or search personal property possessed by an arrestee. However, in a recent Michigan case,[43] a backpack had been seized from an arrestee following an arrest for trespass at a retail store. The police department did not have a written policy or clear oral policy directives that officers were to follow when taking property from persons who were arrested in public. An appeals court upheld the suppression of the evidence produced by the search on the ground that there was no written policy and the trial court decision was not clearly erroneous. The best practice appears to require that police agencies have and follow written inventory policies similar to what the Supreme Court of the United States has required where inventories of motor vehicles is involved.

8. Traditional Requirements for the Plain View Doctrine

The "plain view" doctrine constitutes an exception to the warrant requirement for a search, but, standing alone, the doctrine does not allow an officer to immediately enter private premises to effectuate a seizure. As a general rule, the plain view doctrine allows a police officer to seize an item in plain view when the officer has probable cause to believe that the item is contraband or evidence of a crime, when the officer observes the object of the seizure from a lawful vantage point, and when the officer can acquire dominion over and control of the object without a violation of the Fourth Amendment.[44]

An object subject to police seizure may present itself during a search for some different object, a stop and frisk, a routine traffic stop, or hot pursuit or at any other time where a law enforcement officer lawfully observes evidence indicative of criminality. Under this legal theory, police may be permitted to seize an object without a warrant where the officer is lawfully in a position to view it, if the object's incriminating character is clearly and immediately apparent, and if the police have a lawful right of access to the item. The legal theory behind the plain view doctrine is that

> if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy, and thus no "search" within the meaning of the Fourth Amendment—or at least no search independent of the initial intrusion that gave the officers their vantage point.
>
> *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993)

The usual legal standards for a valid plain view seizure, as described in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), required that the police officer observe the seizable evidence from a position the officer had a lawful right to occupy and that the incriminating nature of the evidence be clearly apparent to the officer. The second requirement merely restates the necessity of probable cause to seize the evidence. Originally, *Coolidge* required that the officer make the plain view discovery inadvertently and since, in *Coolidge*, they were looking for a car, it was not likely to be inadvertent, but a later case removed this requirement from the plain view doctrine.

In a classic case in which the plain view had application, in the early morning hours, a police officer observed a vehicle traveling at about ninety miles per hour in a forty-five-mile-per-hour zone with a flat tire and sparks coming from the rim of the tire wheel. The officer made a probable cause stop of the vehicle, and the driver subsequently opened the driver's door and fell out of the car onto the road. When one officer smelled a strong odor of marijuana coming from the vehicle, he looked inside the passenger compartment and observed plastic baggies containing what the officer recognized as marijuana. The appellate courts upheld the seizure under the plain view theory, since the officers had a lawful vantage point outside the vehicle; the nature of the object clearly offended the law; and, in a vehicle context, they were lawfully allowed to enter the premises and make a seizure.[45]

9. Inadvertent Discovery: No Longer Required

Subsequent to the *Coolidge* plain view doctrine case, police officers were permitted to seize evidence if they were lawfully on the premises and discovered evidence that had not been anticipated but was clearly indicative of criminal activity. The reality, of course, was that officers legitimately on the premises would pretend to inadvertently discover evidence they may have expected to discover on the premises but for which they lacked probable cause. The fact that probable cause did not exist for the expected objects meant that the affidavit could not have mentioned such evidence and the warrant would not have included a description of the evidence.

Almost twenty years after *Coolidge*, the Supreme Court reexamined the legal elements of the plain view doctrine in *Horton v. California*, 496 U.S. 128 (1990) (Case 7.3). In *Horton*, police determined that there was probable cause to search Horton's residence for the proceeds of a robbery and weapons used in the robbery. Police obtained a search warrant that covered the proceeds of the robbery but did not mention a handgun that police believed would likely be present. The search revealed a handgun but no evidence of the robbery proceeds. The Supreme Court held that even if the discovery of the handgun was expected and not inadvertent, the evidence was properly seizable under the plain view doctrine. According to the Court, inadvertent discovery no longer was a requirement for use of the plain view doctrine.

Case 7.3 LEADING CASE BRIEF: THE PLAIN VIEW DOCTRINE NO LONGER REQUIRES INADVERTENT DISCOVERY

Horton v. California
Supreme Court of the United States
496 U.S. 128 (1990).

CASE FACTS:

A California trial court convicted Horton of an armed robbery involving the treasurer of the San Jose Coin Club. As the victim, Wallaker, entered his garage, two masked men, one armed with an Uzi submachine gun, attacked him. One of the robbers used an electrical "stun gun," which rendered the victim unable to resist. As the robbers

carried on a fairly open conversation between themselves, they bound and handcuffed Wallaker. The victim recognized petitioner Horton's distinctive voice while another witness observed the robbers leaving the scene of the crime and was able to add some corroboration to the identification. Additional evidence disclosed that Horton had gained knowledge that Wallaker possessed a large quantity of cash and jewelry because Horton had attended a coin show where Wallaker had done business.

After making an initial investigation, police obtained a warrant to search Horton's residence for the proceeds of the robbery. The affidavit for the search warrant described weapons as well as proceeds of the robbery as being objects of the proposed search, but the warrant mentioned only robbery proceeds, including three specifically described rings. During the execution of the warrant, police seized an Uzi submachine gun, a .38-caliber revolver, two "stun guns," a handcuff key, and several other items. The officer conducting the search admitted searching not only for the rings but for other evidence connecting Horton to the crime. Some of the seized evidence was not discovered "inadvertently" since police expected to find some of the seized materials.

Horton alleged that the warrant had been defective since it did not have sufficient specificity to mention the firearms that the police fully expected to find. The trial court refused to suppress the evidence, and a jury convicted Horton. He appealed with no success to the California Court of Appeals. Subsequently, the Supreme Court of California denied review.

Since the application of the plain view exception to the warrant requirement had been construed by the California courts not to require inadvertence in discovery under the plain view doctrine, the Supreme Court of the United States granted certiorari.

LEGAL ISSUE:

Is warrantless seizure of criminal evidence in plain view prohibited by the Fourth Amendment if the discovery of the evidence was expected, even though the item was not listed on a search warrant?

THE COURT'S RULING:

The Justices determined that the earlier version of the plain view doctrine that required that evidence be inadvertently discovered was not required under the plain view doctrine if the evidence seized is clearly indicative of crime under the facts of the case, even if police expected to find some of the evidence.

ESSENCE OF THE COURT'S RATIONALE:

In this case we revisit an issue that was considered, but not conclusively resolved, in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971): Whether the warrantless search of evidence of crime in plain view is prohibited by the Fourth Amendment if the discovery of the evidence was not inadvertent. We conclude that even though inadvertence is a characteristic of most legitimate "plain view" seizures, it is not a necessary condition.

I

* * *

The criteria that generally guide "plain view" seizures were set forth in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The Court held that the seizure of two automobiles parked in plain view on the defendant's driveway in the course of arresting the defendant violated the Fourth Amendment. . . . The State endeavored to justify the seizure of the automobiles, and their subsequent search at the police station, on four different grounds, including the "plain view" doctrine. The scope of that doctrine as it had developed in earlier cases was fairly summarized in these three paragraphs from Justice Stewart's opinion:

> It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. But it is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the "plain view" doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal.
>
> * * *

Justice Stewart then described the two limitations on the doctrine that he found implicit in its rationale: First, "that plain view *alone* is never enough to justify the warrantless seizure of evidence," and second, "that the discovery of evidence in plain view must be inadvertent."

* * *

It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. First, not only must the item be in plain view, its incriminating character must also be "immediately apparent." Thus, in *Coolidge*, the cars were obviously in plain view, but their probative value remained uncertain until after the interiors were swept and examined microscopically. Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself. . . . In all events, we are satisfied that the absence of inadvertence was not essential to the Court's rejection of the State's "plain view" argument in *Coolidge*.

III

Justice Stewart concluded that the inadvertence requirement was necessary to avoid a violation of the express constitutional requirement that a valid warrant must particularly describe the things to be seized. He explained:

> The rationale of the exception to the warrant requirement, as just stated,

> is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a "general" one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "per se unreasonable" in the absence of "exigent circumstances."
>
> If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intent to seize it, then there is a violation of the express constitutional requirement of "Warrants . . . particularly describing. . . [the] things to be seized."
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> 403 U.S., at 469–471

We find two flaws in this reasoning. First, evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement.

* * *

Second, the suggestion that the inadvertence requirement is necessary to prevent the police from conducting general searches, or from converting specific warrants into general warrants, is not persuasive because that interest is already served by the requirements that no warrant issue unless it "particularly describ[es] the place to be searched and the persons or things to be seized," see *Maryland v. Garrison*, 480 U.S. 79, 84 (1987); and that a warrantless search be circumscribed by the exigencies which justify its initiation. See, *e.g., Maryland v. Buie*, 494 U.S. 325, 332–334 (1990); *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). Scrupulous adherence to these requirements serves the interests in limiting the area and duration of the search that the inadvertence requirement inadequately protects. Once those commands have been satisfied and the officer has a lawful right of access, however, no additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be inadvertent.

[Affirmed.]

CASE IMPORTANCE:

The plain view doctrine allows officers to seize any evidence that is indicative of criminality that is observed during a valid search if the officers occupied an area they were legally permitted to occupy. This decision made the plain view doctrine easier to apply.

10. Officer Needs to Be Lawfully Present

Following *Horton*, the requirements for the use of the plain view doctrine dictate only that the officer be lawfully on the premises or at a lawful vantage point, that probable cause for seizure be clearly apparent, and that the officer have a lawful method of gaining access to the seizable property.

The evidence must be clearly visible and not in a location where the officer must manipulate or minutely examine the evidence to determine whether the property is seizable. If the officer needs to move the property to find a serial number to determine whether the property was stolen,[46] open a container to observe the incriminating item, or occupy a place where the officer has no legal right, such conduct constitutes a separate search and cannot meet the dictates of the plain view doctrine. Demonstrative of the proposition that the property and its seizable qualities must be clearly visible to the officer is *Arizona v. Hicks*, 480 U.S. 321 (1987), where police were lawfully on the premises following reports of a shooting. One of the officers noticed some expensive stereo components that looked out of place in such a squalid apartment and concluded that they might have been stolen. The officer moved the components so that he could see their serial numbers and recorded them for future use, which constituted a search beyond the scope of plain view.

Another requirement under the plain view doctrine is that officers must have lawful access to the seizable evidence. In an analogous situation, but outside of a home, Georgia police observed a man with what appeared to be marijuana using a weighing scale to portion marijuana on his porch, within the curtilage of his property.[47] The man left his porch and walked close to the officers and away from the drugs. In a warrantless seizure, allegedly based on the plain view doctrine, officers entered the defendant's property, seized the contraband, and then arrested the defendant. The reviewing court reversed the drug-related convictions on the theory that the officers had no right to enter the property past the curtilage and the plain view doctrine did not apply. The plain view doctrine required that the officers enter and occupy a place or position to which they had a legal right, and there was no right to intrude onto the curtilage of the home. The officers thought that the evidence was seizable because they could see it in plain view and neglected to determine whether they could have lawful access to the real property without a warrant or under some other exception.

In an Illinois case,[48] officers were in the process of lawfully carrying out an eviction from an apartment and conducting a lawful protective sweep of the premises to discover the presence of anyone who might attempt to frustrate their purpose. They also smelled the odor of raw marijuana. In Illinois, search warrants are not required for evictions, but a court eviction order is required, and proper notice to the residents must have been given. During the sweep, one officer noticed a large open bag that appeared to contain marijuana within a clear plastic bag, and the defendant/occupant was arrested. A subsequent search of the outer bag revealed a firearm and cocaine underneath the clear plastic inner bag. The defendant was convicted of various charges, including possession of marijuana, despite his motion to suppress the cannabis. The trial court's decision that the plain view doctrine allowed the seizure of the marijuana that was clearly observable

during the protective sweep was upheld by an Illinois appellate court. The plain view doctrine applied because the officer was in a position that he had the legal right to occupy during an eviction sweep, and there was no violation of the Fourth Amendment under the circumstances.

Whereas the evidence must be in plain view, the officer remains free to lawfully take a position that permits the best vantage point. For example, in *California v. Ciraolo*, 476 U.S. 207 (1986), in the absence of a search warrant, police used an aircraft to fly over a grow house to find cultivated marijuana. Due to the fact they were in lawfully navigable airspace, they were where they had the right to occupy, the procedure met the plain view doctrine, and they could use this information to obtain a search warrant. Similarly, in a federal California case,[49] a police officer who possessed a lawful vantage point looked through a vehicle windshield to discover a partially hidden handgun. Since the driver had prior felonies, possession of the gun constituted an additional offense, and the officer seized the evidence. This practice was lawful because the officer had the legal right to be outside of the vehicle and to look inside through the glass, the evidence was clearly criminal, and the officer had a lawful ability to seize the firearm.

11. The Plain Feel and Plain Smell Doctrine

Under the stop and frisk doctrine, police officers often discover items that are not reasonably considered weapon-like lumps but that, to a trained and experienced officer, may seem to be contraband. An officer may seize nonthreatening contraband evidence discovered by the sense of touch during a protective frisk. Consider the situation involving a pat-down in which an officer comprehends what seems to be evidence of criminality, but could not reasonably be construed as a weapon, through the sense of touch. Such a search may allow the officer to enter the inner clothing if he or she has felt an object whose contour or mass makes its identity immediately apparent. Under these circumstances, there has been no illegal invasion of the suspect's privacy beyond that already authorized by the search for weapons under a stop and frisk.

In *Minnesota v. Dickerson*, 508 U.S. 366 (1993), a police officer was conducting a lawful stop and frisk. As he patted down a suspect who had been lawfully seized, the officer felt what he thought was a rock of crack cocaine, a determination made only after manipulating it between his thumb and index finger. The Supreme Court agreed that a plain feel doctrine would allow a seizure under the circumstances where a police officer lawfully patted down a suspect's outer clothing and felt an object whose contour or mass made its identity as contraband immediately apparent. The *Dickerson* Court recognized there would have been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. If the object reasonably seems to be contraband, the seizure by the officer would be justified by the same practical considerations that inhere in the plain view context. Justice White, writing the lead opinion in *Dickerson*, held that the officer's manipulation of the object in the subject's pants constituted a search beyond the stop and frisk and could not be considered lawful seizure following the plain feel doctrine. A seizure would be permitted only where the lawful touch allowed the officer to instantly develop a reasonable belief that the object offended the law.

In a case similar to Dickerson[50] but with a different result, a police officer was frisking a subject who had attempted to evade a lawful stop when the officer felt what he thought was methamphetamine, and he testified that the identity was immediately apparent to him based on his experience in frisking subjects over a ten-year career. The officer cited the nature of the object, the location on the person, the conduct of the subject, and the officer's experience in making a determination of the criminality of the object. The officer did not manipulate the pocket's contents; he merely went inside to remove the contraband. Wyoming uses a reasonable person standard to evaluate an officer's conduct, and the top Wyoming court upheld the search and seizure of the drug based on the plain feel doctrine that produced probable cause. In a different case,[51] an officer was not permitted to remove and open a pill bottle found in a frisked person's pocket, since there was no suspicion that the individual, who was a passenger in a stopped car, had committed any wrong, and there was no evidence of a drug offense. The officer had a hunch that there would be narcotics in a pill bottle found on this person since it was a high-crime area and late at night, and the subject failed to answer what was in the bottle. A pill bottle has numerous lawful uses as a container. The reviewing court found that the plain feel doctrine had no application and no probable cause to search the bottle existed. Under the circumstances, the methamphetamine from the bottle should have been suppressed.[52]

Where police officers encounter smells that through their training indicate criminality, they may act on such smells, whether the odor involves fresh marijuana, marijuana smoke, ether that might indicate the manufacture of methamphetamine, or something else that might give rise to a reasonable basis to suspect criminal activity. In any event, relevant odors and smells dictate some additional investigation and response. In an Oregon case,[53] an officer stopped a speeding vehicle from which a strong odor of marijuana wafted out of the passenger window when the officer approached. Some marijuana was observed in the passenger compartment of the vehicle, a crime since the driver admitted he had imported it from California. Oregon courts have held that the mere smell of some marijuana alone is not sufficient to support a finding of reasonable suspicion, since recreational marijuana is legal in Oregon.[54] However, the officer had extensive experience over eight years in interdicting marijuana smugglers and had seized over 400 pounds during that time, and believed that the odor was too strong for the amount of marijuana that the driver was observed bringing into Oregon. Believing that the plain smell doctrine gave him sufficient reason to extend the traffic stop and probable cause to search the rental car, in the trunk, the officer uncovered three ecstasy pills, a gram of cocaine, $10,000 in cash, and over 500 oxycodone pills. In addition, the officer seized about two ounces of marijuana. The reviewing court upheld the warrantless search of the vehicle based on the initial plain view of marijuana and the plain smell of marijuana that seemed too strong for the small amount observed in the passenger cabin. In this situation, the very strong odor of marijuana, no driver's license, marijuana in plain view, convoluted story concerning his destination, and no rental car agreement gave rise to search probable cause. In a similar situation,[55] after Maryland decriminalized marijuana possession, a police officer stopped a taxi for traffic violations and smelled the odor of raw marijuana coming from the motor vehicle, and that fact permitted a search of any container that had been within the vehicle. A similar odor of raw marijuana emanated

from a bag carried by one of the passengers that fell to the ground as he exited. The reviewing court observed that the detective had already smelled raw marijuana when the passenger alighted from the taxi. When the odorous bag fell to the ground, the subject lost his expectation of privacy because probable cause existed to search the container that had been inside the car.[56]

With respect to the odor of marijuana, in states that have legalized forms of cannabis that can be smoked, whether for recreational or medical purposes, merely smelling marijuana may not have the same effect on reasonable basis to suspect criminal activity or for probable cause to search or arrest. In Pennsylvania, where medical marijuana has been permitted, the plain smell doctrine may not have the consequences that it once did.[57] A person who exhibits the odor of marijuana, encounters a police officer, and possesses a Medical Marijuana Act card does not necessarily present a criminal situation, since hundreds of thousands of persons in Pennsylvania may lawfully exhibit such an odor. The plain smell of marijuana along with other factors may still give rise to probable cause to search. However, the strength of illegality that could substantiate probable cause to search or arrest that previously existed when the plain smell doctrine revealed the odor of marijuana has clearly been reduced in such states and localities. The plain smell doctrine involving marijuana would still have its original legal effect if the officer who encountered an odor of marijuana was a federal law enforcement official, since marijuana in all forms remains illegal under United States law, 21 U.S.C. §§ 812, 841.

12. Searches Based on Consent

When law enforcement officials wish to search a particular area for which no probable cause exists or where probable cause may exist, but the officer possesses no required search warrant, there exists a possibility of searching by the use of the theory of consent. Like many personal constitutional rights, the Fourth Amendment guarantees are waivable if the parties involved follow appropriate steps.

The first requirement in acquiring consent dictates that the *proper person* give consent. Generally, this person must have sole dominion and control over the property but may share dominion and control with another person or persons. Apartment dwellers may not own the real estate, but since the dweller has dominion and control over the property at the moment, that individual is a proper person from whom consent may be obtained. Personal property generally falls into the same set of rules. The person possessing dominion and control over the subject property may give consent to search a car, backpack, shoulder bag, purse, or other container. Consistent with this principle, in a Texas homicide case,[58] the mother of the suspect gave police permission to search her vehicle and even unlocked it for them. She was not a suspect and was not under any coercion. Since she possessed dominion and control of her car, she was the correct person to ask for consent. Inside his mother's car, the murder suspect had a duffel bag, and he assisted police in unlatching the hatchback of the car to retrieve the property. The reviewing court upheld the trial court in ruling that by actively assisting and by not objecting, the defendant had consented to the seizure and search of his duffel bag. He possessed dominion and control and was the correct person to ask for permission to seize

and search the property. Fourth Amendment rights are generally considered personal and can be waived or asserted by the person possessing the right.

There may be occasions on which the proper person purports to have dominion and control over the property, especially real estate, but the individual is being untruthful or the police are relying on reasonable appearances. In *Illinois v. Rodriguez*, 497 U.S. 177 (1990), a former girlfriend of Rodriguez, who exhibited signs of a severe beating, told police that she could use her key to allow police to enter their formerly shared apartment to arrest Rodriguez, who had drugs and paraphernalia in plain view. The woman represented that the apartment was "ours" and that she had clothes and furniture there, but she did not tell officers that she had moved out a month prior. The general rule is that a warrantless entry is valid when based on the consent of a third party if the police reasonably believe that the third party possesses common dominion and control over the premises.[59] The *Rodriguez* Court held, essentially, that if police had a good faith reasonable belief that the individual with the key possessed dominion and control, that fact could support a consent search if all the other components were present.

The second requirement under the Fourth Amendment for a valid consent to search is that the consent be given freely and voluntarily. According to the Supreme Court, voluntariness is a question of fact to be determined from all the circumstances surrounding the situation, but knowledge of the right to refuse consent is not an absolute requirement.[60] The factors to be considered include the level of education and general intelligence of the consenting party, the coerciveness of the circumstances, whether the individual was under arrest, whether the person knew about the right to refuse to grant consent, whether the police indicated a search would be conducted anyway, and whether police falsely stated that they possessed a warrant. One Iowa court[61] indicated that coercion and/or deception by police, threats made, illegal police action immediately preceding the request for consent, and knowledge of the right to refuse to consent were factors to be evaluated to determine whether consent was freely and voluntarily granted. Although these factors are not exclusive, they demonstrate the usual considerations that courts use in determining whether consent was voluntarily given.

Where a question arises concerning the validity of a consent search, the prosecution must demonstrate that the proper person gave consent and that it was given freely and voluntarily under the totality of the circumstances. Demonstrative of these principles is *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), where police lawfully stopped a vehicle during the early morning hours. The driver had no license, and most of the six men had no identification. Officers requested permission from the car owner's brother, Alcala, to search the car. A police backup unit arrived with more officers, creating a slightly coercive atmosphere. As the proper person to give consent, Alcala agreed to allow a search of the vehicle. Criminal charges eventually resulted against passenger Bustamonte, who contended that the evidence seized had been discovered during an illegal search involving a lack of consent.

The driver apparently did not possess dominion and control over the vehicle, since Alcala, the owner's brother, made decisions involving the car's operation. The real issue involved whether Alcala gave a free and voluntary consent under the totality of the circumstances. Alcala's educational level was not known, but he appeared to be of normal

intelligence. There was no indication that anyone was initially threatened with arrest or that the numbers of officers present indicated a coercive atmosphere. Under the circumstances, the Supreme Court upheld the conviction and ruled that the consent had been freely and voluntarily offered by the proper person.[62]

While it is clear that the proper person or party must give consent, there may be occasions on which two individuals possess shared dominion and control over real or personal property. In the absence of the other person having shared dominion and control over the property, the person who is present and who has shared dominion and control is a person who may give consent to search. Although they may share control over the property when both are present, when one is absent, control over the property falls to the one individual who is present. A different rule applies where two people share a dominion and control over property and are both present when police officers request consent to conduct a search. Where one person refuses to grant consent while the other party is willing to give consent, the consent of one party over the objection of the other party fails to give lawful consent for police to conduct a search. In *Georgia v. Randolph*, 547 U.S. 103 (2006), where the wife was willing to allow police to search their marital home and the husband objected to the search and refused to give his consent, police entered the premises anyway. This initial search revealed evidence that was used to procure a search warrant that was used to conduct a more extensive search of the marital home. The results of the warrant revealed some drug possessory offenses that had been committed by the husband. A majority of the justices on the Supreme Court of the United States decided that consent to enter a private home would not exist for a guest if one resident invited the social guest into the home while the other resident commanded that the guest not enter the home. If consent to enter the home would not exist for social guest when both parties are present and disagree, there cannot be valid consent for police to conduct a search of the home where the disagreement is obvious.[63] On the other hand, if two persons possess share dominion and control over property and only one is present or the other one is removed due to a valid arrest, the person present or the remaining person is a proper person who may give a valid consent for a search. The only remaining issue would be whether the consent was given freely and voluntarily by the remaining person. In a *Fernandez v. California*, 571 U.S. 292 (2014), when two occupants were initially present at an apartment but one was lawfully arrested and removed due to domestic abuse, the Supreme Court held that police may properly ask the remaining partner for consent to search, even if they know that the absent co-tenant would object to the search.

Case 7.4 LEADING CASE BRIEF: CONSENT SEARCH REQUIRES AGREEMENT BY THE PROPER PARTIES PRESENT TO GRANT VALID CONSENT

Georgia v. Randolph
Supreme Court of the United States
547 U.S. 103 (2006)

CASE FACTS:

In late May of 2001, Scott Randolph and his wife separated when

Mrs. Randolph left the marital home to reside elsewhere in Canada. At this time, she removed some of her personal possessions and took their son for a time to her parents' home. In early July of the same year, she returned to their marital residence, but harmony did not ensue because the tumultuous relationship with her husband continued at its former pace. After some specific marital strife, Mrs. Randolph phoned police to report the domestic dispute and indicated to police that respondent Randolph had removed their son from the premises.

Mrs. Randolph informed police that her husband's drug abuse had harmed the marriage relationship. One police officer accompanied Janet Randolph to retrieve her child from where her husband had taken the son. Upon her return to the family home with a police officer, Mrs. Randolph renewed her allegations of her husband's drug abuse and current drug possession. Following a police request for consent to search the marital home, Janet Randolph agreed to permit a consent search of their shared residence, but her husband, who was present, refused to grant consent. Pursuant to directions offered by the wife, police initiated a cursory search of the home and recovered a drinking straw with a residue believed to contain cocaine powder.

Subsequently, police executed a search warrant based on the wife's information and the straw containing the cocaine powder. The search of the marital home revealed additional evidence of drug possession that resulted in the indictment of Mr. Randolph for possession of cocaine. His motion to suppress was denied by the trial court on the ground that the wife of the defendant possessed shared dominion and control over the marital residence and could grant a legally sufficient consent to search the premises.

The Court of Appeals of Georgia reversed the trial court on the theory that the consent to conduct a warrantless search of a residence given by one lawful occupant is not valid when another occupant refuses to grant consent when the other occupant is physically present. The Supreme Court of Georgia upheld the Court of Appeals by distinguishing an earlier federal case, *United States v. Matlock*, 415 U.S. 164 (1974), that permitted one occupant to consent to a search of commonly occupied property when the other occupant was absent at the time of the consent request. The Supreme Court of the United States granted certiorari.

LEGAL ISSUE:

Where one of two co-occupants of residential property grants consent to search commonly held property when an equal cotenant refuses to grant consent, does such conduct indicate that police may conduct a proper consent search consistent with the Fourth Amendment?

THE COURT'S RULING:

The justices determined that where two persons share dominion and control over property, where both are present, the consent of one cotenant over the objection of the other does not constitute proper consent under the Fourth Amendment.

ESSENCE OF THE COURT'S RATIONALE:

* * *

The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. *Illinois v. Rodriguez, 497 U.S. 177 (1990); United States v. Matlock, 415 U.S. 164 (1974).* . . .

* * *

II

To the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable *per se, Payton v. New York, 445 U.S. 573, 586 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 454–455 (1971)*, one "jealously and carefully drawn" exception, *Jones v. United States, 357 U.S. 493, 499 (1958)*, recognizes the validity of searches with the voluntary consent of an individual possessing authority, *Rodriguez, 497 U.S., at 181*. . . . None of our co-occupant consent-to-search cases, however, has presented the further fact of a second occupant physically present and refusing permission to search, and later moving to suppress evidence so obtained. The significance of such a refusal turns on the underpinnings of the co-occupant consent rule, as recognized since *Matlock*.

A

The defendant in that case was arrested in the yard of a house where he lived with a Mrs. Graff and several of her relatives, and was detained in a squad car parked nearby. When the police went to the door, Mrs. Graff admitted them and consented to a search of the house. In resolving the defendant's objection to use of the evidence taken in the warrantless search, we said that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *Id., at 170*. Consistent with our prior understanding that Fourth Amendment rights are not limited by the law of property, we explained that the third party's "common authority" is not synonymous with a technical property interest:

* * *

B

Matlock 's example of common understanding is readily apparent. When someone comes to the door of a domestic dwelling with a baby at her hip, as Mrs. Graff did, she shows that she belongs there, and that fact standing alone is enough to tell a law enforcement officer or any other visitor that if she occupies the place along with others, she probably lives there subject to the assumption tenants usually make about their common authority when they share quarters. They understand that any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another.

* * *

C

* * *

To begin with, it is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out." Without some very good reason, no sensible person would go inside under those conditions.

* * *

E

There are two loose ends, the first being the explanation given in *Matlock* for the constitutional sufficiency of a co-tenant's consent to enter and search: it "rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right. . . " *415 U.S., at 171, n. 7*. If *Matlock*'s co-tenant is giving permission "in his own right," how can his "own right" be eliminated by another tenant's objection? The answer appears in the very footnote from which the quoted statement is taken: the "right" to admit the police to which *Matlock* refers is not an enduring and enforceable ownership right as understood by the private law of property, but is instead the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances. Thus, to ask whether the consenting tenant has the right to admit the police when a physically present fellow tenant objects is not to question whether some property right may be divested by the mere objection of another. It is, rather, the question whether customary social understanding accords the consenting tenant authority powerful enough to prevail over the co-tenant's objection.

* * *

III

This case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent.

* * *

The judgment of the Supreme Court of Georgia is therefore affirmed.

CASE IMPORTANCE:

To have proper Fourth Amendment consent to search property where two individuals share dominion and control over the property, where both are present, consent by both parties is required under the Fourth Amendment.

Instead of real property, if police request permission to search personal property where two or more individuals possess dominion and control over the property, consent of those present would be required to validate a warrantless search. Alternatively, if two persons were traveling with one piece of luggage that they shared and one of the two

individuals left to use a restroom, consistent with *Randolph* and *Fernandez*, police could lawfully ask the person remaining with the luggage for permission to search its contents.

Assuming the proper party voluntarily and freely grants consent, the person may offer a complete or limited right to search with respect to the length of the search or its scope. Once given, consent may be withdrawn at any time. If police exceed the scope of the consent, items seized in violation of the limitations may be excluded from use as evidence. The scope of consent may be informed by the object of the search. In *Florida v. Jimeno*, 500 U.S. 248 (1991), a police officer informed a motorist that the officer had reason to believe that the automobile contained narcotics. The officer explained that the driver did not have to consent to a search of the car. After the driver stated that he had nothing to hide, he granted the officer permission to search the automobile. When a folded brown bag in the car proved to contain cocaine, the driver contended that his consent did not extend to the closed paper bag. While Jimeno had success in the Florida state courts, the Supreme Court held that the consent covered the paper bag. Justice Rehnquist, writing for the Court, held that consent to search for drugs would allow the officer to open and look into any containers within the car that could reasonably conceal drugs.

Where the consenting party gave a free and voluntary consent to search property under that party's control and where police do not exceed the bounds of the consent given, any evidence seized may be used in court unless excluded for evidentiary reasons unrelated to the Fourth Amendment. Consent to search for an object or material extends to any place where the property may be hidden or stored within reasonable bounds.

13. Stops and Searches of Motor Vehicles

The mobile nature of motor vehicles dictates that search and seizure issues under the Fourth Amendment take a different route than for homes and buildings. Naturally, most motor vehicles are mobile and could pass through a court's jurisdiction before a warrant could be obtained. Since all motor vehicles have windows, arguably a lower expectation of privacy may be expected by persons who are inside vehicles and who have placed personal items within the interior of the vehicle. Motor vehicles, as well as their operators, have been subject to extensive regulation by the states almost from their introduction as self-powered means of conveyance. Court interpretation of the right to be secure against unreasonable searches of one's person, papers, and effects when they are contained within a motor vehicle indicates that a person has a reduced vehicle expectation of privacy.[64]

Despite a diminished level of Fourth Amendment protection where motor vehicles are concerned, the general rule requires that, prior to a search, the governmental agent possess probable cause. Although the level of privacy is reduced in a motor vehicle, the level of probable cause remains identical to that for any other search where evidence of criminality is being sought. Probable cause may mature due to a police officer's observations, reports from other officers, information from informants, or a combination of all these factors. For example, in *Carroll v. United States*, 267 U.S. 132 (1925), police officers had convincing evidence that Carroll and Kiro were transporting illegal liquor

in violation of federal law because the men had offered illegal liquor to be sold to the officers at an earlier time. When the officers identified the Carroll vehicle traveling along the same route frequented by illegal bootleggers in the same car, they possessed probable cause to stop and search the vehicle.[65] Under the Court's interpretation in *Carroll*, the presence of probable cause permitted the officers to search the vehicle without a warrant.

Vehicles may be stopped based on a reasonable belief that an officer possesses probable cause, even where that belief was mistaken, so long as it was a reasonable mistake. In *Heien v. North Carolina*,[66] a police officer stopped a vehicle that had only one working rear light, under the mistaken belief that state law required two rear lights. State appellate decisions indicated that one light was sufficient to comply with state law, but the police were ignorant of that fact. A consent search revealed cocaine, and the defendant was convicted for attempted drug trafficking. The state's top court found that the stop of the vehicle was reasonable under the Fourth Amendment. The Supreme Court also held that the stop of the vehicle, based on the mistaken belief concerning taillights, was reasonable under the circumstances and affirmed the decision by the top North Carolina court that the stop reasonable and lawful, even though the officer was mistaken concerning state law.

14. Vehicle Searches Generally Do Not Require Warrants

Although the Fourth Amendment speaks of no warrants being issued except upon probable cause, the literal reading of the Amendment might indicate that a warrant would be required for a search of a motor vehicle. The reality is that the Supreme Court has determined that a warrant is not a usual requirement for a vehicle search. The operative difficulty with motor vehicles revolves around their inherent mobility and the fact that a court has a limited jurisdiction in which its search warrant may be executed. A court in California cannot issue a warrant that would be valid in Nevada—whether to search a building or an automobile. If a police officer possessed probable cause and wished to search a motor vehicle, the vehicle could leave the jurisdiction if a warrant were a necessity. Alternatively, an officer could seize the vehicle and immobilize it until a warrant had been procured, but a warrantless seizure would still run afoul of the literal meaning of the Fourth Amendment. Since the Fourth Amendment requires a reasonable approach to searches and seizures, one could contend that an immediate search with probable cause would be more reasonable and less of an inconvenience to the driver and occupants than immobilizing the vehicle while other officers procure a search warrant. According to the Court in *Chambers v. Maroney*, 399 U.S. 42 (1970), where the police possessed probable cause to stop a car matching the description of a robbery getaway vehicle, the Court approved an immediate warrantless search of that car. According to the *Chambers* Court:

> [A]n immediate search is constitutionally permissible. Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question, and the answer may

> depend on a variety of circumstances. For constitutional purposes, we see no difference between, on the one hand, seizing and holding a car before presenting the probable cause issue to a magistrate and, on the other hand, carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.
>
> *Chambers v. Maroney*, 399 U.S. 42, 52 (1970)

Following *Chambers*, which built on the doctrine of *Carroll*, where police have probable cause to search a motor vehicle, the search may be conducted immediately[67] so long as good probable cause exists at the time of the search. In support of this concept, a reviewing court in Ohio upheld the search of a motor vehicle when the officer had smelled the odor of marijuana coming from the car during a valid traffic stop.[68] The court noted that under the vehicle exception to the warrant requirement, law enforcement officers may search a vehicle in the absence of a warrant so long as the officer possesses probable cause to believe that the vehicle contains contraband. The court also held that when probable cause justifies the search, it may extend to every part of the vehicle, including its contents, that might conceal the object of the search. Essentially, where a motor vehicle is involved, the officer has a choice whether to conduct a search with or without a warrant, since either course has been determined to be reasonable given the presence of probable cause.

Although most searches of motor vehicles do not require warrants,[69] in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Court identified a situation wherein a search warrant was required for a motor vehicle. While the facts in *Coolidge* were unique and the case may stand only for a situation exactly on point with *Coolidge*, the case has not been overruled and remains good law. In *Coolidge*, the police suspected the defendant of murder, the defendant had no control over the car, and there were no exigent or emergency circumstances that justified an immediate warrantless search. The *Coolidge* Court invalidated the searches of the automobile because a valid warrant had not been obtained prior to the police search of the car. The Court distinguished this case from *Carroll v. United States* (the *Carroll* doctrine) by noting that the defendant had ample time to destroy any evidence in his car, he had no access at the time of search, and the car was not capable of going anywhere, unlike the Carroll automobile, which was actually being driven at the time it was seized. One concept that arises from *Coolidge* is that automobiles that cannot be moved under their own power may require a search warrant or some recognized exception to the warrant requirement in order to be lawfully searched. Most assuredly, to protect the admissibility of evidence in motor vehicles that are not readily mobile, the possibility of procuring a warrant prior to conducting a search supported by probable cause should be considered by law enforcement officers.

One area where vehicle searches do require warrants involves placing global positioning satellite (GPS) tracking devices or similar electronics on a vehicle to determine its historical location over time. In a case from the District of Columbia,[70] a man named Jones came under scrutiny for drug trafficking, and police asked for and obtained a warrant to place the GPS device on his motor vehicle. The warrant expired before it was ever served, and when the outdated warrant was executed, it was served in Maryland, where it was not valid for several reasons. The device recorded his movements in the vehicle over a significant period of time and helped the prosecution obtain a drug conviction for conspiracy and possession with intent to sell. The appellate court held that the

warrantless use of the GPS device violated the Fourth Amendment, and the prosecution appealed. The Supreme Court found that the attachment of a GPS tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements, constituted a search or seizure within the meaning of the Fourth Amendment. The Supreme Court determined that police had trespassed on the defendant's vehicle property in placing the GPS device and that type of trespass and subsequent monitoring constituted a continuing search under the Fourth Amendment for which a warrant was required. The Court upheld the reversal of the convictions.

15. Scope of Motor Vehicle Search

Given the existence of probable cause to search a vehicle, the police need to determine the extent of the lawful search permitted. Clearly, probable cause to search a car will not, without significantly more evidence, justify a search of the driver's home, especially without a warrant. The general rule concerning scope of a search dictates that the area of the automobile to be searched depends upon the nature of the object that is the goal of the search. For example, if the police possessed probable cause to search a car for a stolen desktop computer system, a look in the trunk of the vehicle would be appropriate, but sifting through the ashtray near the driver's seat would not be likely to reveal a computer and would be an unreasonable search. Following similar logic, if there were probable cause to search for some recreational pharmaceuticals, a search in virtually any part or location of the vehicle would be reasonable, since drugs may be secreted in any small or large area of the car. In one case,[71] a Louisiana police officer properly stopped a moving vehicle for a traffic violation and smelled a strong odor of raw marijuana. Under the circumstances, probable cause to search the vehicle existed. The scope of the warrantless search of a vehicle is not regulated by the nature of the container in which the object of the search may be hidden, but rather, the scope is defined by the object of the search and the places where there is probable cause to believe it may be found. As a general rule, police do not need a warrant to search a container in an automobile if the object of the search could be found within the container. In upholding the validity of the vehicle search, the reviewing court referenced an earlier case and noted that "the smell of fresh marijuana provided the officer with sufficient probable cause to conduct a warrantless search of the entire car, including the trunk and backpack in the trunk."[72] Given probable cause to search a motor vehicle, police may search in any location in the vehicle where the object of the search might reasonably be located.

16. Limited Vehicle Searches on Less Than Probable Cause

In addition to complete motor vehicle searches based on probable cause, a law enforcement officer may make limited warrantless searches of moving vehicles in the absence of any probable cause where the government is searching for evidence of alcohol impairment by car and truck drivers. In *Michigan v. Sitz*, 496 U.S. 444 (1990), the

Court gave approval to the practice of setting up sobriety checkpoints in which police stopped all vehicles passing down the highway as a diagnostic to screen for alcohol-impaired drivers. Following this plan, the police made a limited seizure in the absence of probable cause and in the absence of any individualized suspicion of intoxication or impairment. The *Sitz* Court approved the brief seizures by balancing the state's interest in reducing alcohol-impaired driving against the minimal and very brief intrusion upon members of the motoring public who were briefly stopped. The Court determined that the short stop to discern sobriety was reasonable under the Fourth Amendment.

Limited motor vehicle searches based on less than probable cause do have their limitations, as the Supreme Court noted in the *City of Indianapolis v. Edmond*.[73] Indianapolis police operated various vehicle checkpoints designed to interdict unlawful drug users and traffickers. At each roadblock, the police stopped a predetermined number of motor vehicles and did not base the stops on any individualized suspicion. Police advised each driver that the purpose of the stop involved checking of license and registration while looking for signs of impairment or drug use. Police conducted a look-see into each vehicle from the outside of the car. The primary focus of the program involved general criminal drug interdiction and did not involve brief stops to detect alcohol impairment. The Supreme Court of the United States agreed with the Court of Appeals that the drug interdiction program stopping motorists on the highway based on no individualized suspicion failed to meet the requirements of the Fourth Amendment. The Court noted that because the program's goal was general criminal law enforcement, it did not have the narrow purpose and focus as was the situation in the *Michigan v. Sitz* case. As was noted in the syllabus to the case, the Supreme Court never has approved any roadblock program where the primary purpose was to detect evidence of usual and typical criminal wrongdoing. Had *Edmond* been decided differently, police would have been able to use roadblocks for general criminal law enforcement and use the technique on any road at any time.

A search that is initially based on the *Terry v. Ohio* standard of reasonable basis to suspect that criminal activity may be afoot often allows a brief stop of a vehicle and a limited search. Consistent with *Terry*, vehicles may be stopped on less than probable cause. If an officer has some reason to be suspicious that a lawfully detained driver may have either drugs or illegal weapons inside his motor vehicle but lacks the level of proof known as probable cause, an officer may peer inside the vehicle in order to satisfy his or her objective curiosity. For example, an officer discovered a person occupying a parked car in a remote area who made furtive movements as the officer approached the car and had no rational explanation concerning why he was parked at 3:30 in the morning. The subject appeared nervous and uncomfortable in his dealings with the police officer. After securing the detainee, the officer looked inside the windows of the vehicle and saw a syringe and a piece of aluminum foil that indicated probable cause that drug usage had occurred or was occurring. The initial cursory search made by the officer was based on the reasonable basis to suspect standard and permitted the limited initial search but matured into probable cause to search the car for drugs. The court in this case permitted the admission of the drugs against the defendant.[74]

In a recent vehicle case involving reasonable suspicion, *Kansas v. Glover*,[75] the Supreme Court of the United States approved the initial stop of a truck by an officer who

knew, due to a license plate check, that the registered owner of the vehicle had a revoked operator's license. The officer did not know who was actually driving the vehicle, but drew the natural inference that the owner was likely to be the driver of the vehicle. The officer had no knowledge that would have negated an inference that the owner was the driver. Such knowledge and inferences gave rise to reasonable suspicion that the vehicle was being operated by an unlicensed driver. The fact that a registered owner of a vehicle is not always the driver did not reduce the officer's reasonable inference, and the stop was justified on less than probable cause. In a case decided by the Supreme Court of California,[76] police had received anonymous tips that an impaired driver was in a general area. When they located her, she exhibited no symptoms of impairment. She had alighted from her vehicle but consented to speak with officers. She told the police that she had no driver's license but acknowledged that some identification might be in the car. Following her arrest and without asking her to identify herself, officers opened the car and found a purse on the front passenger seat that they immediately searched and found methamphetamine. The California Supreme Court ruled that the initial stop was valid, as was her arrest for no driver's license, but that there was no reasonable basis to suspect that evidence would be found within the car. Since the court did not find any other lawful reason for the police to search her parked car or her purse resting within the car, it reversed her drug conviction. The court found that the Fourth Amendment does not cover an exception to the warrant requirement to searches to locate a driver's identification after a traffic stop.[77]

Limited searches of persons, cars, and effects may be supported on less than probable cause where there is reasonable basis to suspect criminal activity, but when there is insufficient evidence for the officer to have probable cause to believe that a crime has been committed and that evidence will be found in a particular place or on a particular person, generally no search is permissible.

17. Vehicle Inventory Searches

Some vehicle searches may follow valid arrests of the driver or passenger using the theory of search incident to arrest,[78] while other warrantless searches may be justified under an inventory search theory.[79] In a search incident to arrest of a vehicle's driver, officers are permitted to search the interior of the vehicle when any facts indicate that the arrestee might reasonably make a grab or lunge to obtain a weapon or destroy evidence.[80] The inventory search[81] stands on a different theoretical basis and is designed to "protect an owner's property while it is in the custody of the police to insure against [false] claims of lost, stolen, or vandalized property, and to guard the police from danger."[82] The inventory search also is intended to protect property custodians from any dangerous substance or ordinance that might be transported to a property room or remain in an impounded vehicle. The Supreme Court approved inventory searches in *Colorado v. Bertine*, 479 U.S. 367 (1987), where the search parameters were directed by a written policy. Where an automobile has been lawfully impounded, courts will generally uphold inventory searches as reasonable, even in the absence of search probable cause.

An inventory search of a motor vehicle requires that the police agency *have* and *follow* a written inventory search policy. In the absence of a policy regulating this process, individual officers would have unlimited discretion so that a particular inventory search could evolve into a ruse for conducting a general search. The policy regulating inventory searches must be designed to produce an inventory rather than permitting the inventory officer so much latitude that no standards exist. In *Florida v. Wells*, 495 U.S. 1 (1990), police arrested Wells for intoxicated driving. He gave police permission to open the trunk of his impounded car, and a suitcase was revealed. An inventory search at an impoundment facility revealed marijuana within a suitcase and in the car's ashtray. The *Wells* Court approved the state court decision holding that the evidence should have been suppressed on the grounds that the Florida Highway Patrol possessed no governing standards or written policy covering the opening of closed containers found within motor vehicles. A search of this nature was deemed unreasonable under the Fourth Amendment.

Clear examples of the appropriate use of an inventory search theory occur following many traffic accidents where the vehicles need to be removed from the roadway for safety reasons. When police officers conduct an inventory search with a view to securing valuables and protecting officers, the basic reasonableness of such a search becomes obvious. In an Arkansas case,[83] a woman had a rollover single-car accident, and her injuries dictated removal and hospitalization. The police engaged a wrecker service to remove the vehicle and followed the department's inventory policy to secure valuables and other items. The inventory search disclosed some recreational quantities of marijuana and methamphetamine that were properly admitted against her at a later trial. The court of appeals approved the admission of the drugs and cited the reasonableness of the inventory policy even under circumstances where the officer may have possessed a secondary investigatory motive. When officers fail to follow the inventory policy, the evidence may be suppressed. In a Nebraska case,[84] after officers validly arrested the driver of a Jeep, they conducted what they referred to as an inventory search, discovering illegal drugs. The written departmental policy stated that all property had to be inventoried. The searching officers failed to prepare an inventory of the contents of the vehicle, but, in a brief report, did mention the drugs and paraphernalia that they found in a black bag. One officer admitted that he did not prepare an inventory log of seized materials following the search, and he did not know whether any other officer did. At the motion to suppress hearing, no inventory log was offered by the prosecutor, but suppression was denied. The Supreme Court of Nebraska held that suppression was required and reversed the convictions on the basis that police failed to follow the inventory search policy and its requirements, indicating a constitutional error.[85]

18. Plain View Doctrine and Motor Vehicle Searches

In the context of motor vehicle stops, police officers frequently have occasion to lawfully view the interior of motor vehicles. As a general rule, so long as the traffic stop is determined to be lawful, the officer will be in a position to lawfully observe evidence in plain view, and such evidence will be seizable if its criminal nature or value as evidence is clearly obvious. In one case,[86] prosecuted in federal court, local Missouri police,

who knew that a vehicle had the wrong plates displayed, surrounded the car in order to investigate. One officer knew the subject driver and was aware that he had a prior felony. When he was ordered out of the car, he fumbled with some object under the driver's seat, arousing officer suspicion. A different officer shined a flashlight through the car's windshield and observed a handgun partially sticking out from under the driver's seat. After the firearm was seized, police searched the subject's black bag incident to arrest, revealing meth, heroin, and marijuana. The trial court ruled and the reviewing court agreed that officers had probable cause to arrest the defendant driver due to the car license belonging to another vehicle, and the courts held that the officer's act of looking through the windshield to discover the gun was lawful, based on the plain view doctrine,[87] even though a flashlight was used.[88]

As long as the officer occupies a lawful position within or near a motor vehicle and observes objects that, under the circumstances, indicate criminality, the plain view doctrine allows the officer to immediately seize the offending object. In an Ohio prosecution,[89] officers initially stopped the defendant's car for a window tint violation and asked him to step from the vehicle. After he exited, officers noticed what appeared to be a marijuana cigarette on the floorboard of the driver's side of the car. A subsequent search revealed a concealed handgun and some more marijuana. The motion to suppress the incriminating articles was denied based on the initial plain view discovery of the original marijuana cigarette. The reviewing court agreed with the trial court that the officer was in a place he had a legal right to occupy when he observed the marijuana in plain view, and its incriminating nature was immediately apparent. In addition, the officers had the legal right to order the defendant to remove himself from his vehicle, which allowed the officer the visual position to observe the marijuana. The plain view doctrine applied, and there was no violation of the Fourth Amendment under the circumstances.

19. Scope of Search of Containers Within Motor Vehicles

Where containers are not associated with motor vehicles, individuals possess a Fourth Amendment right to expect that governmental agents will not look through luggage, backpacks, grocery bags, and similar articles without probable cause and without a warrant unless special circumstances exist.[90] Different rules have developed when the same containers are stowed or hidden in motor vehicles. When police encounter luggage and similar containers within motor vehicles, the jurisprudence has followed a complicated path as courts struggled to produce coherent, consistent, and unified rationales consistent with the Fourth Amendment.

In *Carroll v. United States*, 267 U.S. 132 (1925), the Court approved a general search of the vehicle on probable cause that it held untaxed liquor in some sort of container or containers. Consistent with *Carroll* was *United States v. Ross*, 456 U.S. 798 (1982), where the Court gave approval to a probable cause warrantless search of the interior of a car, its trunk, a closed brown paper bag, and a zippered leather pouch. In *Ross*, the police had probable cause to believe that Ross had been selling drugs from

the car and that additional drugs were contained within the car with the exact location unknown. The *Ross* Court allowed a search anywhere within the automobile where drugs might reasonably be hidden, which naturally included a search of any containers.

When the police do not have probable cause to search an entire vehicle but only a container, a different rule has been applied, but it is not current law.[91] In *Arkansas v. Sanders*, 442 U.S. 753 (1979), the police, acting on an informant's information that Sanders, upon arriving at an airport, would be carrying a green suitcase containing marijuana, placed him under surveillance. When Sanders placed a green suitcase in the trunk of a taxi, police stopped the vehicle, opened the unlocked suitcase, and discovered marijuana. The police conducted the vehicle search without a warrant[92] based on the justification of the *Carroll* vehicle doctrine permitting warrantless searches of vehicles on probable cause. Since there was probable cause for not only the vehicle stop and search but to search the luggage, the connection of the luggage to the vehicle seemed sufficient to allow a warrantless search of the luggage under the *Carroll* doctrine. The Supreme Court disagreed on the legality of the search, holding that in the absence of exigent circumstances, police are required to obtain a warrant before searching luggage taken from an automobile properly stopped and searched for recreational pharmaceuticals. In *Sanders*, the probable cause extended only to the luggage, and merely touching a motor vehicle with luggage did not turn the search into a *Carroll* search, for which no warrant would have been required. The Court made a distinction between a probable cause search of an automobile that coincidentally turned up a container and a similar search of a container that coincidentally ended up in an automobile. Thus, at the time of *Sanders*, the evidence had to be suppressed, since police needed a warrant to search luggage taken from a motor vehicle.

That theory changed when the Court decided *United States v. Ross*, 456 U.S. 798 (1982), where the Court held that given probable cause to search a container within a motor vehicle, no warrant was required to conduct the search. To the extent that *Ross* was inconsistent with *Sanders* and other similar cases, the Court seems to have overruled that line of cases and substituted the rule of *Ross*. The Court reasoned that where a home search has been authorized, a search for a small object would include looking inside containers and closets. Therefore, where a vehicle search for an easily hidden object is appropriate, looking inside containers, as in a house search, should be reasonable.

The problem with the court cases centered on the concept that a search of luggage or other container would be illegal if conducted without a warrant where probable cause extended only to a search of the luggage, but the same piece of luggage could be lawfully searched without a warrant if encountered inside a vehicle during a search as in *Ross*. The Supreme Court attempted to clarify the case law so that Fourth Amendment protections would not turn on the happenstance of the location of the luggage at the time probable cause matures. As the *Ross* Court stated:

> When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.
>
> *Ross* at 821

The newer theory applied where there was probable cause to search the automobile, but it did not clearly address a situation where there was probable cause only to search a particularly described container within the vehicle, as was the case in *Arkansas v. Sanders*.

In *California v. Acevedo*, 500 U.S. 565 (1991), police made a controlled delivery of drugs to an apartment (see Case 7.5). Acevedo arrived, entered, and exited the apartment quickly while carrying a brown paper bag of the size delivered to the apartment. With probable cause to search the bag but not the car, police waited until Acevedo placed the bag within his automobile and drove away. Police stopped him and conducted a warrantless search of the brown paper bag. The police followed the search practice, which transgressed the outdated theory of *Sanders*, by searching a container because it had come in contact with a motor vehicle.

Case 7.5 LEADING CASE BRIEF: WHERE PROBABLE CAUSE EXISTS TO SEARCH A VEHICLE, POLICE MAY SEARCH ANYWHERE THE OBJECT MIGHT REASONABLY BE HIDDEN, INCLUDING CONTAINERS.

California v. Acevedo
Supreme Court of the United States
500 U.S. 565 (1991).

CASE FACTS:

A federal drug enforcement agent in Hawaii notified Santa Ana, California, police that the government had seized drugs from the Federal Express system. Federal agents sealed the package and had it sent to the Santa Ana police department, which, with the cooperation of the local Federal Express office, delivered the drugs to one J. R. Daza. He immediately drove to his apartment, where he took the drug package inside.

While Daza was still under law enforcement observation, Charles Acevedo arrived at Daza's address, entered Daza's apartment, and left after a ten-minute visit. Police observed that he carried a brown paper bag of the same size as the marijuana shipped from Hawaii and that he placed it in the trunk of a Honda. As he drove away, officers stopped his car and conducted a warrantless search limited to the contents of the brown bag. The search disclosed a quantity of marijuana.

Acevedo lost a motion to suppress the marijuana and pled guilty but reserved his right to appeal the denial of his claim that the bag had been illegally searched. The California Court of Appeal reversed the trial court with the conclusion that although the police had probable cause to believe that the bag contained drugs, opening the bag required a warrant. According to the Court of Appeal, once the bag was inside the car, a separate expectation of privacy existed.

The California Court of Appeal reasoned that the case was controlled by *United States v. Chadwick* (1977), where officers were permitted to seize a container for which probable cause existed but the search failed because officers did not obtain a needed warrant to open the container. The Supreme Court of California rejected the government's petition for review in Acevedo's case.

The Supreme Court of the United States granted certiorari for the purpose of clarifying search and seizure law applicable to a closed container in an automobile.

LEGAL ISSUE:

Where probable cause exists for the search of a container within an automobile and where there is no probable cause to search the entire vehicle, may police stop the car, seize the container, and search it without a warrant?

THE COURT'S RULING:

The Justices decided that where probable cause exists to search a container that has been placed in a motor vehicle, police may stop the vehicle and search the container without a warrant without violating the Fourth Amendment.

ESSENCE OF THE COURT'S RATIONALE:

* * *

II

* * *

In *United States v. Ross*, 456 U.S. 798, decided in 1982, we held that a warrantless search of an automobile under the *Carroll* doctrine [*motor vehicle can be searched based on probable cause only*] could include a search of a container or package found inside the car when such a search was supported by probable cause. . . . In *Ross*, therefore, we clarified the scope of the *Carroll* doctrine as properly including a "probing search" of compartments and containers within the automobile so long as the search is supported by probable cause.

In addition to this clarification, *Ross* distinguished the *Carroll* doctrine from the separate rule that governed the search of closed containers. The Court had announced this separate rule, unique to luggage and other closed packages, bags, and containers, in *United States v. Chadwick*, 433 U.S. 1 (1977). In *Chadwick*, federal narcotics agents had probable cause to believe that a 200-pound double-locked footlocker contained marijuana. [Police seized and opened the locker once it had been placed in an automobile trunk.] . . . [T]he United States urged that the search of movable luggage could be considered analogous to the search of an automobile. 433 U.S., at 11–12. The Court rejected this argument because, it reasoned, a person expects more privacy in his luggage and personal effects than he does in his automobile.

In *Arkansas v. Sanders*, 442 U.S. 753 (1979), the Court extended *Chadwick*'s rule to apply to a suitcase actually being transported in the trunk of a car. [In Sanders, police stopped a taxi and warrantlessly searched luggage for which they had probable cause.] . . . Although the Court had applied the *Carroll* doctrine to searches of integral parts of the automobile itself (indeed, in *Carroll*, contraband whiskey was in the upholstery of the seats, *see* 267 U.S., at 136), it did not extend the doctrine to the warrantless search of personal luggage "merely because it was located in an automobile lawfully stopped by the police." Again, the *Sanders* majority stressed the heightened privacy expectation in personal luggage and

concluded that the presence of luggage in an automobile did not diminish the owner's expectation of privacy in his personal items.

In *Ross*, the Court endeavored to distinguish between *Carroll*, which governed the *Ross* automobile search, and *Chadwick*, which governed the *Sanders* automobile search. It held that the *Carroll* doctrine covered searches of automobiles when the police had probable cause to search an entire vehicle but that the *Chadwick* doctrine governed searches of luggage when the officers had probable cause to search only a container within the vehicle. Thus, in a *Ross* situation, the police could conduct a reasonable search under the Fourth Amendment without obtaining a warrant, whereas in a *Sanders* situation, the police had to obtain a warrant before they searched.

* * *

III

* * *

The Court in *Ross* rejected *Chadwick*'s distinction between containers and cars. . . . It also recognized that it was arguable that the same exigent circumstances that permit a warrantless search of an automobile would justify the warrantless search of a movable container. In deference to the rule of *Chadwick* and *Sanders*, however, the Court put that question to one side. . . . We now must decide the question deferred in *Ross:* whether the Fourth Amendment requires the police to obtain a warrant to open the sack in a movable vehicle simply because they lack probable cause to search the entire car. We conclude that it does not.

IV

* * *

To the extent that the *Chadwick-Sanders* rule protects privacy, its protection is minimal. Law enforcement officers may seize a container and hold it until they obtain a search warrant. *Chadwick*, 433 U.S. at 13.

Since the police, by hypothesis, have probable cause to seize the property, we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases.

And the police often will be able to search containers without a warrant, despite the *Chadwick-Sanders* rule, as a search incident to a lawful arrest. In *New York v. Belton*, 453 U.S. 454 (1981), the Court said:

> [W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment. *Id*., at 460.

* * *

In light of the minimal protection to privacy afforded by the *Chadwick-Sanders* rule, and our serious doubt whether that rule substantially serves privacy interests, we now hold that the

Fourth Amendment does not compel a separate treatment for an automobile search that extends only to a container within the vehicle.

* * *

VI

* * *

In the case before us, the police had probable cause to believe that the paper bag in the automobile's trunk contained marijuana. That probable cause now allows a warrantless search of the paper bag. The facts in the record reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment.

* * *

We . . . interpret *Carroll* as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.

The judgment of the California Court of Appeal is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

CASE IMPORTANCE:

Police do not need a warrant to search a vehicle where they have probable cause to search only within a container inside the vehicle. The Fourth Amendment allows police to search anywhere within a motor vehicle, including containers, where the object of the search may be reasonably hidden so long as probable cause to search for the item exists.

In order to provide one rule for searches of containers discovered in automobiles, the *Acevedo* Court held that the police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained somewhere within the motor vehicle. Under this view, the search of the luggage in *United States v. Chadwick* would have been lawful in the absence of a warrant, and the search of the luggage in *Arkansas v. Sanders* would have produced lawfully seized evidence.

In a Louisiana case that applied the teachings of *Ross* and *Acevedo*,[93] officers lawfully stopped a motor vehicle for a moving violation and, as they approached the vehicle, smelled a strong odor of raw marijuana wafting from the car. The strong smell gave officers probable cause to warrantlessly search the entire automobile in any place where marijuana might be hidden, including any containers found within the vehicle. The reviewing court referenced *Ross* and *Acevedo* and noted,

> Police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it, may conduct a warrantless search of the vehicle as thoroughly as a magistrate could authorize. The scope of the warrantless search of an automobile is not defined by the nature of the container in which the contraband is secreted, but rather, is defined by

> the object of the search and the places in which there is probable cause to believe it may be found. That is, if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.[94]

In this case, officers "peeled back" some carpet in the trunk and found a plastic container filled with marijuana, cocaine, and methamphetamine. The container did not seal perfectly, and the marijuana was wrapped in thin plastic bags that allowed the odor to escape. Since the search was lawful, the court did not reverse the convictions.

20. Searches Following Vehicle Forfeitures

In some cases, a state government may possess a complete right of ownership of a car[95] and not merely a right under the Fourth Amendment to search it. Where a motor vehicle's status allows it to be seized as forfeitable contraband, no warrant is required prior to taking control of the vehicle and searching the interior. In *Florida v. White*, 526 U.S. 559 (1999), police officers observed White using his car to deliver cocaine on three separate occasions, thus developing probable cause to believe that the automobile was subject to forfeiture under Florida law. Several months later, police had probable cause to arrest White on charges unrelated to his cocaine dealing. During the arrest process, police noticed the car, which they believed was subject to forfeiture due to its prior use to deliver cocaine, and immediately, without a warrant, seized the vehicle and conducted a search.[96] The Supreme Court of the United States reversed the Florida Supreme Court's prior holding that a warrant was required under the Fourth Amendment to seize the car. According to the *White* Court, since there was probable cause to believe that the car was contraband, having been used in a drug delivery, and since it was mobile and in a public place, the vehicle could be reasonably seized without a warrant under the Fourth Amendment as interpreted by the *Carroll* doctrine. Consistent with *Florida v. White* was a recent case involving a federal forfeiture of a Jaguar automobile the police had good reason to believe had been purchased with drug proceeds.[97] In this case, the defendant had no visible means of making a living for a year and a half, which had been verified by the Virginia Employment Commission. In addition, the defendant had mentioned owning a Jaguar during one of the police/DEA-controlled drug sales in which he was the seller, and he had been seen driving the vehicle on numerous occasions. One detective testified that the defendant was obtaining kilogram quantities of narcotics and reselling them in ounce quantities. The federal district court noted that there were numerous cases where evidence of drug trafficking combined with an absence of legitimate sources of income will support that the wealth is related to criminal activity. The judge found that there was probable cause to seize the vehicle for forfeiture purposes and held that the vehicle could be searched without search probable cause and in the absence of a warrant without violating any Fourth Amendment right of the defendant. The general rule, consistent with *Florida v. White*, is that where police have probable cause to believe a vehicle is subject to forfeiture, no warrant is necessary to seize or to search a vehicle. Under

such circumstances, the defendant had no Fourth Amendment expectation of privacy in the seized vehicle, and the evidence was not suppressed.[98]

21. Other Theories of Vehicle Searches and Seizures

The Fourth Amendment allows officials to conduct warrantless searches of motor vehicles based on probable cause to search, pursuant to an inventory search, incident to lawful arrest, based on consent, following forfeitures, and, to a limited extent, at sobriety checkpoints. Limited searches are permitted under the stop and frisk rationale where police officers possess reasonable basis to suspect that criminal activity might be afoot. Automobile inventory searches require that the law enforcement agency have and routinely follow a written inventory policy. Exigent circumstances might allow a vehicle search where life was clearly at risk.

Searches of motor vehicles following a lawful arrest[99] of the driver or passenger follow the general rules for searches incident to arrest.[100] The primary goal of such a search is to remove any weapons over which an arrestee might gain control. Where the arrest occurs while a driver is seated, the area inside the passenger compartment may be searched, since the arrestee might be able to grab a gun or other weapon or destroy evidence. Once the driver has been removed and secured at another location, a search incident to arrest of a motor vehicle must be related to the reason for the arrest.[101] Naturally, the driver's person may be searched following an arrest within a motor vehicle.

Limited motor vehicle searches have been approved on less than probable cause where the state was attempting to detect drug- or alcohol-impaired drivers. In *Michigan v. Sitz*, 496 U.S. 444 (1990), the Supreme Court approved a police plan in which automobile drivers were stopped briefly while officers attempted to observe traits that indicated impairment. The *Sitz* Court held that, although such stops were Fourth Amendment seizures, they constituted reasonable seizures when balanced between the state's grave and legitimate interest in curbing drunk driving and the minimal intrusion on and inconvenience for the motorist. According to the Court, the use of sobriety checkpoints is reasonable where all motorists are briefly screened for drug or alcohol use and only those who appear impaired are subject to additional inquiry.

If an effort to detect drinking drivers passed muster under the Fourth Amendment on less than probable cause or reasonable basis to suspect criminal activity, it would seem as if the interdiction of a drug-carrying or drug-using motorist might win court approval. In *Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Court ruled against the practice of setting up roadblocks on public highways so that police could inspect the interiors of automobiles and observe drivers while a drug-sniffing dog walked around the vehicle. The locations where automobiles would be stopped were marked by highway signs. Police practice involved stopping a group of cars and allowing all others to proceed while the officers processed the stopped vehicles. There was no particular reason to stop any car. The officers conducted each stop in the same manner until and unless particularized suspicion developed. The officers possessed no discretion to stop any vehicle out of sequence.

In failing to approve the practice in *Edmond*, the Court distinguished *Michigan v. Sitz* on the ground that the program in *Sitz* was

> clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue. The gravity of the drunk driving problem and the magnitude of the State's interest in getting drunk drivers off the road weighed heavily in our determination that the program was constitutional.
>
> *Michigan v. Sitz*, 496 U.S. 444, 451 (1990)

The stop in *Sitz* was quite brief, the carnage on highways from impaired drivers was well documented, and the Court felt the stop at the checkpoint was reasonable under the Fourth Amendment. The gravity of the drunk driving problem and the extent of the state's interest in getting drunk drivers off of the road weighed heavily in the Court's determination that the *Sitz* program was constitutional. In contrast, in *Edmond*, the primary purpose was the interdiction of narcotics and other illegal drugs and the arrest of drug offenders. Such a goal was more of a general crime-fighting activity, which, if the drug stops were upheld, could be considered for other types of crime using roadside stops. Since the primary purpose involved a general interest in crime control, the Court declined to suspend the general requirement of individualized suspicion normally required to seize a person.

In a Maryland case[102] that did not involve police briefly seizing motorists, Baltimore police walked on foot among cars stopped at traffic lights under a program called a "traffic initiative." Police looked for visible violations and they only used the plain view doctrine to look inside cars as they walked among the cars. The traffic lights stopped all the cars and not the police. One man was not wearing a seatbelt and police detained him to find that he had an outstanding arrest warrant and a firearm that he was not entitled to possess. He appealed his convictions based on the fact that police used an illegal checkpoint or roadblock to seize him. The essence of a checkpoint is that drivers and passengers are stopped by the police in the absence of any reasonably articulable suspicion to do so. The reviewing court found that the stop light scrutiny did not involve a type of illegal checkpoint condemned in *Indianapolis v. Edmond* since police did not block the road and did not stop anyone until a violation was observed. No barriers were utilized and no police flashing lights alerted motorists to the "traffic initiative" that would commonly be part of a checkpoint. The reviewing court found no Fourth Amendment violation and upheld the convictions.

While receiving mixed reviews in the drug and alcohol context, the roadblock screen has constitutional vitality in some other limited contexts, especially where an emergency dictates that reasonable police practice requires some minimal scrutiny of vehicles leaving an area. In a Massachusetts case, after three o'clock in the morning, police received numerous 911 calls concerning a series of multiple gunshots from a cul-de-sac and found fifty or more people milling about. Since some of the individuals were attempting to leave the area in vehicles, the police decided to take a look at each vehicle passing out of the cul-de-sac. During the brief questioning of each occupant, an officer noticed a firearm in one of the vehicles and eventually arrested the occupants, charging

one with illegal possession of a firearm. When the subject filed a motion to suppress the evidence, the court noted that, although normally articulable suspicion is required to make a vehicle stop, on some occasions, the intrusion is limited and serves a crucial public need that cannot be easily met in any other manner. The court held the initial stop and intrusion were reasonable given the fact that the police knew a crime had been committed but possessed no individually particularized suspicion. The reasonableness required a balancing of the public interest against the right of a person to be free from arbitrary seizure by law enforcement personnel. In upholding the brief stop, the court of appeals noted that

> the facts indicate this was a deliberate emergency police effort to apprehend one or more fleeing suspects as to whom the police had no physical description, no information as to their number, and indeed no indication as to whether they were fleeing on foot or by vehicle.[103]

22. Summary

Fourth Amendment case decisions have determined that persons residing in private residences have the greatest expectation of privacy under the Fourth Amendment, even though the Fourth Amendment does not mention the concept of privacy. As a strong general rule, the search of a home requires the use of a search warrant based on search probable cause, unless some other legal theory provides an excuse or other justification. The use of thermal imaging devices cannot be used to help develop probable cause to search a residence. Consent and emergency circumstances are two exceptions to the warrant requirement that allow warrantless searches of homes. In a similar fashion, an arrest warrant is generally required to make a lawful arrest within the home of the arrestee. Individuals who live within a residence clearly have an expectation of privacy, as do other persons who are permitted to stay or sleep overnight.

Individuals for whom probable cause to arrest exists may be arrested outside the home without a warrant, and the arrestees may be searched incident to the arrest. The scope of a search incident to arrest includes the person of the arrestee and the area that is within that person's immediate dominion and control. Personal property on or near an arrestee may be searched without probable cause and without a warrant immediately following a lawful arrest.

Objects that are in plain view that are observed by an officer who lawfully occupies the position from which contraband or other seizable evidence has been observed may be seized without a warrant. Seizable objects that are expected to be found pursuant to a search warrant but were not listed as seizable property on the warrant may be seized even though the discovery was not inadvertent. Evidence that may be smelled by an officer who is lawfully on the premises may be seized provided the smell indicated criminality. Officers who are conducting frisks and feel objects for which the nature of the incriminating property is immediately apparent may lawfully seize those objects, but officers are not permitted to manipulate objects found in pockets because this is a search beyond the scope of a frisk.

When probable cause does not exist, a search may be based upon consent of the person who holds dominion and control over the property. Where the person gives consent, based on the totality of circumstances test, and where the consent has been freely and voluntarily given, police officers may conduct searches within the scope of the consent granted. Consent to search can be limited in time and can be withdrawn.

Motor vehicle searches generally do not require warrants but do require the presence of probable cause to search. The mobility of motor vehicles and the fact that they may move through other jurisdictions makes the obtaining of warrants in some cases difficult. Given probable cause, a motor vehicle and its containers may be searched, limited only by the scope dictated by the type of object that is the goal of the search. Court decisions have permitted brief stops of motor vehicles for a sobriety check of drivers but have stopped short of permitting roadway stops for general criminal investigation.

REVIEW EXERCISES AND QUESTIONS

1. Why is a warrant generally necessary in order to lawfully arrest a person who is residing within his or her own home?
2. Where police officers have a search warrant for a particular home for small objects and drugs, can the search extend to motor vehicles that are inside an attached garage and to motor vehicles that are parked in front of the attached garage?
3. Assume that law enforcement officials developed information that individuals were growing marijuana inside a suburban home, but they did not have probable cause to obtain a search warrant. If the officers were to use a thermal imaging device that could detect and interpret heat signatures coming from the home that indicated excessive heat escaping from the home, could this information be combined with other information to obtain a warrant based on probable cause to search? Why or why not? See *Kyllo v. United States*, 533 U.S. 27 (2001).
4. Explain the scope of a search of a person incident to that person's lawful arrest. Should any incriminating evidence that was discovered during the search be suppressed if the search turns out to have been unlawful? Why or why not?
5. Why is the conducting of a search of an arrestee's personal property appropriate following an arrest? Does an inventory search of an arrestee's property require a search warrant?
6. What are the requirements for the use of the plain view doctrine? Give an example.
7. Assume that a police officer conducted a lawful stop and frisk. In conducting the frisk, the officer felt what reasonably seemed to be a package of cigarettes in the subject's top shirt pocket. Would the plain feel doctrine that is related to the plain view doctrine allow the officer to reach inside the shirt pocket, retrieve the cigarette pack, and look inside the pack for incriminating evidence? Why or why not?

8. In conducting a lawful consent search of a person or of that person's motor vehicle, the proper person must be asked to give consent, and it must be given freely and voluntarily. Who is the proper person to give consent? What are the factors that are considered in determining whether the consent has been freely and voluntarily given?
9. Do searches of motor vehicles generally require search warrants in addition to probable cause?
10. If police have probable cause to search a motor vehicle, may the search extend, in all cases, to every possible place in a motor vehicle where anything could have been hidden? What factor determines the scope of a motor vehicle search?

1. How Would You Decide?

In the Federal District Court for the Southern District of New York.

The defendant, Watson, had been indicted for a single count of possession of a firearm by a convicted felon, in violation of federal law, after police found a handgun on his person that he was not permitted to possess. Officers, positioned across the street, originally observed him leaving a convenience store carrying a unlit cigar blunt and a fountain drink, giving rise to a stop for suspicion of the possession of marijuana. Around his waist, Watson wore an opaque bright-blue fanny pack that was later discovered to contain a .40-caliber handgun. As several officers surrounded him, one officer observed the smell of marijuana and saw, in plain view, a heavy-looking L-shaped object contained within his fanny pack that one officer suspected was a firearm. Fearing that he might be armed and dangerous, one officer conducted a frisk of his person and of the fanny pack and believed that he felt a firearm through the cloth. After Watson became evasive and took a step away from the officers, they grabbed him and placed him under arrest. One of the officers removed the fanny pack from his waist and opened it to reveal a firearm. The defendant contested the stop and the frisk of his person and the frisk of his fanny pack by filing a motion to suppress the evidence of the marijuana and the firearm. He based his motion to suppress on the ground that he should not have been stopped and that his fanny pack should not have been frisked and opened. The government contended that the stop was valid because the cigar looked like one that contained marijuana. Additionally, the prosecution argued that the visible L-shaped bulge in the fanny pack gave the officer's reasonable suspicion to frisk him and that the officers then were then permitted to search the fanny pack pursuant to the plain feel doctrine.

How would you rule on the defendant's contention that the facts observed by the officers failed to support the use of the plain view and plain feel doctrine and did not permit the search and seizure of the gun?

The Court's Holding:

[The District Court found that police officers had a reasonable basis to stop Watson, because as they approached him, one of the officers testified that he started to smell marijuana, and another officer indicated that unlit marijuana contains an odor that one can

smell. The District Court found at the moment the officers directed Watson to stop, they had reasonable suspicion to believe that the cigar contained marijuana. This reasonable suspicion is based on the fact that, while standing "pretty close" to Watson, the officers, already suspicious about the shape and wrapping of the cigar, began to detect the smell of marijuana.]

* * *

C. **Whether, Upon Stopping Watson, the Officers Had Reasonable Suspicion to Frisk Him**

That the officers had reasonable suspicion to stop Watson does not mean that they were necessarily entitled to frisk him. To justify frisk under the second Terry prong [*that the person with whom they were dealing might be armed and dangerous*], the officers must have had reasonable suspicion that Watson was "armed and presently dangerous." The Government contends that the officers had the requisite reasonable suspicion on the basis of their observation, made during the Terry stop, of the "heavy-looking L-shaped object" in Watson's fanny pack, which, based on their "training and experience," the officers recognized as "likely a firearm."

Whether a "bulge" is enough to provide reasonable suspicion that someone is "armed and dangerous" is a fact-driven inquiry. In *Pennsylvania v. Mimms*, 434 U.S. 106, 112, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977), for example, the Supreme Court held that a "large bulge under [the defendant's] sports jacket . . . permitted [an] officer to conclude that [the defendant] was armed and thus posed a serious and present danger to the safety of the officer." But not every "bulge" can justify a frisk. "[T]he outline of a commonly carried object such as a wallet or cell phone does not justify a . . . frisk."); *People v. Stevenson*, 7 A.D.3d 820, 820, 779 N.Y.S.2d 498 (2d Dep't 2004) (finding no justification for a frisk where "[t]he detective did not indicate that the bulge had the outline of a weapon, and he was unable to describe it in any further detail").

Where, however, the "bulge" presents the "classic 'L-shape' typical of larger guns," courts will typically approve an officer's investigatory frisk. See *United States v. Price*, No. 13-cr-216 (RRM), 2014 U.S. Dist. LEXIS 17155, 2014 WL 558674, at *9 (E.D.N.Y. Feb. 11, 2014) (collecting cases).

* * *

II. Whether, Upon Frisking Watson, the Officers Were Entitled to Open the Fanny Pack Pursuant to the Plain Feel Doctrine

Finally, Watson argues that because the officers gained complete control of the fanny pack after removing it from Watson's body, they were required to obtain a search warrant before opening it. The Government responds that the officers were entitled to open the fanny pack without a warrant under the so-called "plain feel doctrine."

The plain feel doctrine, a variation on the plain view doctrine, provides that law enforcement officers may seize evidence discovered through the sense of touch during

a lawful Terry frisk. See *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). "The plain feel doctrine applies to the seizure of objects in containers as well as objects found on the person of a suspect." *United States v. Colon*, No. 10-cr-498 (RPP), 2011 U.S. Dist. LEXIS 14106, 2011 WL 569874, at *13 (S.D.N.Y. Feb. 8, 2011) (citing *United States v. Ocampo*, 650 F.2d 421, 429 (2d Cir. 1981)).

By contrast, where the nature of the object is not immediately apparent by touch, law enforcement officers are prohibited from "physical manipulation," such as "feel[ing] the bag in an exploratory manner." Thus, if, at the moment a container is properly seized, the contraband is "perceptible by . . . touch," the contraband itself "could be seized as in plain view." ("Where the contents of a container are easily discernible by frisking the exterior of a package . . . it would be a pointless formality to require that the agents first obtain a warrant. . . .").

The Court holds that Officer Rodriguez was entitled to seize and search the fanny pack pursuant to the plain feel doctrine. The Complaint alleges that Officer Rodriguez, upon frisking the fanny pack, "immediately confirmed that it was a firearm." His testimony corroborated the same. For example, he testified that, upon frisking the fanny pack, he "instantly" "felt a very hard object which [he] knew to be a firearm" based on his "experience with gun arrests" and from the fact that he himself often carried a weapon. Accordingly, Officer Rodriguez was entitled to seize the fanny pack (pursuant to *Minnesota v. Dickerson*) and search it (pursuant to *Unites States v. Ocampo*). [A different federal case, 650 F.2d 421 (2nd Cir. 1981).]

Conclusion

For the foregoing reasons, the Court, by Order dated January 26, 2021, denied Watson's motion to suppress. [Some citations omitted.]

See *United States v. Watson*, 2021 U.S. Dist. LEXIS 27276 (S.D.N.Y.2021).

2. How Would You Decide?

In the Superior Court of Pennsylvania.

In a homicide case in Pennsylvania, the deceased's sister gave police a description of the vehicle that the killer drove. A police officer identified a vehicle that matched the description given by the victim's sister and initiated a traffic stop, because, among other reasons, the registration sticker on the vehicle's license plate indicated that it had expired and the vehicle could not be legally operated on the public highways of Pennsylvania. When the subject told the officer that he did not have the required vehicle insurance, the officer impounded the motor vehicle and initiated an inventory search pursuant to the police department's inventory policy. Evidence indicated that the inventory search followed the department's inventory policy and that under the circumstances presented by this case, the officers in the department would have routinely conducted an inventory of an impounded vehicle. The inventory search revealed a firearm in the vehicle that the subject could not lawfully possess. At a later time, after the defendant was in custody, he confessed to being the person who committed the homicide at issue in this case. The firearm and the defendant's confession to murder made following his arrest were introduced against him at his murder trial. The Court of Common Pleas of Allegheny County

refused to suppress either the firearm or confession, and both contributed to the guilty verdict of first-degree murder.

How would you rule on the defendant's contention that the inventory search was illegal because he should not have been stopped and his vehicle should not have been impounded in the first instance?

The Court's Holding:

[The reviewing court considered the facts in the case and considered the arguments that the defendant offered in support of the proposition that he had been illegally stopped by the police officer. The court also reviewed the facts that led to the inventory search that revealed the illegally possessed firearm that prompted the arrest of the defendant.]

Appellant seeks to suppress the evidence of the gun and his confession based on (1) the illegal inventory search and (2) the illegal traffic stop of his vehicle. In reviewing the denial of suppression, the following applies:

Appellant argues that because Officer Hilley was following his car at Detective Logan's request and intended to pull him over regardless of whether or not he was in violation of the Code, this renders the stop somehow illegal. We have to look at the facts as they are, not what they might have been; Officer Hilley's testimony is clear that he saw appellant's expired registration sticker prior to pulling the vehicle over. Appellant does not contest the fact that an expired registration is a violation of the Motor Vehicle Code. Therefore, the stop was valid.

* * *

Next, we consider appellant's argument that the impoundment of his vehicle and subsequent inventory search were unlawful and the evidence should have been suppressed. Inventory searches are a well-defined exception to the search warrant requirement. *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987); *Commonwealth v. Nace*, 524 Pa. 323, 327, 571 A.2d 1389, 1391 (1990), *cert. denied*, 498 U.S. 966, 111 S. Ct. 426, 112 L. Ed. 2d 411 (1990).

"The purpose of an inventory search is not to uncover criminal evidence. Rather, it is designed to safeguard seized items in order to benefit both the police and the defendant." [Citations omitted.] Inventory searches serve one or more of the following purposes: (1) to protect the owner's property while it remains in police custody; (2) to protect the police against claims or disputes over lost or stolen property; (3) to protect the police from potential danger; and (4) [***12] to assist the police in determining whether the vehicle was stolen and then abandoned. *See South Dakota v. Opperman*, 428 U.S. 364, 369, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976).

* * *

In determining whether a proper inventory search has occurred, the first inquiry is whether the police have lawfully impounded the automobile, *i.e.*, have lawful custody of the automobile. *Opperman*, 428 U.S. at 368, 96 S.Ct. 3092. The authority of the police to impound vehicles derives from the police's reasonable community care-taking functions. *Id*. Such functions include removing disabled or damaged vehicles from the

highway, impounding automobiles which violate parking ordinances (thereby jeopardizing public safety and efficient traffic flow), and protecting the community's safety. *Id*. at 368–369, 376 n.10, 96 S.Ct. 3092.

The second inquiry is whether the police have conducted a reasonable inventory search. *Id*. at 370, 96 S. Ct. 3092. An inventory search is reasonable if it is conducted pursuant to reasonable standard police procedures and in good faith and not for the sole purpose of investigation. *See Bertine*, 479 U.S. at 374, 107 S.Ct. 738, 93 L. Ed. 2d 739 ("reasonable police regulations relating to inventory procedures of automobiles administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure").

* * *

At the suppression hearing in January 2000, the validity of the inventory search conducted pursuant to City of Pittsburgh Police Department procedures was raised and extensively discussed. Appellant argued that the impounding of the vehicle for lack of registration and insurance was not covered by the relevant police standard order, and therefore the inventory search was not proper procedure. The trial court resolved the issue as follows:

> The subsequent search of the vehicle was also proper. It was made pursuant to the policy of the Pittsburgh Police regarding inventory searches. It was not disputed that [appellant]'s vehicle did not have a current registration and that it did not carry insurance. It was also not disputed that the vehicle was stopped in an area where parking was not permitted on either side of the street. The officer could not permit [appellant] to move the vehicle; department policy prohibited the officer from moving it himself and it could not be left where it was because parking was not permitted in that area. The only course left to the officer was the one he followed, the towing of the vehicle. Since it was going to be towed, department policy required that an inventory search be conducted. It was during this lawful search that the weapon, which gave the officer probable cause to arrest [appellant], was found.

The second requirement, that the inventory search be conducted in accordance with a reasonable, standard policy, was also met. The officer explained that the department policy was that whenever a vehicle is seized the seizing officer is to conduct a search of the entire vehicle to identify its contents.

* * *

We find no evidence to support appellant's contention. Officer Hilley testified that appellant's vehicle was stopped in the middle of the roadway such that it constituted a traffic hazard; that the particular street on which appellant's vehicle was stopped did not permit parking on either side; and that there was a great amount of snow on the road, preventing appellant from pulling onto the sidewalk so as not to interfere with traffic. Officer Hilley also testified that in the case of a recovery of a stolen vehicle, the owner is notified and given an opportunity to come and claim it; however, department policy in the case of an unregistered/uninsured vehicle is to impound it if it cannot be legally parked. Officers are not permitted to move an unregistered/uninsured vehicle to a safe

area where it can be legally parked. In impounding appellant's vehicle and conducting the required inventory search, Officer Hilley was merely following established departmental policy; the search was not designed to uncover evidence of a crime.

Affirmed. [the conviction.] See *Commonwealth v. Henley*, 2006 PA Super 276, 909 A.2d 352, 2006 Pa. Super. LEXIS 3054 (2006).

Notes

1. *Wilson v. Layne,* 526 U.S. 603, 609 (1999), Chief Justice Rehnquist quoting *Semayne's Case* as cited internally previously.
2. *Id*. at 610.
3. See *Payton v. New York*, 445 U.S. 573 (1980), where the Court held that a warrant was a requirement to validly arrest within the subject's home unless special circumstances were present. According to Justice Stevens, "Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment." 445 U.S. 573, 584.
4. *Kentucky v. King*, 563 U.S. 452, 461, 131 S.Ct. 1849, 1857, 179 L.Ed.2d 865, 875, 2011 U.S. LEXIS 3541 (2011). The Court noted that officers may not manufacture an emergency and then benefit from it by citing the emergency as an exception to the general rule requiring a warrant to enter private property.
5. 569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495, 2013 U.S. LEXIS 2542 (2013).
6. *Id*. at 9.
7. See *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706, 1973 U.S. LEXIS 48 (1973).
8. ___U.S.___, 141 S.Ct. 1596, 209 L.Ed.2d 604, 2021 U.S. LEXIS 2582 (2021).
9. *Id*. at ___.
10. ___U.S.___, 141 S.Ct. 2011, 28 Fla. L. Weekly Fed. S. 969 (2021).
11. *Id*. at ___.
12. *Payton v. New York,* 445 U.S. 573, 585 (1980).
13. 445 U.S. 573 (1980).
14. *Michigan v. Jones,* 249 Mich. 131, 137; 640 N.W.2d 898, 900, 901 (2002).
15. 456 U.S. 798 (1982).
16. *Id*. at 821.
17. 436 N.W.2d 92 (1989).
18. See *United States v. Place,* 462 U.S. 696 at 707 (1983).
19. *Kyllo v. United States,* 533 U.S. 27, 40 (2001).
20. 232 U.S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652, T.D. 1964 (1914).
21. *Chimel v. California,* 395 U.S. 752 at 762–763 (1969).
22. In *United States v. Robinson,* 414 U.S. 218 at 234 (1973), the Court approved the full search of a driver of an automobile for whom probable cause to arrest existed. Immediately following the arrest, the officer conducted a search of the inner pockets and personal effects of the arrestee and discovered heroin. The *Robinson* Court quoted then Associate Judge Cardozo of the New York Court of Appeals as he explained the justification of a search incident to arrest. Cardozo stated, "The peace officer empowered to arrest must be empowered to disarm. If he may disarm, he may search, lest a weapon be concealed. The search being lawful, he retains what he finds if connected with the crime." *People v. Chiagles,* 237 N.Y. 193, 197; 142 N.E. 583, 584 (1923).
23. See *Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492, 1998 U.S. LEXIS 8068 (1998).
24. *State v. Pines*, 2021 Wash. App. LEXIS 1160 (2021).
25. *Mitchell v. Wisconsin*, 588 U.S.___, ___, 139 S.Ct. 2525, 2531, 204 L.Ed.2d 1040 (2019). For the origin of the search incident to arrest, see *Weeks v. United States,* 232 U.S. 383 (1914).
26. In *Payton v. New York,* 445 U.S. 573 at 610 (1980), the Court quoted with approval an early Massachusetts case, *Rohan v. Swain,* 59 Mass. 281 at 282 (1851), which upheld the practice of warrantless arrests:

"It has been sometimes contended that an arrest . . . without a warrant, was a violation of the great fundamental principles of our national and state constitutions, forbidding unreasonable searches and arrests except by warrant founded upon a complaint made under oath. . . . They do not conflict with the authority of constables or other peace officers . . . to arrest without warrant those who have committed felonies. The public safety, and the due apprehension of criminals, charged with heinous offences, imperiously require that such arrests should be made without warrant by officers of the law."

27. See *United States v. Latham*, 763 Fed. App. 428, 2019 U.S. App. LEXIS 4188 (6th Cir. 2019).
28. *United States v. Abreu*, 2021 U.S. Dist. LEXIS 1945 (S.D.N.Y.2021).
29. See *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, 1969 U.S. LEXIS 1166 (1969) and *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485, 2009 U.S. LEXIS 3120 (2009).
30. Some searches may be permissible following an arrest within the home that are not necessarily incident to arrest as the term is now understood. In *Maryland v. Buie,* 494 U.S. 325 (1990), the Court approved of a properly limited protective sweep of the rooms in conjunction with an in-home arrest when the searching officer possessed a reasonable belief based on specific and articulable facts that the area to be swept could harbor an individual posing a danger to those on the arrest scene. The justification for such an extensive sweep is decidedly not automatic; the sweep may be conducted only when justified by a reasonable suspicion on behalf of the officers.
31. *Holguin v. State*, 2021 Tex. App. LEXIS 580 (2021).
32. *Id*. at __.
33. 566 U.S. 318, 132 S.Ct. 1510, 182 L.Ed.2d 566, 2012 U.S. LEXIS 2712 (2012).
34. See *Maryland v. King*, 69 U.S. 435, 445, 133 S.Ct. 1958, 186 L.Ed.2d 1, 2013 U.S. LEXIS 4165 (2013).
35. 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485, 2009 U.S. LEXIS 3120 (2009).
36. See *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430, 2014 U.S. LEXIS 4497 (2014).
37. See *Birchfield v. North Dakota*, 579 U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560, 2016 U.S. LEXIS 4058 (2016). See also *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696, 2013 U.S. LEXIS 3160 (2013).
38. *United States v. Rivers*, 988 F.3d 579, 2021 U.S. App. LEXIS 5063 (1st Cir. 2021).
39. See *Florida v. Wells*, 495 U.S. 1, 110 S.Ct. 1632, 109 L.Ed.2d 1, 1990 U.S. LEXIS 2035 (1990). The Court determined that under the Fourth Amendment, vehicle inventory searches require a written departmental policy that regulates inventory searches, and the policy must be routinely followed to make such searches reasonable.
40. *Ibid*.
41. See *Obregon v. State*, 2007 Tex. App. LEXIS 6282 (2007).
42. 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65, 1983 U.S. LEXIS 71 (1983).
43. *People v. Swenor*, 2021 Mich. App. LEXIS 1822 (2021).
44. See *Glanden v. State*, 2021 Md. App. LEXIS 80, 245 A.3d 519 (2021).
45. *Pennsylvania v. Ballard*, 2002 PA Super 283; 806 A.2d 889, 892 (2002).
46. See *Arizona v. Hicks*, 480 U.S. 321 (1987).
47. *Lewis v. State*, 2021 Ga. App. LEXIS 85, *8 (2021).
48. *People v. Pittman*, 2021 Ill. App. Unpub. LEXIS 324 (2021).
49. See *United States v. Smith*, 2021 U.S. App. LEXIS 6490 (8th Cir. 2021).
50. *Maestas v. State*, 2018 WY 47, 416 P. 3d 777, 2018 Wyo. LEXIS 49 (2018). The dissent in this case believed that the officer only had a suspicion and not probable cause to believe that the object was contraband and would have decided the case based on Dickerson.
51. *Young v. State*, 563 S.W.3d 325, 2018 Tex. App. LEXIS 6424 (2018).
52. *Id*. at 329.
53. See *State v. Robinson*, 310 Ore. 644, 2021 Ore. App. LEXIS 496 (2021).
54. *Id*. at *18.
55. *Thomas v. State*, 2018 Md. App. LEXIS 493 (2018).
56. *Id*. at *16, *17.
57. See *Commonwealth v. Griffin*, 2021 Pa. Super. Unpub. LEXIS 1148 (2021). See also *Commonwealth v. Barr*, 2020 PA Super 236, 240 A.3d 1263 (2020).

58. See *Abel v. State*, 2020 Tex. App. LEXIS 6922 (2020).
59. *Illinois v. Rodriguez,* 497 U.S. 177, 182–189 (1990).
60. The Court in *Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 227 (1973), held that knowledge of the right to refuse to grant consent was not essential to offering valid consent; it was but one of several factors in the totality of the circumstances test.
61. *State v. Conkey*, 2021 Iowa App. LEXIS 43 *8 (2021).
62. When a court decides whether to suppress evidence, an important question to deal with is which person possesses standing to contest an alleged illegal search and seizure. Normally, only a person with an expectation of privacy as recognized by Fourth Amendment case law will be permitted to argue the merits of a motion to suppress. Applying modern standing rules of *Rakas v. Illinois,* 439 U.S. 128 (1978), to *Schneckloth v. Bustamonte,* the passenger, Bustamonte, who was eventually prosecuted, might not have any expectation of privacy since he did not own or lease the vehicle. Under such circumstances, the passenger would not have any legal right to contest the validity of the search and seizure. But see *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 l.Ed.2d 132, 2007 U.S. LEXIS 7897 (2007), where the passenger in a stopped vehicle may litigate the legality of the stop since passengers are seized when a vehicle is stopped.
63. See *Georgia v. Randolph*, 547 U.S. 103, 126 S.CT. 1515. 164 l.Ed.2d 208, 2006 U.S. LEXIS 2498 (2006).
64. The Fourth Amendment by its words does not speak of a right of privacy being guaranteed to individuals, but the amendment has been interpreted over the years as giving some level of privacy that varies with the facts, situation, and location. For some discussion of privacy and the Fourth Amendment in two different contexts, consult Justice Scalia's opinion in *Wyoming v. Houghton,* 526 U.S. 295 (1999), and Justice White's lead opinion in *California v. Greenwood*, 486 U.S. 35 (1988).
65. In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable cause issue and the issuance of a warrant before a search is made. Only where an emergency exists and in a few other exceptional situations can the judgment of the police as to probable cause may serve as a sufficient authority for a warrantless search. *Carroll* held that a search warrant was unnecessary where there is probable cause to search an automobile stopped on the highway where the car is movable and the car's contents may never be found again if a warrant must be obtained. Hence, an immediate search is constitutionally permissible.
66. 574 U.S. 54, 59, 135 S.Ct. 530, 190 L.Ed.2d 475, 2014 U.S. LEXIS 8306 (2014).
67. There is no requirement that police procure a search warrant for a motor vehicle even where there is ample time to do so. In a per curiam opinion in *Pennsylvania v. Labron,* 518 U.S. 938 (1996), the Court clearly rejected the Pennsylvania Supreme Court's attempt to require that police obtain vehicle search warrants where time permits.
68. *State v. Brown*, 2021-Ohio-753, *P33, 2021 Ohio App. LEXIS 775 (2021).
69. In a per curiam opinion, the Court stated in *Maryland v. Dyson,* 527 U.S. 465, 467 (1999), "We made this clear in *United States v. Ross,* 456 U.S. 798 (1982), when we said that in cases where there was probable cause to search a vehicle 'a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained.'"
70. See *United States v. Jones*, 565 U.S. 400, 402, 132 S.Ct. 945, 181 L.Ed.2d 911, 2012 U.S. LEXIS 1063 (2012).
71. *State v. Landor*, 2021 La. App. LEXIS 196 (2021). See also *California v. Acevedo*, 500 U.S. 565, 570, 111 S.Ct. 1982, 1986, 114 L.Ed.2d 619 (1991). (Court held that police do not need a warrant to search a container found within a lawfully stopped vehicle if police officers possessed probable cause for the search, given the nature of the object of the search.)
72. *Id*. at *6.
73. 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333, 2000 U.S. LEXIS 8084 (2000).
74. See *Camp v. State*, 2007 Ala. Crim. App. LEXIS 72 (2007).
75. 589 U.S. ___, 140 S.Ct. 1183, 206 L.Ed.2d 412, 2020 U.S. LEXIS 2178 (2020).
76. *People v. Lopez*, 8 Cal. 5th 353, 255 Cal. Rptr. 526, 454 P. 3d 150, 2019 Cal. LEXIS 8892 (2019).

77. *Id*. at 381.
78. For examples of searches incident to arrest of drivers of motor vehicles, see *United States v. Robinson,* 414 U.S. 218 (1973), and *Gustafson v. Florida,* 414 U.S. 260 (1973).
79. In many situations, probable cause for a search, the justification for an inventory search, and consent may all coexist, giving a prosecutor several legal theories on which to argue in favor of admission of the evidence. Where one theory allows admission, the evidence will generally be admitted.
80. See *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201, 1983 U.S. LEXIS 7 (1983).
81. An inventory search may be conducted after an automobile has been lawfully impounded, as occurred in *Florida v. White,* 526 U.S. 559 (1999), where the officers, conducting a routine inventory search, discovered illegal drugs within the automobile.
82. *Benson v. State,* 342 Ark. 684, 30 S.W.3d 731 (2000).
83. *Bratton v. Arkansas,* 77 Ark. App. 174; 72 S.W.3d 522 (2002).
84. *State v. Briggs*, 308 Neb. 84, 953 N.W.3d 41, 2021 Neb. LEXIS 3 (2021).
85. *Id*. at 106.
86. *United States v. Smith*, 990 F.3d 607, 2021 U.S. App. LEXIS 6490 (8th Cir. 2021).
87. *Id*. at ___.
88. *United States v. Evans*, 830 F.3d 761at 767 (8th Cir. 2016). (Court affirmed the denial of suppression under plain view doctrine where officer used a flashlight to look inside car and observed a firearm and marijuana.)
89. See *State v. Jackson*, 2021 Ohio App. LEXIS 559 (2021).
90. Emergency situations, airport searches, consent searches, school searches, border searches, postarrest searches, and some stop and frisk situations may allow an officer to search personal belongings as exceptions to the general rule that probable cause and warrants are necessary.
91. The current law is expressed by *United States v. Ross,* 456 U.S. 798 (1982). The *Ross* Court concluded that officers who have legitimately stopped an automobile and who possess probable cause that seizable matter is concealed somewhere within the vehicle may conduct a warrantless search of the vehicle that is as thorough as a judge or magistrate could have authorized by warrant, even though no warrant has been obtained.
92. The *Sanders* police would have been on notice that a search of a piece of luggage generally required a warrant in addition to probable cause. In *United States v. Chadwick,* 433 U.S. 1 (1977), with probable cause but without a warrant, police seized and opened a piece of luggage that had traveled from San Diego to Boston on a train. The *Chadwick* defendants had just placed the luggage in the trunk of a car. In substance, the *Chadwick* Court held that the warrant clause of the Fourth Amendment required a warrant to search luggage absent exigent circumstances or some other exception and that merely touching a car with the luggage did not trigger the *Carroll* doctrine.
93. *State v. Landor*, 2021 La. App. LEXIS 196 (2021).
94. *Id*. at *5.
95. Justice Thomas explained, "The Florida Contraband Forfeiture Act [Florida Contraband Forfeiture Act, Fla. Stat. § 932.701 *et seq*. (1997)] provides that certain forms of contraband, including motor vehicles used in violation of the Act's provisions, may be seized and potentially forfeited." *Florida v. White,* 526 U.S. 559, 561 (1999).
96. Mr. White also developed other troubles subsequent to his arrest when the police subjected his forfeited vehicle to an inventory search that revealed two rocks of crack cocaine. The inventory search could have been justified as a routine inventory search for which neither probable cause nor a warrant would be required. An alternative manner of justifying the search finds no expectation of privacy in the automobile by Mr. White, since, at the time of the search, it belonged to the government of Florida under the forfeiture law. See Florida Contraband Forfeiture Act, Fla. Stat. § 932.701 *et seq*. (1997).
97. *United States v. Horsley*, 2021 U.S. Dist. LEXIS 51309 (W.D. Va. 2021).
98. *Id*. at *34.
99. The basis for a search of a motor vehicle following an arrest of the driver requires an actual arrest of the driver. In *Knowles v. Iowa,* 525 U.S. 113 (1998), where a police officer possessed probable cause to arrest but issued only a citation and then searched the automobile because the officer *could* have arrested Mr. Knowles, the Court held the search unreasonable under the Fourth Amendment.

100. For a case detailing the scope of a search incident to an arrest involving a motor vehicle, consult *United States v. Robinson,* 414 U.S. 218 (1973).
101. See *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485, 2009 U.S. LEXIS 3120 (2009).
102. *Johnson v. State*, 242 Md. App. 588, 216 A3d 32, 2019 Md, App. LEXIS 783 (2019).
103. *Commonwealth v. Grant,* 57 Mass. App. Ct. 334, 339; 783 N.E.2d 455, 459, 460 (2003).

The Internet of Things: Searches of Computers, Cell Phones, and Other Smart Devices

8

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Learning Objectives

1. Know and be able to articulate some of the different types of personal data that various devices in the Internet of Things might store on the device or in the cloud.
2. Be able to explain the "third party doctrine" as it pertains to information given or shared with another person and why a person might lose an expectation of privacy under such circumstances.
3. Be able to distinguish why the use of a GPS tracker on an automobile would require a warrant, while no warrant would be required if police simply followed a suspect and reported on his or her location to other officers.
4. Comprehend why a person's heart pacemaker or FitBit would generally require a warrant to access its data.
5. Develop an understanding that some smart devices (bank money beepers) included within the Internet of Things do not carry an expectation of privacy for the recipient.
6. Be able to articulate some of the reasons a government search of a private person's cell phone generally requires the use of a search warrant.
7. Understand that for police to obtain long-term cell phone location data, a search warrant is required, consistent with the Fourth Amendment.
8. Under the exigent circumstances or emergency exception, be able to articulate one example in which an emergency exists for which a cell phone search would not require a warrant.
9. With respect to pole security camera searches and other public security cameras, be able to articulate why a warrant might be required in some instances and, in some jurisdictions, why a warrant would not be required in a different jurisdiction or under different circumstances.
10. Be able to identify explain at least three items of data that an event data recorder (EDR) for a motor vehicle stores within its computer memory.

Chapter Outline

KEY TERMS

1. Automobile event data recorder
2. Cloud storage
3. Door bell camera/recorder
4. FitBit
5. Global position satellite tracker
6. Heart pacemaker
7. OnStar
8. Pole surveillance camera
9. Smart device
10. Third party doctrine

1. Introduction: Fourth Amendment and Searches of Electronic Devices

The category of the Internet of Things encompasses a wide variety of smart devices that store, analyze, transmit, and act upon data. Some of them stand alone, while others help build a picture by combining the information they store or convey. The future of smart devices that may connect to the Internet constantly or intermittently is largely dependent upon the imagination of humans and of manufacturers. With computer memory being so relatively inexpensive compared to the past, virtually any sort of device that needs to use or manipulate data will have plenty of memory with which to accomplish any given task. Smart devices include, obviously; cell phones; various watches that acquire and transmit data; implanted and wearable medical devices; automobiles that use cell phone providers and connect to the Internet; devices within the automobile that store and analyze data; GPS devices that may be carried personally, in a motor vehicle, or within a phone; home electrical and water meters; and a host of others that now exist or will exist in the future. Some motor vehicles contain smart cameras that record events that occur around the vehicle, and there are wearable cameras for civilians or the police that record human activity. Many of these smart devices record and report their data to associated servers.

The Internet of Things and its future development and direction are somewhat unknown, but the technology is only going to grow and to get more pervasive. Data collection, network-based sensors, and machines that contain networked sensors are certainly on the horizon, if not with our society already. More and more smart devices will be built into automobiles; home appliances; and controllers in the houses where we live that regulate and measure heat, lighting, and how and when particular rooms in our homes are used. Human activity that largely passed unknown will be measured, recorded, and stored to a degree that will catalogue much of human activity. Much of this stored data will be beyond the control of those who use and interact with these novel smart devices. These new Internet of Things devices will make our lives more

comfortable, and the conveniences will be undeniable, but the data may have uses in the criminal justice system that are barely imaginable. New statutes, case law, and hardware with associated software will be required to make sense of all of this new data, and legislatures and courts will have to fashion new rules concerning privacy issues.

To one degree or another, virtually all of these devices record and store information about human behavior. What quantity of data stored by smart devices under the Internet of Things concept will be available to private parties and/or to government enforcement agencies has been and will continue to be hotly debated, depending upon whether an entity is allowed to use the information or release information to other individuals. Data that has been transmitted to third parties may cause criminal defendants concern because the general rule is that information that has been conveyed to a third party loses any Fourth Amendment expectation of privacy. Much of the data acquired by smart devices will be transmitted to third-party locations for usage, storage, and manipulation that benefits the generator of that data. With respect to some cell phone data, motor vehicle data, and some medical data, it may not be within the control of the individual who generates it, because that data occurs by virtue of the way the device must operate.

Devices that record and report data under the broad topic of the Internet of Things may be of great utility to law enforcement and to prosecutors. One case from Connecticut offers an example of how various smart devices might help solve criminal cases.[1] In a murder case, police were called to the home of a married couple and found that the woman was deceased and the husband had superficial injuries. The husband, a computer technician, reported that he had been on his way to work when the couple's home's burglar alarm alerted him that it had been tripped. He e-mailed his work to tell them he would be late and returned home. His wife had previously gone to a yoga class and was not supposed to be present. According to the husband, when he arrived at the house, the door was open, and he encountered an intruder in the upstairs bedroom. At this point in time, his wife returned early from the canceled yoga class, and he told her to run, whereupon he reported that she ran into the basement. The intruder allegedly followed her to the lower level. At this point, according to the husband, the intruder found a gun, owned by the husband, and shot the wife dead and tied the husband to a chair, stabbed him, and used a blowtorch on his person. At some point, the intruder left, at which time the husband called 911 and activated the panic button on the alarm system. However, a variety of Internet-connected devices cast strong doubt on the husband's story. The e-mail message he sent to work originated from the home IP address, not from his phone, and the burglar alarm records indicated that the alarm system did not give him an alert on his cell phone because it had not then been activated by the subscriber. It appeared that the husband only activated the alarm a few minutes before he pushed the panic button on the alarm and also called 911, all the while inside the marital home. Cell phone records failed to support the husband's timeframe, activity, and locations. In addition, the deceased wife wore a FitBit that indicated she took far too many steps from the time she allegedly arrived home until she entered the basement, and the FitBit indicated the time that she ceased all movement in the basement due to her decease. The FitBit revealed that her last movements were nearly an hour after the husband told officers that she had been killed by the intruder.[2] In this case, a variety of smart devices failed to support the husband's rendering of the facts: cell phone data, e-mail data, security alarm activity, FitBit data

recordings. The defendant's case was not helped by the fact that one of his girlfriends was pregnant with his child and he allegedly attempted to collect on a $475,000 life insurance policy covering his deceased spouse just days after her death.[3] Interestingly, the suppression judge ruled that the defendant's numerous Internet searches concerning poisons would be excluded from trial.[4]

A different homicide case that is demonstrative of what smart devices can record and store that can be useful in various types of criminal prosecutions is a case involving a death of a former policeman in a hot tub in Arkansas.[5] A homeowner, who had been drinking alcohol with his friend in a hot tub, went to bed alone, while his friend remained in the hot tub. The next morning, the friend was floating face down in the warm water and was clearly deceased. Police officers were summoned, and they noticed that the deceased's body exhibited cuts and bruises, and there was blood in the water of the hot tub. The coroner reported that the deceased had probably been engaged in an altercation and that he appeared to have died from both strangulation and drowning.[6] Subsequently, police became aware of a variety of smart devices that the homeowner had installed, some of which reported their data to the Internet cloud servers or other Internet-connected storage devices. The homeowner had an Amazon Echo that listened for commands and recorded some snippets of information when activated. Police felt that the Echo might have caught some incriminating conversations. The utility company had installed an Internet-connected smart water meter that recorded time and amount of usage of water and shared this data with investigators. In this case, a significant amount of water had been used in the middle of the night that was completely unusual based on the past history of the homeowner's water usage, which might have indicated that the water was used to flush away other information. The prosecutor's office wanted information from Amazon's Echo-connected server, but, following an initial resistance to a warrant directed to Amazon, the homeowner-Echo subscriber consented to the release of information.[7] The potential defendant might not have possessed an expectation of privacy in the digital data that was recorded by the two smart devices because he had given the data to a third party. Ultimately, the prosecutor found insufficient evidence to support a criminal case, and the murder charge was dropped.

A Supreme Court case that may have begun to question the concept that when a person gives data to a third party, no expectation of privacy remains for that person was *Carpenter v. United States*,[8] decided in 2018. Defendant Carpenter and some of his criminal associates had committed robberies at business locations where cell phones were sold and serviced. Ironically, in managing their criminal plan, they themselves used cell phones to coordinate their activities. Cell phone operation creates an extensive amount of data related to operation of the cell network. This cell phone usage came to the attention of law enforcement officials, who then requested historical cell site location information (CSLI) for particular phones, one of which was issued to Mr. Carpenter. Police did not obtain Fourth Amendment search warrants but used a court order, based on a federal statute. Cell phone providers gave law enforcement officials the CSLI for the phones that had been identified and used in the cell phone store robberies.

As is well known, cell phones generate extensive amounts of data that are required to make sure that cell phone towers recognize cell phones within their area and can transfer a call to a different cell phone tower as the phone moves across the geography.

The data includes the number assigned to the phone, where it is located, where it has been located, what numbers it calls, data involving text messages, information for billing purposes, and a host of other information that is most particularly useful to the cell company. While the general rule that conveying information to a third party causes its expectation of privacy to cease would normally cover cell phone data, the Court took a new look at this concept in *Carpenter*. With respect to the third party doctrine, the Court noted that the government had failed to comprehend the seismic shifts that have occurred in digital communication technology that made it possible to track Mr. Carpenter as well as everyone else who uses a cell phone. Cell phone data is quite different from voluntarily sending a traditional check to pay a bill and conveying associated information on a one-time basis; a cell phone tracks a person's movements every day, every moment, over several years.[9] The Court found that Mr. Carpenter retained a Fourth Amendment expectation of privacy in the data generated by his cell phone, whether he was talking on it or merely carrying it around with him. Specifically, the CLSI was covered, even when transmitted to a third party. Not only did the Supreme Court find that the obtaining Mr. Carpenter's cell phone records constituted a search, the court determined that a warrant based on probable cause was also required in order to obtain admissible evidence for court room use.

Carpenter has opened a crack in the third party doctrine, the extent and size of which is not now known. It clearly conveyed that its decision was a narrow one that did not in any way call into question typical law enforcement surveillance techniques such as the use of security cameras. The Court also took pains to indicate that this decision did not address other business records that might incidentally disclose location information, and the opinion does not consider any data acquisition issues involving national security or foreign affairs. However, location data generated by smart devices is most likely to be covered by the *Carpenter* decision, while other data that smart devices create may not require a warrant. What is not clear is precisely when law enforcement inquiries and acquisition of data from smart devices will require a warrant. For example, when a person programs a smart watch to record steps or heart rate and to send it to a third party, will a warrant be required by law enforcement? Until the Supreme Court generates case law that creates a broad interpretation involving the Internet of Things and other smart devices included within that constellation, law enforcement officials would be better served by providing probable cause to a magistrate and obtaining a warrant, especially in cases of great importance.

Within the world of the Internet of Things, these smart devices require a unique IP address to distinguish one device from a different device. In one case,[10] decided by the federal First Circuit Court of Appeal after *Carpenter* had been adjudicated, the reviewing court held that subscriber information in the form of the IP address, which must be provided by an Internet service provider to make a device work, is not protected under the Fourth Amendment privacy expectation. The case involved in charge of transportation and receipt of child pornography wherein the defendant attempted to suppress some of the evidence, including his IP address information, that was generated and transmitted through his cell phone. The appeals court noted that the defendant had a faulty argument because an IP address, unlike data in *Carpenter*, on its own, failed to provide any information concerning the location of the user.

2. Personal Computer Searches

Personal computers, whether desktop, laptop, or tablet, generally carry with them a Fourth Amendment expectation of privacy for the owner/user, at least when a government wants to search the data stored on them. Some differences may exist when the government owns the computer and in some cases where the computer is owned by a business entity. The expectation of privacy generally extends to peripheral devices such as thumb drives, jump drives, personal cloud storage devices, and hard drives, whether internal or external or detachable. An expectation of privacy in peripheral devices may be eroded or nonexistent where a person leaves the device where anyone might find it[11] and/or where it is not secured by a password. The strong general rule is that when a government wishes to search a computer or its peripheral devices, a search warrant, consent, or emergency situation must exist if the evidence is to be admissible in court against the person who had the expectation of privacy. In making an analogy to the search of a home, since an particular object might not be found in some places of a home, a search of the computer must specify the data for which probable cause exists. If, while conducting a search, other incriminating data is inadvertently discovered, the plain view doctrine may make the evidence admissible, even though probable cause for the discovery did not originally exist.

In support of the requirement for the use of the search warrant to recover computer data, in an Oregon murder case,[12] police promptly developed probable cause that data might be contained on a personal computer because it was known that the data had been entered on a particular date. The defendant told police that his infant child had died and that he had used his computer to look online for first aid advice before calling for medical assistance. For that reason, police seized his computer as part of their investigation. There was no probable cause to think evidence of the murder existed on any other date in the device, but police forensically examined computer for other dates that were not consistent with the probable cause and directives of the warrant. This other evidence discovered, which was beyond the warrant's directives, indicated that the defendant had searched the Internet for terms related to abuse of infants several times in the months and weeks before his child's untimely death. In fact, there were searches on the computer that went back six years before the deceased child was born. The Oregon Supreme Court held that the evidence beyond the one particular date specified in the warrant should have been suppressed because the expansive computer search was unreasonable. The top Oregon court reversed the homicide conviction.[13]

Police and forensic examiners of computers may not exceed the scope of the warrant in making their searches or risk that the evidence will be suppressed. In a case where investigators possessed probable cause and a warrant to search a suspect's computer for evidence of a murder, in conducting the search, they discovered evidence of child pornography.[14] The warrant specifically limited the officers' search discretion by permitting them to look in the computer for evidence of the murder which was under investigation. There was ample probable cause to search the computer's data because the murder arrestee had instructed his parents to remove the computer from his room because he said that there were things on it that needed to be "cleaned up." Police knew of the arrestee's instructions to his parents as well as other information that might help prove the murder.

In this case, the plain view doctrine permitted the use of the evidence of child pornography, even though the officers were not authorized to search for pornography and were not searching for child pornography evidence.

In a situation where the owner of a computer properly grants consent for police to search a computer, no warrant is necessary, but the search must not exceed the scope of consent that has been granted or it becomes unreasonable. In a case where the defendant had been convicted of a single count of possession of child pornography as a party to the crime,[15] the defendant had given consent to the police to search the family computer, but he told officers that the consent was limited to the search of his son's user account on the computer. Law enforcement officials conducted a forensic examination of the computer's hard drive, which included the recycle bin container and other areas which allegedly were beyond the scope of the consent that had been granted. In effect, the defendant had not consented or authorized a search of all files in any shared area of the computer but had offered consent only for the areas in files visible within his son's user account. In expanding the search beyond the hard drive area allotted to the defendant's son, police exceeded the scope of the consent granted, and the evidence should have been suppressed.[16] In contrast, when defendant or a housemate who shares dominion and control over a computer voluntarily gives consent for a search of the shared computer's hard drive and does not limit the extent of that consent, police may forensically search the entire hard drive, and a court should admit any relevant evidence discovered.[17]

3. Searches of Cell Phones: Warrant Generally Required

In an age in which virtually everyone from middle schoolers to adults carry cell phones, questions arise concerning when, where, and how they might be searched. A modern cell phone stores the individual's history, tastes, interests, photos of one's past, financial data, texts, and addresses, to name a few. Many of these categories contain information that the cell user would not want the whole world to know, and thus, the user has an expectation of privacy that society would generally view as a reasonable one. Some litigation concerning cell phone searches made analogies to previous cases decided involving different levels of searches of places where a person might expect privacy.

In an earlier case, *Chimel v. California*, 395 U.S. 752 (1969), the Court placed limitations on the extent of the search incident to lawful arrest, holding that when a person was arrested inside his own home, the entire house could not be searched incident to lawful arrest. In a Supreme Court case that opened up the extent of a search incident to arrest, *United States v. Robinson*, 412 U.S. 218 (1973), the defendant was properly arrested and subjected to a search of his person incident to an arrest. The Court held that the officer properly found and removed a cigarette pack from his breast pocket and searched it, revealing heroin. The principle from the case allowed a search of anything found on a person, including containers, following an arrest, which, by analogy, would allow police officers to search for a cell phone found on a person incident to a lawful arrest. Since a cell phone is capable of containing a large amount of data of all sorts, one could make an analogy that a cigarette pack is a container and that since it can be

searched following an arrest, a cell phone should be subject to the same concept since it holds information.

However, the Supreme Court has taken a different view of cell phone searches and generally requires a warrant, consent, or some other exception for a law enforcement officer to conduct a search of a person's cell phone. The seminal case in this area is *Riley v. California*, where the court found that a cell phone is quite different from other objects that might be found on a suspect's person. In Riley's case, he had been validly stopped for having expired registration tabs on his vehicle. Police eventually arrested him for having concealed and loaded firearms. His cell phone was seized, and police searched its digital contents. Evidence discovered on the phone resulted in additional charges. He argued that a warrant was necessary to search the contents of his smart cell phone. Riley was convicted, and California courts offered him no relief in his appellate endeavors. The Supreme Court agreed with Riley that an Internet-connected, smart cell phone requires a search warrant for police to look at its contents.

Case 8.1 LEADING CASE BRIEF: CELL PHONE SEARCHES REQUIRE WARRANTS

Riley v. California
Supreme Court of the United States
573 U.S. 373 (2014).

CASE FACTS:

Police stopped defendant-petitioner Riley for a traffic violation, which eventually led to discovery of firearms and his arrest on weapons charges. Later, he was charged with shooting at an occupied motor vehicle based on data from his cell phone.

Riley was subjected to a search incident to arrest, which revealed a cell phone taken from Riley's pants pocket. The officer managed to look through information that he accessed on the phone and noticed the repeated use of a gang-based term. Sometime later, a detective specializing in gangs examined the phone's contents. Based in part on photographs and videos that the detective found, California charged Riley in connection with a previous shooting and sought an enhanced sentence based on Riley's gang membership. Riley filed an unsuccessful motion to suppress all evidence that the police had obtained from his cell phone. The trial court denied the motion, and the cell phone evidence helped to convict Riley. The California Court of Appeal affirmed and rejected his argument that the search of a cell phone requires a warrant to be reasonable. The Supreme Court of California declined review, and the Supreme Court of the United State granted certiorari and combined it with a case involving similar issues.

LEGAL ISSUE:

As a general rule, does a government search of a cell phone require a search warrant?

Held: Yes

The Supreme Court determined that in order to produce admissible evidence against the owner of a cell phone, a search warrant is generally required.

THE COURT'S RULING:

Chief Justice Roberts delivered the opinion of the Court.

These two cases raise a common question: whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

I

* * *

III

These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. . . .

Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." [Citation omitted.] Such a balancing of interests supported the search incident to arrest exception in [*United States v.*] Robinson, and a mechanical application of Robinson might well support the warrantless searches at issue here.

* * *

[The Court mentioned *Chimel v. California*, 395 U.S. 752 (1969), where the Court did not allow a whole house search when a person was arrested inside; Court found it unreasonable in scope. Also mentioned was *United States v. Robinson*, 414 U.S. 218 (1973), where the Court approved of the search of a cigarette pack's contents incident to a lawful arrest.]

We therefore decline to extend Robinson to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search.

* * *

Both Riley and Wurie [the other appellant] concede that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant. And once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.

The United States and California argue that information on a cell phone may nevertheless be vulnerable to two types of evidence destruction unique to digital data—remote wiping and data encryption. Remote wiping occurs when a phone, connected to a wireless network, receives a signal that erases stored data.

* * *

In any event, as to remote wiping, law enforcement is not without specific means to address the threat. Remote wiping can be fully prevented by disconnecting a phone from the network.

1

Cell phones differ in both a quantitative and a qualitative sense from other

objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as telephones. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.

One of the most notable distinguishing features of modern cell phones is their immense storage capacity.

* * *

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Finally, there is an element of pervasiveness that characterizes cell phones but not physical records.

* * *

Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.

Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. See *United States v. Jones*, 565 U. S. 400, 415, 132 S. Ct. 945, 955, 181 L. Ed. 2d 911, 925 (2012) (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

Mobile application software on a cell phone, or "apps," offer a range of tools for managing detailed information about all aspects of a person's life. . . . There are over a million apps available in each of the two major app stores; the phrase "there's an app for that" is now part of the popular lexicon. The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life.

In 1926, Learned Hand observed (in an opinion later quoted in Chimel) that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." *United States v. Kirschenblatt*, 16 F. 2d 202, 203 (CA2). If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

* * *

2

To further complicate the scope of the privacy interests at stake, the data a user views on many modern cell phones may not in fact be stored on the device itself. . . . Cloud computing is the capacity of Internet-connected devices to display data stored on remote servers rather than on the device itself. Cell phone users often may not know whether particular information is stored on the device or in the cloud, and it generally makes little difference. Moreover, the same type of data may be stored locally on the device for one user and in the cloud for another.

* * *

C

The United States also proposes a rule that would restrict the scope of a cell phone search to those areas of the phone where an officer reasonably believes that information relevant to the crime, the arrestee's identity, or officer safety will be discovered. This approach would again impose few meaningful constraints on officers. The proposed categories would sweep in a great deal of information, and officers would not always be able to discern in advance what information would be found where.

* * *

IV

We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.

Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.

* * *

Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. "One well-recognized exception applies when ' "the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is

objectively reasonable under the Fourth Amendment.'" [Citations omitted.] Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury. [Citations omitted.]. In [*United States v.*]*Chadwick* [1977], for example, the Court held that the exception for searches incident to arrest did not justify a search of the trunk at issue, but noted that "if officers have reason to believe that luggage contains some immediately dangerous instrumentality, such as explosives, it would be foolhardy to transport it to the station house without opening the luggage." [Citation omitted.]

* * *

Our cases have recognized that the Fourth Amendment was the founding generation's response to the reviled "general warrants" and "writs of assistance" of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.

* * *

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life" [citation omitted.]. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

We reverse the judgment of the California Court of Appeal in No. 13–132 [Riley] and remand the case for further proceedings not inconsistent with this opinion. We affirm the judgment of the First Circuit in No. 13–212. [Wurie]

It is so ordered.

In a Michigan case[18] that applied *Riley*, the trial court permitted the introduction of the defendant's cell phone data and images in a robbery prosecution. The defendant entered the victim's home while the victim was "engaged" with a sex worker and pointed a gun at them. Defendant ordered the prostitute to "tie up" the victim while he searched, found, and took the victim's safe containing cash.

During the defendant' robbery trial, the prosecution presented several exhibits that contained summaries of cellular phone data that was extracted from the defendant's cell phone, which defendant had in his possession when police arrested him. Police had obtained a cell phone search warrant that met the requirements of *Riley v. California*. The prosecutor presented clear evidence that the phone belonged to the defendant. The prosecution also introduced evidence that the phone contained several "selfies" of defendant and evidence that the defendant and the sex worker had made nineteen calls between them on the date of the robbery.

The defendant contended that the results of the warrant-based search of his cell phone should have been suppressed because the phone was searched due to investigation

of a different case, where the defendant was suspected of drug trafficking. The warrant authorized the seizure of any cell phones found and permitted a forensic or manual search of any phones discovered. The execution of that warrant revealed evidence introduced against the defendant at his robbery trial. The reviewing court rejected the defendant's contention that the cell phone evidence from one criminal case should not be used in a separate case unless police secured a separate cell phone search warrant. The reviewing court found that once a person's privacy has been reasonably breached, a prosecutor may use the evidence against the suspect in any sort of criminal prosecution where the evidence would be relevant.[19]

Case 8.2 LEADING CASE BRIEF: WARRANT REQUIRED TO OBTAIN CELL PHONE LOCATION DATA FOR CELL PHONE USER

Carpenter v. United States, ___U.S.___, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018).

CASE FACTS:

Carpenter and his criminal associates had been involved with committing robberies of stores that sold cell phones. In order to acquire these valuable devices and to properly coordinate their various criminal endeavors, Mr. Carpenter and his friends used cell phones to enable them to manage their criminal enterprise, which robbed clerks in Radio Shack and T-Mobile stores. Cell phones are able to perform their functions by continuously staying in contact with cell phone towers. When a cell phone is turned on, it constantly "pings" one or more cell phone towers to let them know that it is available for use so that incoming calls can properly be routed to it and outgoing calls can be facilitated. This data is a time-stamped record generally known as cell site location information, and wireless cell carriers collect and store this information for their own billing purposes and other business necessities. Basically, a cell phone tells local cell phone towers where it is at all times.

In this case, the Federal Bureau of Investigation managed to identify the cell phone numbers of Mr. Carpenter and many of his criminal associates and was then granted a court order, but not a warrant, that required the wireless carrier for Mr. Carpenter's phone to reveal where it had been for about 127 days. However, the court order was based on a federal statutory law and was not in compliance with the Fourth Amendment.

Prior to trial, Carpenter filed a motion to suppress all of the cell site location information for his phone on the theory that the government had conducted a warrantless search of his cell phone activity and that the evidence was thus illegally obtained. One problem that defendant Carpenter faced was the concept of the third party rule whereby when one gives his or her information to another person, individual, or entity, there remains no expectation of privacy in that information because it has been shared with others and is no longer secret.

In Carpenter's case, the federal district court denied his motion to suppress, and prosecutors used his cell phone location data to help convict him. Since he was near four of the robbery locations at the time the robberies occurred, and with other evidence, he was convicted of the robberies. The Sixth Circuit Court of Appeal affirmed the convictions on the theory that Carpenter lacked any expectation of privacy in the cell site location information that was given to the FBI because he had shared that cell phone location data with his wireless cell phone carriers who held the data as business records.

LEGAL ISSUE:

In order to acquire cell phone location data and other metadata generated by the use of an individual's cell phone, does a cell phone user have a Fourth Amendment expectation of privacy in that data sufficient to require a warrant in order to require the third party holder of the data to reveal it to the government?

Held: Yes.

In deciding this case, the Court reduced the coverage of the third party rule and found an expectation of privacy in some cell phone data transmitted to third parties when it revealed significant amounts of personal information.

ESSENCE OF THE COURT'S RATIONALE:

* * *

As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to "assure [] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U. S. 27, 34, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). For that reason, we rejected in Kyllo a "mechanical interpretation" of the Fourth Amendment and held that use of a thermal imager to detect heat radiating from the side of the defendant's home was a search. [Citation omitted.] Because any other conclusion would leave homeowners "at the mercy of advancing technology," we determined that the Government—absent a warrant—could not capitalize on such new sense-enhancing technology to explore what was happening within the home.

Likewise in Riley, the Court recognized the "immense storage capacity" of modern cell phones in holding that police officers must generally obtain a warrant before searching the contents of a phone. 573 U. S., at ___, 34 S. Ct. 2473, 189 L. Ed. 2d 430, 442. We explained that while the general rule allowing warrantless searches incident to arrest "strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to" the vast store of sensitive information on a cell phone.

B

The case before us involves the Government's acquisition of wireless carrier cell-site records revealing the location of Carpenter's cell phone whenever it made or received calls. This sort of digital data—personal location information maintained by a third

party—does not fit neatly under existing precedents. Instead, requests for cell-site records lie at the intersection of two lines of cases, both of which inform our understanding of the privacy interests at stake.

The first set of cases addresses a person's expectation of privacy in his physical location and movements. In *United States v. Knotts*, 460 U. S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983), we considered the Government's use of a "beeper" to aid in tracking a vehicle through traffic. Police officers in that case planted a beeper in a container of chloroform before it was purchased by one of Knotts's co-conspirators. . . . Since the movements of the vehicle and its final destination had been "voluntarily conveyed to anyone who wanted to look," Knotts could not assert a privacy interest in the information obtained. Id., at 281, 103 S. Ct. 1081, 75 L. Ed. 2d 55.

* * *

Three decades later, the Court considered more sophisticated surveillance of the sort envisioned in Knotts and found that different principles did indeed apply. In *United States v. Jones*, FBI agents installed a GPS tracking device on Jones's vehicle and remotely monitored the vehicle's movements for 28 days. The Court decided the case based on the Government's physical trespass of the vehicle. . . . Since GPS monitoring of a vehicle tracks "every movement" a person makes in that vehicle, the concurring Justices concluded that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy"—regardless whether those movements were disclosed to the public at large. [Citation omitted.]

* * *

III

The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS monitoring we considered in Jones. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled.

At the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle. . . . But while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records. After all, when [an earlier case was decided], few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements.

We decline to extend [prior cases] to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in Jones or leverages the technology of a wireless carrier, we hold that an individual

> maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.
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> * * *
>
> Allowing government access to cell-site records contravenes that expectation [of privacy]. Although such records are generated for commercial purposes, that distinction does not negate Carpenter's anticipation of privacy in his physical location. Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." [Citation omitted.] These location records "hold for many Americans the 'privacies of life.'" [Citation omitted.] And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense.
>
> * * *
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> Accordingly, when the Government accessed CSLI from the wireless carriers, it invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements.

In a case[20] that complied with the dictates of *Riley* and *Carpenter* involving stolen FitBits, police obtained a warrant to search a suspect's cell phone, which revealed his text messages to friends that implicated him in the burglary and theft of a tractor trailer that contained the FitBits. The cell phone data disclosed that defendant had sent text messages to someone offering to pay $15,000 for that person to drive a semi truck that contained the FitBits from the wholesaler's premises to another location. Further implicating the defendant was the fact that his phone data revealed that he had been in close contact with the owner of the business where the thieves stashed the stolen FitBits[21] In addition, the tractor trailer had been equipped with a GPS tracking system, and video from a local hotel showed people moving product from the trailer into a local business,[22] all of which further added to the ability of police to piece together more information on the crime. In this particular crime, numerous smart devices, cell phones, GPS, and security video all helped prove the crimes beyond a reasonable doubt.

4. Cell Phone: Voluntary Consent and Emergency Exceptions

With the general teaching of *Riley v. California*[23] in place, a consent search of a cell phone makes such a search reasonable in the absence of a warrant. To search a cell phone based on consent, the proper person must give consent, and the consent that is

purportedly given must be freely and voluntarily offered under a totality of the circumstances test. The question arises concerning who is the correct person to give consent for a telephone search, and this is generally answered by determining which person is the account holder for that cell phone. For private cell phones that are registered to individual persons, this is a fairly straightforward proposition in determining to whom the question of consent should be directed. Other possibilities concerning the proper person to give consent might concern the person who has dominion and control over the use of the cell phone at the time the request for consent is made. Where the owner of the cell phone and/or the associated account is a corporation or government, generally the entity may give consent, and the entity itself may search a phone or a pager.[24] In situations where a cell phone is jointly owned and controlled by two or more individuals, requested consent from any individual who possesses the phone at that time would be sufficient unless the other individual were present and objected. In cases where a search is requested based on consent, if two individuals who share dominion and control are present and one consents and the other does not, the consent search is not valid, as a general rule.[25]

When the question arises concerning whether the consent was freely and voluntarily given, the benchmark appears to require a consideration of the totality of the circumstances.[26] This test evaluates the age and education of the subject, coerciveness of the circumstances, number of officers, display of weapons, use of trickery, whether the consenting party knew of the right to refuse consent, and whether the person was under arrest or threatened with arrest.

Demonstrative of a consent search of a cell phone is a case from Massachusetts[27] where the suspect appeared to grant consent for police officers to search her cell phone. In a violent assault case, a female suspect was thought to have been involved, but she voluntarily arrived at the police station. She possessed her cell phone and indicated that she had videos of herself that would effectively help as an alibi. After police seized her cell phone, she agreed to allow the detective to take a look at its contents and did not appear to care if police searched it. In addition, she was told that if she didn't consent, they would get a warrant and search the phone, but the female acted as if she didn't care if they searched her phone. She signed a consent form that gave away her password to unlock the phone and passwords to some of her various user accounts. The prosecution appealed the trial court decision to suppress evidence from the phone based on lack of consent by the defendant owner of the cell phone. The reviewing court noted that a consent search may be conducted provided the search has been undertaken with the free and voluntary consent of the person with the authority to give consent. According to the appeals court, with respect to the initial seizure, the phone was validly seized because it was based on probable cause. The subject had admitted that there was evidence on the phone that would show her whereabouts at the relevant time, and she admitted to talking to her grandmother about the crime. In addition, the scope of her consent did not limit police ability to search in any particular area of the phone for evidence, and she provided passwords for extensive access. In this case, the defendant clearly understood that she had the right to refuse consent and chose to offer her written consent. Accordingly, the reviewing court found that her consent to search the cell phone was freely and voluntarily done and was unlimited in scope. The reviewing court reversed the trial court decision to suppress, and the cell phone evidence was determined to be available for trial.

In a Colorado federal case,[28] the arrested subject was asked to give his consent to a search of his cell phone. Since it was his cell phone, he was the proper person from whom to receive consent. He was given a written consent search form, which he signed, and also gave oral consent. The written consent form clearly stated that the consent to search had been given voluntarily, without promises, threats, coercion, or the use of any force at all. In the motion to suppress, the defendant requested that the results of the cell phone search be suppressed, contending that he did not understand the scope of the search to which he had "consented." The federal district court denied suppression because it found that the federal agent had advised the subject that he wanted to search the phone to corroborate information that the subject might tell him, that any contraband of the crime found during the search could be used against him, that he had the right to refuse consent, and that he could withdraw his consent any time prior to the termination of the search. The judge noted that the signed consent form authorized the agents to make a complete search of the cell phone. The cell phone consent search was ruled as valid under the Fourth Amendment.

Emergency exceptions that have been considered to exist in other areas covered by the Fourth Amendment clearly have been recognized by the Supreme Court in the context of cell phone searches, despite the fact that the Supreme Court in *Riley* did not apply the search incident to arrest theory for cell phones. In *Riley*, the Court did recognize that in some instances, case-specific exceptions may still apply so as to allow a warrantless and consentless search of a particular cell phone. When an emergency situation reasonably exists that makes the needs of law enforcement critical or very compelling, a warrantless search of a cell phone will be considered reasonable under the Fourth Amendment. As the court noted in *Riley*, "Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury."[29] According to the Court, when cell phone information is necessary to prevent the detonation of a bomb or when there might be information concerning the location of an abducted child, an emergency search of a particular cell phone would fit the exigencies of the situation, and both types of searches would be reasonable under the circumstances.[30]

5. Searches of Smart Devices

Some devices under the Internet of Things that connect to the Internet or a cell network may not involve any expectation of privacy, but a person carries the device with him or her as it stores and/or transmits data to the cloud via WiFi or a cellular network. These devices include stationary circuitry attached to water meters and power consumption meters that report to a central computer. Some home appliances record, store, and may transmit data concerning their operation. Another category of these devices is global positioning system-connected smart devices used in situations where significant money, jewelry, or high-dollar items may be the subject of robbery.[31] GPS smart devices are often used by truck fleet operators to keep track of their vehicles and may involve an expectation of privacy or may not since the data is transmitted to a third party. Some police agencies issue phones, cameras, and other communication devices to their officers

that do not carry an expectation of privacy. Traditionally, banks and other financial institutions used dye packs that the lawful custodian of the money or valuable transfers to a robber that are designed to explode after the robber leaves the premises to taint the money with a distinctive color, typically bright red. Modern technology has a more sophisticated take by using a smart device that the bank teller or other victim places alongside real money or valuables that are transferred to a robber. Many of these devices look like banded money and may have real money on the outside layer, but internally, radio transmitters and batteries are present. Once removed from the teller's drawer or other storage place, these smart devices activate using GPS, a global navigation satellite system (GNSS), or other tracking technology, and they give their positions to the individuals or entities that are programmed to receive the location data. Since most robbers of financial institutions carry their loot with them to the point where it is either hidden or dispersed, the smart tracking device is usually transported personally by the criminal, all the while giving away its location to law enforcement without the knowledge of the soon-to-be defendant. Under such circumstances, the accused criminal has no expectation of privacy, while the use of these smart devices offers a defendant little chance of a successful exclusion of the evidence motion.

For example, in a Michigan case involving robbery of bank tellers,[32] in addition to the regular bank's money, they gave the robber a pack of fake money that concealed a GPS tracking device. When the device was removed from the drawer of the teller, it activated and began broadcasting its location, which it continued to do until the robber was apprehended in his motor vehicle. In this case, the defendant was apprehended by police based upon the location information supplied by the GPS tracking device concealed in the stolen money. The teller described how the robber appeared, including gender, race, and the clothing he was wearing. Based on the location of the GPS device, police pulled the defendant over in his car and found significant evidence, including the GPS smart device that was in his motor vehicle. The GPS device helped to indicate that he was the guilty party. At the trial, the police officer and one of the bank's security officers detailed the path that the GPS smart tracker took after he left the bank. A bank employee identified the bank's GPS device the police recovered from the defendant's automobile. In this case, the defendant had no expectation of privacy in what GPS smart devices broadcast to bank officials and to the police. The robber did not own the device and had no connection to it or expectation of privacy in property that he had unlawfully extracted from bank employees. At trial, he made no effort to suppress the smart device information/location data that it was broadcasting to the owner of the device. Based on this GPS evidence, and other evidence, the defendant's conviction was affirmed by a Michigan reviewing court.

In a different case[33] that additionally illustrates the value of smart devices within the Internet of Things, a lone robber wearing an excellent disguise jumped over the counter of a New York bank and removed more than $4000 from the possession of a bank teller. In the process of acquiring the money, the robber also grabbed a hidden GPS tracker, which was in the teller's money drawer. Upon removal, the GPS tracker automatically activated, notified the security department of the corporation that services the GPS tracker, and alerted the local police department with the location of the tracker as it moved from place to place. One bank employee followed the robber outside the bank and got a description of the vehicle in which the robber left the scene. The car's

description information, plus the location data broadcast by the smart device, enabled police to intersect the cross streets where the device was then located and broadcasting. They were able to visually identify the vehicle and eventually make an apprehension following a high-speed chase. In the subject's possession, police found a bag containing the $4000 in cash, and they also recovered the GPS tracker that led to the apprehension. In this case, there was absolutely no expectation of privacy in the data broadcast by the GPS tracker because this robber personally removed the tracker and placed it with the money that he had taken from the bank teller's till. The defendant's petition for habeas corpus relief was denied, and his state robbery conviction had previously been upheld.[34]

In a slightly different context that involved issues that could have application to future criminal cases where Internet-connected smart devices collected data from homes, citizens brought a civil suit alleging a violation of the Fourth Amendment. Some residents of Naperville, Illinois, had concerns relating to the city's use of electrical meters that reported some of their electrical usage amounts and patterns. Currently, some Internet-enabled smart electrical power meters report the amount and time of usage to the power company. Theoretically, an upsurge in electrical power consumption could indicate the cultivation of marijuana, or usage of power at a particular level could show that a subscriber was at home during particular hours. Keeping a running record of residential power consumption may reveal which appliances were being used, and these smart devices could record the duration of use. The citizens' group sued the city concerning the use of the smart meters, alleging a violation of their members' Fourth Amendment expectation of privacy.[35] The group made its allegation because the smart utility meters reported to the government-owned electrical utility concerning time, duration, and amount of power usage. The citizens' organization, the

> Naperville Smart Meter Awareness ("Smart Meter Awareness"), a group of concerned citizens, sued Naperville over the smart-meter program. It alleges that Naperville's smart meters reveal "intimate personal details of the City's electric customers such as when people are home and when the home is vacant, sleeping routines, eating routines, specific appliance types in the home and when used, and charging data for plug-in vehicles that can be used to identify travel routines and history." (R. 102–1 at 14.) The organization further alleges that collection of this data constitutes an unreasonable search under the Fourth Amendment of the U.S. Constitution as well as an unreasonable search and invasion of privacy under Article I, § 6 of the Illinois Constitution.[36]

Following a dismissal of the suit in the trial court, the citizens' group appealed to the Seventh Circuit Court of Appeal. The reviewing court found that the collection of smart data by the Internet-connected device constituted a search under the Fourth Amendment since it collected information from within the home. However, the court found that the data collected by the smart device constituted a reasonable search by balancing the intrusion on the individual person's Fourth Amendment rights against the promotion of a legitimate government interest that was designed to help reduce electrical consumption and enhance the environment. The court noted that the collection of the data by the smart devices was not part of an ongoing criminal investigation, and the public utility has clarified that it would not provide customer data to third parties, including law enforcement officials, without a warrant or court order. Under these circumstances, the use of

the smart devices to collect information from inside an individual's home when done by the government does not constitute an unreasonable search but is instead a reasonable search. In finding a reasonable intrusion here, the court noted that the data collected from the smart device helps the government-owned utility spot power outages, offer variable pricing, and reduce strain on peak demand.[37]

In the future, there will be a variety of smart Internet-connected devices that collect information on citizens and for which court cases will have to determine which situations involve a violation of the Fourth Amendment when done without a warrant and which searches are considered reasonable, for which a warrant will not be required.

6. FitBits and Similar Devices

FitBits and similar smart electronic devices are worn on one's wrist or waist and measure and store various personal physiological information. Included in these smart devices are several brands of watches, like the Apple Watch, that collect and store data and may be used to answer a cell phone or make payments, among other features. These devices, depending on the type or manufacturer, can track a person's sleep data, number of walking steps taken, heart rate, and blood oxygen gas concentration, as well as global positioning location information. Some devices store credit and debit card information so that the wearer can pay for purchased items. Some of these devices have mobile apps so that they can communicate their data to cell phones for additional storage. An Apple Watch can, depending on the model and features, be used as a car key fob to lock and unlock a vehicle. The actual company FitBit offers watches that use an accelerometer to track steps taken, stairs climbed, sleep data, galvanic skin resistance, body temperature, and caloric expenditures over a set period of time. Even children's watches, like the one sold by Disney, the Frozen Touchscreen Interactive Smart Watch, take pictures and video that are stored on the watch and can be uploaded from the device.[38] All of this data, much of which is stored on the device itself, on an associated cell phone, or in the cloud, might become interesting to law enforcement officers, depending on specific investigations and prosecutions.

Another entry into the watch and fitness category is the Samsung Galaxy Watch3, which offers a variety of data collection opportunities. According to the manufacturer and web-published reviews, in addition to telling time, this device will track and record electrocardiogram (EKG) data, provide fall protection and rescue, track and analyze sleep patterns, collect heart rate data, and contain a blood oxygen monitor and a swimming monitor, among other features that are sometimes dependent upon the country in which is sold.[39] The owner can use the Samsung Health web site to get additional apps necessary to monitor health situations and analyze data that the device sends to the site.[40] The device comes with 8 GB of storage capacity[41] that theoretically could contain a wealth of data for criminal justice professionals in a particular case. This personal data might be recorded from either a victim or a defendant. From the personal perspective of a victim of assault, it could tell when the person was attacked and fell; it could report when the heart rate rose, when the heart ceased beating, or when blood oxygen levels fell below a critical point. From a defendant's perspective, the device could report when the defendant was strenuously exerting or running, with a heartrate indicating exertion.

The device could record when a person fell asleep or awakened. Such evidence could be obtained from a victim with consent or a warrant or when from an uncooperative defendant's account by virtue of a search warrant served on the data holder, whether the data was stored on the watch or on a server operated by or for the manufacturer.

Under what circumstances police can access this data and whether a warrant is necessary depends upon the facts of each situation. Since under *Riley v. California* (Section 2, this chapter), the Supreme Court has recognized that a warrant is generally necessary to search a cell phone, the analogy to other personal devices that collect and store personal data seems perfectly appropriate. Searches of these similar devices will require a warrant. There are only a few reported cases, involving FitBit and similar usage in criminal prosecutions, and the Supreme Court has yet to take a case involving such data searches. However, the best view is that a warrant or some exception will be required to allow the information obtained from the devices to be admitted against one who has an expectation of privacy in these types of smart devices. It should also be noted that wearable device data may be stored on a third party's cloud or other system, and normally data given up to a third party loses its expectation of privacy from the person who created the data. The third party concept must currently be evaluated with recognition of *Carpenter v. United States*,[42] where the Supreme Court held that cellular phone data given up in the usual course of cell phone operation retains a Fourth Amendment expectation of privacy from the lawful user of a cell phone.

There are some situations where warrants for some electronic devices are not required. In a Pennsylvania case[43] where police were investigating a homicide, they discovered the victim's cell phone and FitBit at the crime scene. Because a deceased individual generally does not have a Fourth Amendment expectation of privacy, officers were allowed to conduct a warrantless analysis of the FitBit to determine that the victim stopped moving at 9:42 p.m. and was presumed to be dead at that moment. This information, along with other data, helped convict the suspect of voluntary manslaughter. In a different case,[44] a woman left her FitBit and some jewelry on a tanning salon shelf and, within five minutes, returned to retrieve it, but it was gone from the shelf. Surveillance video at the tanning salon showed that one of the workers entered the tanning cubicle right after the victim left. The victim returned a second time with her husband, but there was no resolution to finding the missing FitBit and other items. Later that evening, the victim later noticed that both times she returned to the tanning salon, the FitBit device had synced to her cell phone, so she knew it was nearby. The prosecutor successfully obtained a theft conviction on the tanning store clerk by admitting the victim's testimony, in-store video, and the evidence that the FitBit was close by in the store long after it disappeared. There was no Fourth Amendment issue in this case because the owner of the FitBit was willing to reveal the location data that it reported to her cell phone.

7. Cameras

As a general rule, what a person exposes to public view in a public place does not carry an expectation of privacy. Anyone may photograph or video record objects, places, events, and people when the camera operator/photographer is in a place he or she has a

lawful right to occupy. Public surveillance cameras that take street views and the private business or security cameras that oversee public outdoor parking lots generally do not intrude on anyone's expectation of privacy. When security cameras inside private buildings or other enclosed spaces make recordings, most frequently there is signage, or there exists a common understanding that indicates someone's activities may be recorded. It would seem that if police, who are members of the public, choose to photograph or video record outdoor images that are accessible to the general public, no violation of the Fourth Amendment expectation of privacy would or could occur.

Courts that have addressed the use of public cameras when they are attached to buildings or affixed to an electrical pole normally have determined that the use of such cameras does not infringe on anyone's reasonable expectation of privacy. Fairly recently, a federal First Circuit Court of Appeals decision[45] took the view that surveillance from a pole camera did not constitute a search since the camera lens watched over areas in which no one has an expectation of privacy because people have exposed their activities to the public view. In this case, federal police had been investigating a couple who had been suspected of illegally selling guns without a federal firearms license. In order to get information on how they were using their residential property, federal agents installed a camera at the top of the nearby utility pole across the street from the defendant's home. Officers could access the video feed and watch it in real time or view video recordings. If they were watching on a live stream, officers could control the camera and allow it to zoom, pan, and tilt in order to see what an observer on the public street would normally see. Officers were able to read license plates on cars parked in the driveway. The camera surveilled parts of the front of the suspects' house for twenty-fours a day for eight months until the offending couple was arrested. Federal police did not seek any judicial authorization to install the pole camera that captured images from one side of the house but used the video information to procure other search warrants. When the couple became aware of the surveillance, they filed a motion to suppress the video evidence and any derivative evidence discovered by exploiting the video data. The federal trial court found that the government's use of the camera invaded the defendants' subjective expectation of privacy in recording the whole of their movements over the period of months and that persons who live in quiet suburban neighborhoods have a greater privacy interest that persons who live in other neighborhoods.

> The district court held that: "(1) continuous video recording for approximately eight months; (2) focus on the driveway and front of house; (3) ability to zoom in so close that [the pole camera] can read license plate numbers; and (4) creation of a digitally searchable log" made the use of the pole camera a search.[46]

The federal prosecutor appealed the case to the Court of Appeals, which reversed the trial court and ruled that the use of the pole camera was not a search because there was no objectively reasonable expectation of privacy in the front of someone's home. In a situation when a person possesses no reasonable expectation of privacy, there is no Fourth Amendment violation and therefore nothing to suppress. The court noted that pole cameras, or security cameras, are frequently used by private parties and the government, and they do not intrude on anyone's reasonable expectation of privacy. The reviewing court also cited one of its own prior cases, *United States v. Bucci*, 582

F.3d 108 (2009), wherein it had ruled that law enforcement officials had not violated the Fourth Amendment by conducting relentless and warrantless surveillance of a home using a video camera that could see inside the subject's garage when the door was raised.[47]

In a case from Colorado[48] that took a quite different view of police's warrantless use of a pole surveillance camera, officers had installed a camera on the top of the utility pole for the purpose of conducting continuous video surveillance of the defendant's fenced-in backyard and other external parts of his home. The elevated camera could observe things that an average person walking by or a neighbor next door would not be able to easily see. Police were able to observe which vehicles came and went and which ones appeared to bring drugs to his home. Informant tips also made certain events much more relevant when they occurred. The fruits of this continuous search were used to help procure physical search warrants of the defendant's property. After the defendant was charged with various drug offenses, he filed unsuccessful motions to suppress the evidence and derivative evidence gained by the pole camera. The state court of appeals reversed the trial court decision and indicated that unfettered use of surveillance technology might well alter the balance in the relationship between the government and its citizens. It also noted that the camera monitoring of the person's backyard activities does bring into play the specter of an Orwellian state that constantly surveils its citizens. The court also noted that a pole camera is not really a security camera because the camera was not placed there for the security of the residence but for police to investigate crime. Therefore, the court of appeals reversed the trial court and remanded the case on the basis that the use of a pole camera was a search and did constitute a violation of the Fourth Amendment when done without warrant.[49]

Whether the use of a pole camera for surveillance purposes and the streaming of data to police receivers by cell phone, the Internet, or WiFi violate the Fourth Amendment will ultimately be determined by the Supreme Court when a proper case reaches the Court. Until that decision arrives, states will be free to decide whether such surveillance constitutes a search for which a warrant may be required.

Most, if not all, modern cell phones contain several cameras that are capable of capturing and storing images and many archive photographs and videos in the cloud that can be accessed through an Internet connection. While an individual may have an expectation of privacy in the photos or videos that he or she takes and stores, the taking of such images in public is generally permitted under the First Amendment whether a person is a news gatherer or a private citizen. When an individual possessing a smart phone with a camera makes an effort to photograph or video record police officers who are on duty, the person has a general right to make such a photo or recording. This is true so long as the photographer or videographer does not clearly interfere with the officers' exercise of duty. There are situations in which the photographer gets unreasonably close or otherwise interferes with the tasks that the officers are performing, which can require that the photographer step back from a particular vantage point or face arrest. The precise point at which a photographer is lawfully taking photographs or a video recording and where the photographer has interfered with the officer by being too close is often a judgment call that invites litigation. In a recent case,[50] the Eleventh Circuit Court of Appeals noted:

> [P]recedent holds that individuals have "a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct," *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (collecting cases) (holding that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest"), as well as to engage in lawful protests, *Keating v. City of Miami*, 598 F.3d 753, 766 (11th Cir. 2010) (holding that individuals have "a clearly established right to assemble, protest, and demonstrate peacefully"). Additionally, we've established that law enforcement officers may not arrest an individual as a way "to thwart or intrude upon First Amendment rights otherwise being validly asserted." *Kelly v. Page*, 335 F.2d 114, 119 (5th Cir. 1964).[51]

As noted, making a video or taking a still photograph of police officers may be subject to time, place, and circumstance limitations, since the right to record police is not absolute.[52] Police departments may have a lawful policy that prevents the public from filming inside the police building because such a policy has been determined to be narrowly tailored to ensure the safety, security, and privacy of officers, informants, and victims.[53] This type of limitation is generally considered a reasonable restriction because it prevents interference with the duties of officers, but recording outside of a police department is generally quite lawful. The right to record may be limited in some situations. Demonstrative of this limitation, the First Amendment right to record may not apply in particularly dangerous situations, when the recording interferes with police activity, under circumstances where it is done in a surreptitious manner, or where the recording involves taking pictures of a police undercover investigation.[54]

In summary, taking still photographs and video recording are generally permitted in any public place and of any particular subject or location that is visible in public. Smart devices may store such photographs in the cloud or within the device, and the photographer has a reasonable expectation of privacy in those recordings. Recording police activity is perfectly lawful but can be subject to reasonable limitations concerning time, place, and circumstance.

8. Heart Monitors and Pacemakers

Data generated by the Internet of Things may include that from heart pacemakers and other devices that control the minimum beating of a human heart and generally record some of the telemetry involving this type of medical device. When the person who wears such a device is involved in criminal activities, the data recorded and stored and sometimes transmitted to other locations may become relevant in a criminal prosecution, even against the person who has the embedded device in his or her chest. As is well known, a heart device monitors the human heart rate and can send electrical signals to the heart to increase the minimum rate at which the heart beats. Recent developments in pacemaker technology allow the device to detect body motion and to tell the pacemaker to elevate the heart rate when the body needs it, such as when a person is more rapidly walking or exercising. Some pacemakers, in addition to providing for a baseline heart rate, contain an implantable defibrillator that can correct, to an extent, serious heart irregularities.[55] Naturally, to function properly, heart pacemakers and implantable

defibrillators require the acquisition of data, and many of them keep a database of this to assist a physician in future medical treatment.[56] Many of these devices report to remote healthcare providers and doctors on a regular basis so that the data is often transferred to third parties.[57]

While much of stored telemetry from heart monitors, pacemakers, and implantable medical devices will not be helpful to a criminal investigation due to its intimate and detailed medical information, other data could prove quite helpful in solving criminal cases. Some of the data that details personal activity or lack thereof most assuredly would or could be useful or even critical in a particular case. Such stored information might indicate when a person died; when a person was awake, sleeping, or just inactive; and when a person was experiencing an elevated level of exertion or strenuous activity. Some of this data might illuminate valuable facts about the victim, and other digital data might shed some light on the activities of the defendant at a particular time. While a deceased person generally has no Fourth Amendment rights, a suspect who carries an implantable medical device within his or her body most assuredly has some level of an expectation of privacy concerning data generated. This would be true even if the data is eventually downloaded for medical reasons to a third party, if the data is routinely transmitted to a third party medical provider, or under circumstances when a defendant resists downloading of the data following a criminal charge or investigation.

In an Ohio arson and fraud case,[58] police developed probable cause to search medical data located within a suspect's pacemaker. The alleged victim of a residential fire eventually called authorities for assistance after he escaped from the flames that were engulfing his residence. The story he told officers involved him waking up from sleep to discover an ongoing fire in his home, and he only had time to pack a suitcase with clothing and put some possessions in one or more bags prior to escaping the flames. Apparently, he managed to take the charger for his medical device, gather some of his personal property, and break out a window to escape. Obviously, when a person has an opportunity to collect some belongings, as was done in this case, he could possess some prior information that a fire might start in his home. Other suspicious evidence indicated that the fire had started at multiple locations, and firefighters smelled the odor of gasoline. In the event of a fire that occurs when one is sleeping, it is often a challenge of the highest magnitude to merely escape with one's life, spouse, children, and/or pets. Police charged the occupant with arson and insurance fraud based on the belief that the subject started the fire.

After he mentioned that he had a pacemaker-type device implanted in his chest that used an external pump, police believed that the data on the device might be interesting since he stated that he had been sleeping until the fire and then was abruptly awakened. A sleeping person has a slower heart rate than a person who is awake and moving around, and if he were awakened by the fire, his pacemaker data would back up his story and reveal the time at which he was awakened. If, on the other hand, if his heart rate indicated he was awake at a time when he said he was asleep, that might indicate that he was being untruthful and that he might have been preparing for a fire. Police obtained a search warrant to discover all of the electronic data that the defendant's pacing device had stored during its normal operation. This particular device collected his historical heart rate, pacer demand, and cardiac rhythms that existed before, during, and after the fire, and this

information was revealed to police, who had a cardiologist review the data. According to court records, as reported by a local newspaper, the cardiologist determined that

> it is highly improbable Mr. Compton would have been able to collect, pack and remove the number of items from the house, exit his bedroom window and carry numerous large and heavy items to the front of his residence during the short period of time he has indicated due to his medical conditions.[59]

Following the execution of the medical search warrant, the defendant filed a motion to suppress the evidence from the internal medical device. Through his attorney, he argued that the pacemaker evidence should be thrown out because it was a clear invasion of his constitutional rights and an unreasonable seizure of his private medical information. The trial judge ruled against the defendant and held that the data from the internal medical device could be used in court by the prosecution. According to a local newspaper story, this case may be the first prosecution of its kind to use the data from a defendant's beating heart to prove a link in a chain of evidence that might convict him of a crime.[60] A definitive ruling will not come from the court of appeals because the defendant passed away before the reviewing court could make a determination concerning whether personal heart device data and telemetry may be used against the person who generates the data within his or her own chest.[61]

9. Cloud Storage Concepts: Searches

Cloud digital data storage allows Internet users of smart devices to place large amounts of data in a location where it is accessible to the user at any point when that user/subscriber has Internet access. Most often, the user of cloud storage has no idea of the actual physical location where the server farm that contains his or her data is actually housed, hence the term cloud. "It's up there somewhere!" Traditional text-based data, photographs, audio and video recordings, maps, and any other information that is subject to being digitized may be placed in cloud storage. Many individuals use cloud storage to back up personal hard drives for security purposes, and some programs automatically sync the changes on a hard drive to the cloud. Some companies have made a business of offering cloud storage for a fee, based upon the amount of storage space required or desired, and attempt to make their storage both reliable and secure from unauthorized parties. Other businesses have allowed a certain amount of cloud storage as a way of enticing individuals to use some of their other products, while some individuals may have what is called a personal cloud that stores data on a hard drive that connects to a local router. In any of these situations, the data is always available to the owner or authorized user of the data, assuming one has the right security codes to access the information. For many people, it is unknown to them whether personal data is stored on their device, in the cloud, or in both locations. Interestingly enough, some individuals who have become involved or suspected to be involved in criminal activities may inadvertently, or intentionally, store some data in the cloud. When this occurs, the information may be obtained by law enforcement based on probable cause and a warrant that allows access to the cloud data. Arguments occur when defendants believe that probable cause

did not exist to think that the individual's cloud account had stored data that was relevant to them or their criminal activities, or defendants may contend that a warrant was not properly obtained to access the cloud data.

When the police or other law enforcement officials desire to access a potential defendant's secure cloud data storage, as a general rule, a warrant is required. For example, in a recent Michigan case,[62] the defendant was suspected of a variety of crimes ranging from burglary and car theft to theft of personal property. Following his arrest and while in jail, officers allowed him to use his cell phone to make a call to his girlfriend. However, when he received his cell phone, he promptly used his access to perform a factory reset. When his girlfriend visited, police became interested in piece of paper that he gave to her. Upon inquiry, she indicated that the paper contained login codes to his Google Cloud account and that he had asked her to delete the account, specifically Google Maps, which might have revealed his whereabouts at different times during his criminal activities. Following the receipt of a search warrant for the phone and for the Google accounts connected to that phone, police copied all the data from the phone using a program called Cellbrite and were able to review all the tracking data from the defendant's phone that included cloud data that revealed the historical GPS locations where he had traveled. The Google Maps location data clearly proved that the defendant's phone had been at particular crime scenes at precise times, which was very helpful in convicting him of activities involving his crime spree. The reviewing court held that the warrant properly had ordered police to search the defendant's Google Cloud data. The appellate court affirmed that trial court's rejection of his motion to suppress was appropriate and that the cloud data had been properly admitted.[63] To summarize this case, there was evidence that some of the defendant's activities were recorded on his cloud accounts and that the evidence amounted to search probable cause, a proper application for a search warrant was made, the warrant was served on Google, and the cloud data became available to the prosecution.

Merely having a cloud account for data storage does not, by itself, help prove that probable cause exists to obtain a warrant to search its contents in any particular case. However, when there is probable cause to search a cell phone and the cell phone stores data in the cloud, or when probable cause exists to search a computer or other digital device for particular data and that device connects to the cloud, generally probable cause extends to a search of the cloud itself. A separate warrant may need to be served on the custodian of the particular cloud service to give up the data.

In an example involving location data that a suspect may have generated and stored to a Google cloud server by virtue of carrying a phone or using other Google-connected devices or Google apps during his criminal activity, a federal prosecutor wanted to get some information that covered the various arson locations. Google has a policy that its stored information will not be divulged in the absence of a warrant. In this case,[64] there had been a series of ten arsons in the Chicago area[65] in which fires had been set in motor vehicles and surveillance cameras captured some video that led police to believe the fires had a central connection. Based upon a theory that the perpetrators may have carried a cell phone or phones that were connected to some of Google's applications, the prosecutor and police wanted to obtain Google data concerning these devices. When any Google user activates a service known as Location History, the user can keep track

of the history of the locations that the person has visited and also record the time and duration when the person has been at a particular location.[66] In order to provide this service, Google stores the data on one or more of their servers that can be accessed by the Google customer or by the software without the user taking any overt action. What the prosecution wanted from Google was the location history for everyone who had been within several particularly described geo-fenced areas at particular durations of time on particular days. Once served on Google, a geo-fence warrant would have provided the government the ability to obtain historical location data for a Google subscriber/user of one or more of Google's apps. This data would reveal the person's location at a particular area and, eventually, subscriber information could be discerned for the account holder using Google-based devices or applications. If a suspect had an app or the cell phone communicated with Google's apps, and if that individual phone subscriber were the only common phone number or the only common person being tracked by the Location History for that geo-fenced area, that information would help police narrow down the list of suspects and might actually identify the suspect. Google records subscriber information associated with each Google account, and this information contains other identifiers, which can include a customer's full name, address, and telephone number, as well as other unique identifying sets of data.

In this case, the prosecution had six precise geo-fenced areas for which they were interested in the Location History of individuals who had been within the geo-fenced areas at the relevant times. The warrant-issuing court looked at the information supplied by the prosecution and the police and concluded that there was a fair probability that evidence of arson and conspiracy to commit arson would be found by obtaining data from Google. The issuing court also found that there was probable cause that evidence of these crimes might well be located at Google,[67] because location data on cell phones may have been transmitted to Google, and the court concluded that people who may have witnessed the crimes and who could have useful evidence might be located by virtue of their cell phone data that Google may have stored. The judicial official had some concerns that the particularity requirement of the Fourth Amendment might pose some issues but resolved this concern by noting that the geo-fenced areas were limited in scope and in the time frame for which the Google cloud data was desired. The judge was aware that the search could involve innocent people who just might have been in the area with their cell phones that communicated with Google in one or more apps. In issuing the search warrant directed at Google and its stored cloud data, the court found that "the government's proposed search warrant satisfies the requirements of the Fourth Amendment, and thus the Court grants the government's application for the warrant."[68]

When information has been conveyed voluntarily to a third party, the general rule is that the person who conveys the information no longer has an expectation of privacy for that data. The case of *Carpenter v. United States*[69] appeared to place a limit on the third-party doctrine, to the point that it is possible that merely giving up some data to a third party does not eliminate the expectation of privacy, especially when there is little choice in transmitting the data. When the individual subscribes to a cell phone app wherein the individual knows that his or her data is being given to a third party, there may be no, or a reduced, expectation of privacy, but the holder or custodian of the data may allege an expectation of privacy in its own right. This whole area of search and seizure involving

how cloud data may be obtained is evolving, and what may be settled law in one year may not be considered settled law at a later time.

10. Amazon Echo and Similar Internet Smart Devices

Several manufacturers offer Internet-connected devices that allow voice communication to a variety of Internet sources, with the Amazon Echo being one of the more recognizable ones.[70] These smart devices, sometimes included in the Internet of Things, are usually activated by audible keywords that the device understands, so the reality is the device is always listening or has the capability of listening to voices, sounds, and other noise in the room. With respect to the Amazon Echo, the

> audio recording, which contains the data twenty seconds before the conversation the actor has with Alexa [the Echo] as well as twenty seconds following its conclusion, is then sent to Amazon's cloud servers, where the recorded message is run through a speech-recognition neural network and a response or action is sent back to the device.[71]

The Echo or, as it is commonly called, "Alexa," by design must constantly listen for the activation word, and Amazon keeps a record of what it hears every time an Echo speaker activates. Similarly, for this smart device and most similar devices, audio is generally recorded on servers belonging to the particular manufacturer/service provider, but many devices allow the user to delete any audio files that have been recorded. It is not known positively how effective this delete capability might be for long-term storage by a user who forgets to delete daily files.

When a device has been activated by its keyword, it will interpret different commands that will allow it to do specific tasks and will communicate back to the speaker. Naturally enough, some individuals may ask the device to search for topics that might be of interest to law enforcement in the event that a crime occurs in the home around the time that the searches on the Internet device have been audibly conducted. Since most devices listen to and record conversations that have occurred while it is listening after having been activated, the device transmits what it hears to the server to be recorded. The recording covers audible sounds, whether the conversations are about typical family activities or criminal plans. When a crime has occurred within the home or wherever the device is located, law enforcement officials might want to discover whether any of the audible data would be helpful in solving or prosecuting a crime.

The question will clearly arise concerning whether the service provider that records the audible sounds may be required to give up audio data based on a warrant or consent from the owner of the device. In a New Hampshire murder case[72] involving two victims, a judge ordered Amazon to collect and deliver two days of audio data that the Amazon Echo may have recorded from the crime scene. Police and prosecutors theorized that the Echo may have recorded some audio clues that might help reveal the actual killer even if the operative wake-up word, "Alexa," had not been uttered. A resourceful potential victim might utter the wake-up word as a way of preserving the identity of an attacker.

In an Arkansas case[73] that did not go to trial, prosecutors wanted audio evidence believed to have been collected by an Amazon Echo that might have recorded some audio related to an alleged murder. Amazon initially refused to give up the data in the absence of a valid warrant but eventually turned the audio files over to the prosecution after the owner of the device, the defendant, consented through his attorneys. Ultimately, the Echo data did not reveal any incriminating conversations or sounds, and the case was eventually dropped.[74]

In a different case from Florida,[75] police believed that an Amazon Echo Dot may have captured audio of a fight between a married couple that resulted in the death of the wife. The case was a bit bizarre because the two individuals fought with a spear between them, which allegedly broke and pierced the wife's body, with a fatal result. Police prepared an application for a warrant that a local judge granted that ordered Amazon to disclose audio data that it might have in its possession for the Amazon Echo Dot that was located at the homicide scene. In this case, Amazon apparently responded affirmatively to the warrant. There most certainly are probable cause issues concerning whether to believe that audio data has been recorded, but that is a matter for an issuing judge rather than the recipient company on which the warrant is served. Clearly, any company that receives such a warrant might decide to contest it, but as a general rule, compliance occurs. In this Florida case, a local television station attempted to gain some information about the homicide from Amazon, but the company replied with the statement, "Amazon does not disclose customer information in response to government demands unless we're required to do so to comply with a legally valid and binding order. Amazon objects to overbroad or otherwise inappropriate demands as a matter of course."[76]

In a different utilization of smart device technology, there are a variety of manufacturers that have created video doorbell recording systems that are motion activated when a person approaches the entrance the smart device is covering. Some systems, upon activation, record only locally and for short periods of time, while others store continuous data in the provider's cloud. One of these devices in common use is the Ring doorbell camera/audio system that has varying levels of sophistication. What it records and for what duration depends on the model and subscription level, from short video recordings to continuous video/audio recording to the manufacturer's cloud system.[77] These types of systems record the entry and leaving of the occupants as well as burglars, robbers, or porch pirates who present themselves within camera range. In a case involving a Ring Video Doorbell camera,[78] burglars approached the front door of an apartment while their presence activated the doorbell camera that recorded video of the robbers' conduct to the victim's password-protected personal cloud security file. According to the testimony of the victim, Greer, he receives a cell phone notification whenever the Ring Video Doorbell camera is activated, and it is activated not only when the doorbell is rung but also if any person walks within its range. The resident has a choice to answer the doorbell or talk to the person outside via cell phone. The home occupier may zoom in or out and can orient the camera to go right or left and up and down.[79] In this case, the camera system captured video of the burglars and audio of other apartment residents who were screaming in the background. The victim authenticated the video and audio as presenting a true and accurate rendering of what happened. Over the defendant's objection, the trial judge admitted the video recording that showed the defendant in front of the apartment

door attempting to gain entry, and a slightly later clip showed the defendant and other burglars fighting the victim at the doorway, with one intruder clearly holding a handgun. The reviewing court approved the admission of the evidence from the smart doorbell device that was connected to the Internet cloud of the device's manufacturer. In this case, there was no expectation of privacy for burglars since they presented themselves in front of the camera, but if the dweller of a building were committing criminal acts that the smart doorbell captured, police might be able to obtain the video and audio from the custodian of the server and use it against the home owner.

11. Law Enforcement Use of Vehicle GPS Trackers: Warrant Required

As smart-device technology has advanced, such progress has given law enforcement officers the ability to track motor vehicles by the use of externally attached GPS tracking systems, whether the communication link is cell phone or satellite based. As a general rule, no person has an expectation of privacy concerning driving a motor vehicle or the location where it is operated because the fact of operating a vehicle and its location are factors that are available to anyone out in public who would care or take the time to observe the individual driving. What a person exposes to public view is not considered covered by an expectation of privacy. One view, since debunked by the Supreme Court, was that if police only acquired data with a device that they could otherwise visually have gathered, there would be no expectation of privacy violation.

In a Supreme Court case that originated in the District of Columbia,[80] *United States v. Jones*, the government became interested in an individual who was believed to be involved in drug trafficking. In order to gain more information concerning the locations the suspect frequented and the places he visited, the government obtained a search warrant that allowed a GPS tracking device to be attached to the motor vehicle that the suspect exclusively drove. The warrant authorized the attachment of the GPS device in the District of Columbia, and it had to be served within a ten-day period from its issuance. The problem arose when the warrant was served. Police attached the satellite-based GPS device to the defendant's motor vehicle after the ten-day period had expired, and it was served in the state of Maryland, rendering the warrant invalid. In any event, the government tracked the defendant's movements for twenty-eight days, gathering significant data over a four-week period that resulted in guilty verdicts in a second trial. This method of GPS monitoring generated a precise and fairly comprehensive amount of data that offered a significant wealth of detail about Jones's activity concerning when and where he went and some detail concerning those with whom he associated. Jones underwent two trials at which he attempted to suppress the evidence obtained from the GPS tracking device, but in both cases, the trial court denied suppression, and the GPS evidence was introduced. However, the appellate court reversed the defendant's conviction on the theory that the warrantless use of the GPS device violated the defendant's rights under the Fourth Amendment. The United States appealed, and the Supreme Court granted certiorari to hear the case.

Earlier cases involving the Fourth Amendment had indicated that the amendment protected people and not places, but the concept of an expectation of privacy involving property, whether real or personal, remained in the jurisprudence and had never been overruled. In *Jones*, the Supreme Court of the United States found that the government agents had trespassed upon the property of defendant Jones without a valid warrant and occupied the property over which he possessed an expectation of privacy for the purpose of obtaining information against him. In a concurring opinion, Justice Sotomayor noted that, "The Government usurped Jones' property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection."[81] In upholding the reversal of the defendant's conviction, the Supreme Court sustained the view of the lower appeals court that the Fourth Amendment rights of the defendant had been violated by the government's conduct and that the evidence of Jones's location should have been suppressed.[82]

Case 8.3 LEADING CASE BRIEF: WARRANT REQUIRED TO ATTACH A GLOBAL POSITIONING SATELLITE TRACKING DEVICE TO VEHICLE

United States v. Jones
Supreme Court of the United States
565 U.S. 400 (2012).

CASE FACTS:

Defendant-respondent Antoine Jones, who owned a nightclub in the District of Columbia, was suspected of drug trafficking and became the target of two police agencies within the District. Law enforcement gathered a significant amount of data by surveilling the nightclub, focusing a camera on the front door, and from a wiretap of Jones' cell phone. This information motivated the government to apply to federal court for a warrant that would authorize the installation of a GPS smart tracking device on the vehicle that he drove.

A federal district judge properly issued a search warrant that had to be served within ten days within the District. Officers served the warrant after it expired in Maryland by attaching the GPS device to his vehicle, and the government recorded his movements for twenty-eight days. Positioning signals from multiple satellites permitted the smart device to monitor and report the vehicle's location within a matter of feet. The device communicated all the locations of Jones's Jeep by cellular phone to a government computer.

As a result of all this and other data, the defendant was arrested for drug trafficking and filed a pretrial motion to suppress the GPS-derived information. The trial court suppressed some of the GPS evidence but allowed most, but a mistrial had to be declared. At the second trial, Jones was convicted partially based on the GPS evidence. A federal court of appeal reversed the conviction based on view that the warrantless use of the GPS device violated Jones's Fourth Amendment right to privacy. There was no valid warrant in this case because it had expired one day before it was served. The federal government appealed, and the Supreme Court granted certiorari.

Legal Issue: Does attaching a global positioning satellite device to a private motor vehicle constitute a Fourth Amendment search for which a warrant is required?

Held: Yes.

THE COURT'S RULING:

[In sustaining the Court of Appeals decision, the Supreme Court determined that attaching such a device to a motor vehicle constitutes a search for which a search warrant must be obtained if the evidence is to be admissible in a criminal prosecution.]

* * *

We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search."

It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted. *Entick v. Carrington*, 95 Eng. Rep. 807 (C. P. 1765), is a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law'" with regard to search and seizure. [Citation omitted.] In that case, Lord Camden expressed in plain terms the significance of property rights in search-and-seizure analysis:

> [O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.
>
> Entick, supra, at 817

* * *

The Government contends . . . that no search occurred here, since Jones had no "reasonable expectation of privacy" in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all. But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the Katz formulation [expectation of privacy in a public phone booth]. At bottom, we must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." [Citation omitted.] As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates. Katz [A case that improperly seized a public phone booth conversation without a warrant] did not repudiate that understanding. Less than two years later the Court upheld defendants' contention that the Government could not introduce against them conversations between other people obtained by warrantless placement

of electronic surveillance devices in their homes. . .

* * *

The Government also points to our exposition in *New York v. Class*, 475 U.S. 106, 106 S. Ct. 960, 89 L. Ed. 2d 81 (1986), that "[t]he exterior of a car . . . is thrust into the public eye, and thus to examine it does not constitute a 'search.'" Id., at 114, 106 S. Ct. 960, 89 L. Ed. 2d 81. That statement is of marginal relevance here since, as the Government acknowledges, "the officers in this case did more than conduct a visual inspection of respondent's vehicle." [Citation omitted.] By attaching the device to the Jeep, officers encroached on a protected area. In Class itself we suggested that this would make a difference, for we concluded that an officer's momentary reaching into the interior of a vehicle did constitute a search. 475 U.S., at 114–115, 106 S. Ct. 960, 89 L. Ed. 2d 81.

* * *

The judgment of the Court of Appeals for the D. C. Circuit is affirmed.

It is so ordered. [The GPS evidence remained suppressed from use by the prosecution.]

The lesson that this case teaches is that when a government trespasses upon property without a search warrant, evidence obtained by exploiting the trespass will probably be considered a violation of the Fourth Amendment and will be suppressed. In a federal prosecution[83] involving a GPS tracking device that occurred subsequent to the decision in *United States v. Jones*, Massachusetts police were investigating a string of five bank robberies in which a common motor vehicle appeared in security footage from several banks, probably a black Volvo. A witness reported to police that he had observed a man wearing sunglasses, a hoodie with the hood up, and gloves exiting a faded black Volvo near a bank. The witness gave police the license plate number. The witness reported that the man entered and left that bank without incident in a time frame that was thirty minutes prior to the robbery of a nearby but different bank. Additional information indicated that the occupant of that vehicle with the specific plates appeared to be the same man who had been acting suspiciously at a nearby bank and that the subject wore clothing that was at least similar to the clothing worn by the person reportedly seen at the site of the fifth bank robbery. All of this data, and some other accompanying information, was placed in an affidavit for a search warrant requesting that a warrant permit a GPS vehicle monitor to be attached to the suspect's vehicle. The judicial official issued the GPS warrant that allowed the attachment of the GPS smart device to the specific black Volvo. Due to the seriousness of the conduct, the federal government prosecuted this case based on evidence obtained by Massachusetts police. In conducting their investigation, the local police had properly complied with *Jones* in applying for a GPS tracking warrant by citing facts in the application for the search warrant that showed probable cause. The federal court of appeals found that probable cause existed, that the state

GPS warrant was valid, and that the evidence it produced was properly allowed into evidence in the federal trial.[84]

In a different GPS tracker case in Michigan that involved methamphetamine possession,[85] police had learned from a confidential informant that an individual was in the process of having methamphetamine shipped from California to Muskegon, Michigan, and would then be transporting a quantity of drugs from that location to Oakland County. Much of the informant's information was corroborated by police surveillance, including verification of the defendant's address, the presence of the defendant at that address, and the described Mercury Milan vehicle that was to be used to transport the narcotics. Based on probable cause, a Michigan judicial official issued a warrant to allow a GPS smart device to be attached to the defendant's vehicle. A few days later, the tracker indicated that the vehicle was moving toward Oakland County, where police intercepted the defendant and stopped his motor vehicle based on two outstanding arrest warrants. Following the defendant's arrest, police conducted an inventory search of the vehicle and discovered two packages of methamphetamine. In this case, police complied with requirements of *Jones* in that they developed sufficient search probable cause and obtained a valid warrant for the GPS tracker. The smart device enabled police to locate and follow the defendant as he moved toward the destination that the informant predicted. The Michigan reviewing court found that the trial court properly admitted the evidence into court since it was based on the valid GPS tracker warrant.[86]

In a case[87] that complied with *Jones* and involved the use of a GPS vehicle tracker, police in Montana developed probable cause from information received from two informants that specifically described and identified individuals would be driving from Montana to California to obtain cocaine. Before the suspects left for California, police managed a controlled purchase of cocaine from the two suspects. This purchase further solidified the validity of the confidential informants' information. In order to track the motor vehicle to California and back, police officers prepared an affidavit for a warrant for a GPS tracker to be attached to the Kia Sportage vehicle. When the warrant was issued, police attached the tracker to the vehicle to monitor the travels to California to purchase cocaine using the smart GPS tracker. When the Kia Sportage returned to Montana, the GPS allowed police to know where it was located, and they arranged a lawful traffic stop as a pretext to develop additional probable cause to search the vehicle. After a drug-sniffing dog alerted to the presence of narcotics, police seized the vehicle and later searched it based on a warrant secured by other officers. A search revealed cocaine, and the defendants filed a motion to suppress, contending that there had been no probable cause to obtain the warrant for the GPS tracking device. The federal district court judge found that the original informants were believable and that the information they gave to police, plus the interim drug buy, gave excellent probable cause for the issuance of the warrant allowing the attachment of the GPS tracker to the motor vehicle. The constant location evidence helped provide additional incriminatory evidence. The federal judge ruled that the drug evidence should be admitted against the defendants at their drug trial.

12. Use of OnStar Location and Tracking and Comparable Electronics

Many modern vehicles continually acquire, store, and transmit significant amounts of data to external storage systems. This information can be distinguishable from onboard vehicle data storage that stays in the vehicle since this data often involves the use of the Internet and cell phone data acquisition and usage. OnStar and similar data systems on vehicles can tell a variety of things concerning a motor vehicle, including its location and whether the airbag has deployed, among other data.

In a case[88] involving the suspected drug dealer who rented a sport utility vehicle, was driving from Texas to Louisiana, and was suspected of transporting drugs, police wanted to interdict him. Based on confidential information, police obtained a warrant from a local court that ordered the OnStar system to help the police with the vehicle's location. The OnStar operators directed the local police to find the moving location where the defendant's rented motor vehicle was driving. Police stopped the defendant based on a traffic violation. After police discovered drugs, they arrested the driver. He filed a motion to suppress the evidence found in the vehicle because he contended that the court did not have jurisdiction to order OnStar to assist in revealing the location of his rental vehicle. He also claimed that his Fourth Amendment rights were violated by having OnStar tell the police his precise location. A federal district court considered the case from the perspective of the Fourth Amendment and rejected the defendant's motion to suppress because he failed to demonstrate any subjective expectation of privacy in the vehicle's location. In this case, police received satellite tracking data from a third-party monitoring service to which the rental company had subscribed and to which the defendant was not a party. In the court's view, such a practice did not constitute a seizure in violation of any of the defendant's Fourth Amendment rights because he advanced no evidence that he actually believed that his movements in the vehicle would be free of monitoring, especially given the fact that the OnStar system had been installed in the vehicle prior to leasing it, and he was aware of the OnStar system. There was no evidence the rental agreement prevented tracking of the rented vehicle via GPS or disclosure of real-time monitoring data to other third parties, including law enforcement. The court noted that, in a somewhat related context of a subscriber's information that has been transmitted to Internet service providers, courts have routinely held that the subscribers do not possess an expectation of privacy with regard to data transmitted to third parties. Here, the rented vehicle transmitted its location data to a third party, OnStar. Finally, there was no expectation that a person's travels on the public highway remain private, especially when the vehicle was equipped with a GPS tracking system that was intended to be observed and monitored by a third party. The court did not suppress the evidence of drug trafficking.[89]

In a homicide case from Nebraska,[90] the defendant and the prosecution seemed to assume that a warrant was necessary to obtain OnStar location data that had been generated by the vehicle and stored on the third party's servers. In his motion to suppress, the defendant attacked the mechanics and procedural aspects of the warrant. The homicide

case involved a potential defendant with a rental car that was OnStar equipped, and in order to discover the location of the suspect, police obtained a warrant that was served on OnStar by a deputy United States marshal. The data indicated that the car had relocated to Arizona, where the defendant was eventually arrested. He contended that the warrant was not valid because it had not been returned to the issuing court within a statutory ten-day period, but the Supreme Court of Nebraska found that the late return was a mere ministerial defect and the warrant remained valid.

There are some concerns about the expectation of data transmitted to third parties, especially when the user has no control over the acquisition and storage of such data by the third party. In *Carpenter v. United States* in 2018, the Supreme Court found that historical cell phone location metadata generated by ordinary cell phone operation might carry an expectation of privacy.[91] The general rule is that a person has no expectation of privacy concerning information given to a third party. The *Carpenter* Court held that a search warrant, supported by probable cause, was required for a government to obtain location data generated by cell phones. Whether this view will be followed into other areas of third-party-acquired data is not known, but it could be applied to automobile data generated and stored on the vehicle or vehicle data generated at the vehicle but stored with a third party. If the Supreme Court followed its logic and rationale used in *Carpenter*, a warrant would most likely be required to access OnStar data and similar types of vehicle location data.

13. Automobile Event Data Recorders: Searches and Warrants

All modern vehicles sold after September 1, 2010, in the United States are required to have an event data recorder that, for a brief period of time, stores certain telemetry for the operation of the motor vehicle. Generally, the EDR records pre-crash vehicle dynamics, throttle position, vehicle speed, braking, status of air bag warning light, air bag deployment, driver inputs, and use of occupant restraints, among other bits of information.[92] Unless a crash has been detected, the data is overwritten with updated data on a regular basis and is "frozen" upon a crash. The National Highway Transportation Safety Administration generally considers the owner or lessee of the vehicle the owner of the data, and federal law also provides that the owner of the EDR data is the vehicle's owner or lessee.[93] State laws may not be precisely the same on data ownership, but the lawful operator of a vehicle generally has an expectation of privacy for the information. However, a vehicle thief would have no expectation of privacy concerning this data. The Supreme Court, in a 2018 case not involving an EDR, determined that a lawful driver of a motor vehicle, even if not named on a rental agreement, has an expectation of privacy in the car.[94] Presumably, and in accordance with federal law, this expectation of privacy would include EDR data, so that a search warrant would be required.[95] An argument could be made that the operation of a motor vehicle is not done in private and much of the data contained in an EDR could be captured by watching the vehicle from an external vantage point with respect to safety, speed, wearing of restraints, and other vehicle operations. Such data would be public and not subject to an expectation of privacy.

Alternatively, an argument exists that the EDR captures many data points that would not clearly be observable from a public vantage point and should be considered private to the owner/operator of the vehicle. Accessing and downloading the on-board EDR data is normally accomplished with software that links to the Diagnostic Link Connector found at the lower edge of drive's side of the interior of the motor vehicle.

In a case where the prosecution wanted to use EDR evidence, Florida required that police first obtain a warrant. In *State v. Worsham*,[96] the defendant drove his car recklessly, resulting in the death of a passenger. Police warrantlessly searched his vehicle's event data recorder, or "black box," to obtain telemetry resulting from how he operated his motor vehicle at the time of the crash. The trial court ordered the data from the EDR suppressed on the theory that the data was not exposed to the public, it was difficult to extract, and there existed some difficulty in interpreting the data. Upon the state's appeal of the suppression, the Florida 4th District Court of Appeal supported the trial court decision, and the Supreme Court of the United States denied certiorari.[97]

Case 8.4 LEADING CASE BRIEF: AUTOMOBILE EVENT DATA RECORDER SEARCH GENERALLY REQUIRES A WARRANT

State v. Worsham
227 So. 3d 602, 2017 Fla. App. LEXIS 4162 (2017), cert. Denied, *Florida v. Worsham*, ___U.S.___, 138 S.Ct. 264, 199 L.Ed.2d 125 (2017).

CASE FACTS:

Mr. Worsham was driving his motor vehicle when it was involved in a high-speed accident that killed his passenger. The vehicle was impounded. Twelve days after the crash event, police downloaded the information retained on Worsham's vehicle event data recorder. The police did not apply for a warrant until after the search of the EDR had occurred. The judge denied the warrant because the desired search had already occurred without a warrant.

Police later arrested Worsham for DUI manslaughter and vehicular homicide. He filed a motion to suppress the results of the EDR search, contending that, under the Fourth Amendment and Florida law, police could not lawfully access this data without first obtaining his consent or a search warrant. The prosecution defended the search on the sole ground that Worsham had no privacy interest in the downloaded information, so no Fourth Amendment search occurred. The trial court granted Worsham's motion, and the prosecution appealed the suppression order.

LEGAL ISSUE:

Does a lawful driver/owner of a motor vehicle have an expectation of privacy under the Fourth Amendment in data stored within the vehicle's computer system (EDR) that cannot lawfully be seized absent consent or a search warrant?

Held: Yes.

THE COURT'S RULING:

The state challenges an order granting appellee Charles Worsham's motion

to suppress. Without a warrant, the police downloaded data from the "event data recorder" or "black box" located in Worsham's impounded vehicle. We affirm, concluding there is a reasonable expectation of privacy in the information retained by an event data recorder and downloading that information without a warrant from an impounded car in the absence of exigent circumstances violated the Fourth Amendment.

* * *

In Florida, citizens are guaranteed the right to be free from unreasonable searches and seizures by the Fourth Amendment to the United States Constitution and section 12 of Florida's Declaration of Rights. *Smallwood v. State*, 113 So. 3d 724, 730 (Fla. 2013). "The most basic constitutional rule" in the area of Fourth Amendment searches is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it."

Id. at 729 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)).

"A Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *State v. Lampley*, 817 So. 2d 989, 990 (Fla. 4th DCA 2002) (quoting *Kyllo v. United States*, 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001)) . . .

* * *

Nevertheless, information someone seeks to "preserve as private," even where that information is accessible to the public, "may be constitutionally protected." Katz, 389 U.S. at 351. This is why "a car's interior as a whole is . . . subject to Fourth Amendment protection from unreasonable intrusions by the police." Class, 475 U.S. at 114–15; see also *United States v. Ortiz*, 422 U.S. 891, 896, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975) ("A search, even of an automobile, is a substantial invasion of privacy.").

A car's black box is analogous to other electronic storage devices for which courts have recognized a reasonable expectation of privacy. Modern technology facilitates the storage of large quantities of information on small, portable devices. The emerging trend is to require a warrant to search these devices. See *Riley v. California*, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) (requiring warrant to search cell phone seized incident to arrest); Smallwood, 113 So. 3d 724 (requiring warrant to search cell phone in search incident to arrest); *State v. K.C.*, 207 So. 3d 951 (requiring warrant to search an "abandoned" but locked cell phone).

Noting that cell phones can access or contain "[t]he most private and secret personal information, *Smallwood* [*v. State*], 113 So. 3d at 732, the Florida Supreme Court has distinguished these computer-like electronic storage devices from other inanimate objects:

> [A]nalogizing computers to other physical objects when applying Fourth Amendment law is not an exact fit because computers hold so much personal and sensitive information touching on many private aspects of life. . . .
>
> * * *

The United States Supreme Court drew a similar distinction between a cell phone and other tangible objects in *Riley v. California*. The Court held that the search incident to arrest exception did not apply because neither rationale—the interest in protecting officer safety or preventing destruction of evidence—justified the warrantless search of cell phone data. Riley, 134 S. Ct. at 2486–88. . . .

* * *

It is an issue of first impression in Florida whether a warrant is required to search an impounded vehicle's electronic data recorder or black box. An event data recorder is a device installed in a vehicle to record "crash data" or technical vehicle and occupant information for a period of time before, during, and after a crash. NHTSA, Event Data Recorders, 49 C.F.R. § 563.5 (2015). Approximately 96% of cars manufactured since 2013 are equipped with event data recorders. Black box 101: Understanding event data recorders, Consumer Reports, www.consumerreports.org/cro/2012/10/black-box-101-understanding-event-data-recorders/index.htm, (published Jan. 2014).

Most of these devices are programmed either to activate during an event or record information in a continuous loop, writing over data again and again until the vehicle is in a collision. *Michelle V. Rafter*, Decoding What's in Your Car's Black-Box, Edmunds, www.edmunds.com/car-technology/car-black-box-recorders-capture-crash-data.html (updated July 22, 2014). However, if triggered, the device can record multiple events. 49 C.F.R. § 563.9.

* * *

The information contained in a vehicle's black box is fairly difficult to obtain. The data retrieval kit necessary to extract the information is expensive and each manufacturer's data recorder requires a different type of cable to connect with the diagnostic port. Rafter, supra. The downloaded data must then be interpreted by a specialist with extensive training. Id.; see also Melissa Massheder Torres, The Automotive Black Box, 55 Rev. Der. P.R. 191, 192 (2015).

The record reflects that the black box in Worsham's vehicle recorded speed and braking data, the car's change in velocity, steering input, yaw rate, angular rate, safety belt status, system voltage, and airbag warning lamp information.

* * *

Although electronic data recorders do not yet store the same quantity of information as a cell phone, nor is it of the same personal nature, the rationale for requiring a warrant to search a cell phone is informative in determining whether a warrant is necessary to search an immobilized vehicle's data recorder. These recorders document

more than what is voluntarily conveyed to the public and the information is inherently different from the tangible "mechanical" parts of a vehicle. Just as cell phones evolved to contain more and more personal information, as the electronic systems in cars have gotten more complex, the data recorders are able to record more information. The difficulty in extracting such information buttresses an expectation of privacy.

Recently enacted federal legislation enhances the notion that there is an expectation of privacy in information contained in an automobile data recorder. The Driver Privacy Act of 2015 states that "[a]ny data retained by an event data recorder . . . is the property of the owner . . . of the motor vehicle in which the event data recorder is installed." § 24302(a), 49 U.S.C. § 30101 note (2015). The general rule of the statute is that "*[d]ata recorded or transmitted by an event data recorder . . . may not be accessed by a person other than an owner . . . of the motor vehicle in which the event data recorder is installed*." § 24302(b) (emphasis added). There are only five exceptions to this rule, which include authorization from a court or administrative authority or consent of the owner. § 24302(b)(1)-(5).

* * *

[In a California case] *People v. Diaz*, held that the defendant lacked a privacy interest in his vehicle's speed and braking data, obtained from the "sensing diagnostic module" after a fatal accident, 213 Cal. App. 4th 743, 153 Cal. Rptr. 3d 90 (Cal. Ct. App. 2013). It was undisputed the search was conducted without a warrant, over a year after the accident. There was testimony about the defendant's speed at the time of the accident, but the officer conceded this was based on the information downloaded from the vehicle's sensing diagnostic module.

* * *

Diaz is unpersuasive. It relied on *Smith v. Maryland*, which found no expectation of privacy in information "voluntarily conveyed" to a third party. 442 U.S. at 745. However, when addressing digital devices, the Supreme Court has moved away from the Smith rationale. In *United States v. Jones*, the Court could have relied on Smith when considering the constitutionality of placing a GPS tracking device on a vehicle without a warrant, since the vehicle's position "had been voluntarily conveyed to the public." 565 U.S. 400, 132 S. Ct. 945, 951, 181 L. Ed. 2d 911 (2012). Instead, the Court relied on a trespass theory to find that while "mere visual observation does not constitute a search," attaching a device to the vehicle or reaching into a vehicle's interior constitutes "encroach[ment] on a protected area." Id. at 952–53.

Additionally, the Diaz court's reliance on *Smith v. Maryland* seems misplaced because, as the opinion acknowledged, sensory diagnostic modules can record much more information than what is observable to the public, including "the throttle, steering, suspension, brakes, tires, and wheels." 213 Cal. App. 4th at 748. We disagree with Diaz that all black box data is "exposed to the public."

* * *

In his concurring opinion, Justice Alito expressed a preference for analyzing the case by "asking whether [Jones's] reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove." 132 S. Ct. at 958. Justice Alito observed that the Katz expectation-of-privacy test,

> rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the trade off worthwhile.

Id. at 962. Under Justice Alito's approach, the constant, unrelenting black box surveillance of driving conditions could contribute to a reasonable expectation of privacy in the recorded data. Considering that the data is difficult to access and not all of the recorded information is exposed to the public, Worsham had a reasonable expectation of privacy, and we agree with the trial court that a warrant was required before police could search the black box.

Affirmed. [The appeals court held the evidence was properly suppressed.]

However, caution is advisable in this area of search and seizure of electronically stored data because the Supreme Court had yet to rule on an EDR case involving a search, and some states have concluded that, in some situations, a car owner/driver may not have an expectation of privacy in a vehicle's EDR or equivalent data[98] acquisition system. In a California case in 2013,[99] a court of appeal held a driver's Fourth Amendment rights were not violated when police seized a sensing diagnostic module from a defendant's vehicle, which police had impounded for evidence after a fatal collision, and downloaded data from the vehicle's supplemental restraint system diagnostic module (SDM) device. The SDM records information during a vehicle crash, and its main purpose is to deploy air bags. It records that throttle, speed, and application of the brakes.[100] Defendant admitted that police lawfully seized the vehicle, and the officers' later examination of the vehicle for its evidentiary value did not constitute a search. In a motion to suppress the SDM data, the defendant argued that because the SDM was inaccessible and the data was unavailable without connecting the SDM to a computer, she had a reasonable expectation of privacy in the SDM and its data. Prior case law in California considered the seized motor vehicle, under the circumstances, to be an instrumentality of a crime, which may be searched without a warrant. The court also noted that the data concerning speed and braking are things that are obvious to anyone outside the vehicle who might watch the taillights or see the vehicle moving. The court reasoned that most of the data contained within the module concerned things that were readily available to the public and for which she could claim no expectation of privacy. The appellate court found that the defendant had no reasonable Fourth Amendment expectation of privacy in the data regarding the vehicle's speed and braking.[101]

Some jurisdictions follow a different path when vehicle event data recordings are desired to be used in a criminal prosecution and appear to routinely obtain warrants for such data. While a defendant when faced with such data might file a motion to suppress, the prosecution has a much better probability of prevailing and having the evidence admitted into court. In a federal prosecution involving a fatality on a federal parkway in Maryland,[102] the case involved a motor vehicle that was driven by an apparently intoxicated driver. Prosecutors were permitted to introduce evidence from the vehicle's event data recorder. At the scene of the crash, the vehicle smelled of alcohol, and the driver of the motor vehicle appeared to be under the influence. In addition, he was combative with rescue personnel, who also indicated to police that they believed he was intoxicated. Since probable cause existed to believe that the defendant might have been intoxicated and that the vehicle's event data recorder might indicate that his responses to highway challenges were not normal, probable cause existed to believe that the EDR might contain relevant information. Three weeks later, police applied for a search warrant that particularly described the motor vehicle and vehicle identification number as well as the data that the police wanted to find that was stored in a specific location, the EDR. It specified the vehicle's EDR and further described the relevant data as including diagnostic codes present at the time of the crash, headlight status, engine speed, vehicle speed, brake status, and data covering the throttle position. The judge found probable cause and issued the search warrant covering the fatal car's EDR, along with its data that would cover the time of the crash and give five seconds of pre-crash telemetry data that was needed by a crash reconstruction expert to determine the underlying cause of the crash. The admission of the EDR evidence was upheld by the reviewing court based on the presence of probable cause and the properly issued search warrant.[103]

Concerning vehicle event data recorders, there is generally an expectation of privacy for the operator or owner for what the event data recorder might acquire, and to reveal that information, the government arguably requires both probable cause and a warrant. In one of the previous cases, because the police had lawfully seized the motor vehicle as an instrumentality, or evidence of a crime, the court appeared to take the view that the defendant no longer had an expectation of privacy in the motor vehicle. On the other hand, it is quite possible to believe that an expectation of privacy existed, and to breach privacy requires a warrant. Definitive answers may emerge on a state-by-state basis when top state courts make rulings based on state law or state constitutions, or EDR privacy issues may be eventually resolved by the US Supreme Court. The best practice for the present appears to indicate that police and prosecutors should obtain a warrant for EDR data when its admission is crucial to improving a case beyond a reasonable doubt.

14. Summary

While not explicitly stating by its terms, the Fourth Amendment has been interpreted to offer an expectation of privacy to individuals, where the recognition of that privacy is something that society would consider reasonable under the circumstances. In pursuing a criminal investigation, if the government violates the Fourth Amendment, the general rule is that the evidence received by virtue of that violation will be suppressed

from use in court to prove guilt. When electronic devices under the general heading of the Internet of Things are concerned, an individual who lawfully possesses such a device or devices may have an expectation of privacy concerning the data it holds, stores, or sends to the cloud. To access this data, probable cause and a warrant may be required in order to produce admissible evidence.

The most universal category of smart digital devices would be the cell phone, but it is more than a phone, since it stores significant amounts of data related to the owner/user for which that individual might reasonably expect some level of privacy. This would include the numbers that the phone has called and to which it has connected, text messages, photographs, and videos, as well as the location from which the calls were made, where the photographs or videos were taken, and other usage of apps that might rest within the phone or be accessed by the phone. A close second device might be the personal computer, on which significant personal data is also stored, whether it involves Internet searches, email communication, or storage of photographs and videos. In some cases, the personal computer may well do everything that a cell phone does concerning the storage of personal information, with storage space in the multiple terabyte range.

In addition to cell phones and computers, many smart devices exist that store personal information where the devices are worn or closely connected to the human body, such as a FitBits or a similar device that stores human telemetry concerning activities in which the human may engage, when that person conducts that activity, and how long the activity occurs. These devices may synch and link to the service provider and often store data in their related cloud devices. Many smart devices may be of a more intimate medical nature, such as a heart pacemaker or similar digital device or a small computer that reads blood sugar levels and stores that information. Some medical-type devices may store the information locally, while some may transmit data in real time or at certain intervals. Smart devices such as the Amazon Echo actually listen for human activity and activate based on that but keep records concerning when access was requested and how long the interaction lasted. The better view is that these smart devices carry an expectation of privacy to those who use them.

Individual tracking devices are available for law enforcement use, such as motor vehicle GPS systems and circuitry embedded in money packets that financial institutions use to help track property improperly taken from that particular location. In some of these situations, there may be an expectation of privacy; in others, there may be none; and in some others, such as event data recorders in automobiles, the law is not yet well settled.

In analyzing devices under the rubric of the Internet of Things, close attention must be paid to the "third party doctrine" that basically holds that when an individual gives his or her data to what is called a third party, the individual ceases to have an expectation of privacy. Courts have recognized some exceptions to this, such as historical cell phone location data and information that has been stored on an individual's cell phone cloud account. Information that has been gathered from within a home and transmitted to a security system may fall under the third party doctrine since the data was intended to be given to a third party as well as used by the subscriber's smart devices. Police and private security cameras in public places may not create private data since these smart devices generally record what anyone would be able to observe, but some security cameras operated by police that overlook private residential back yards may violate an individual's expectation of privacy under the Fourth Amendment.

This chapter has presented and analyzed various kinds of data acquisition by some of the available smart digital devices. Whether this information is private and would require a search warrant cannot be definitively answered in every case or situation. As the number of smart devices under the Internet of Things category increases and humans adopt and invite devices into their homes and wear them on their persons, litigation will constantly be evolving. The concept of smart digital devices will generate search and seizure challenges, with some of these issues definitively decided by the Supreme Court of the United States. Searches of some of these devices may be left to a case-by-case analysis, especially when driven by new types of devices not even yet envisioned. Searches of case law in individual jurisdictions will certainly be a requirement for criminal justice professionals for the near-term future.

REVIEW EXERCISES AND QUESTIONS

1. What are some of the reasons police or prosecutors need to have a warrant or some other exception to search the digital data on a modern smart phone? Does it make any difference if the cell phone has been seized incident to a lawful arrest?
2. What factors might allow an emergency or an exigent circumstances search of a cell phone?
3. Does a police agency need a warrant to search or to receive the data from a smart tracking device given or taken by a robbery suspect?
4. What is the rationale for requiring warrants to search FitBits and similar personal smart devices that are worn by people to record their personal data?
5. Why are pictures captured by cameras placed in a public area not subject to a warrant requirement for police or prosecutors to view and use in court?
6. Since heart pacemakers and other heart devices often collect data that is expected to be given to third parties to facilitate their effective use, should the acquisition/collection of this data by law enforcement officers require a warrant?
7. Personal digital devices like the Amazon Echo and similar Internet-connected smart devices theoretically only record what a customer desires, but the data is given to a third party. Should a warrant be required for police to obtain data for which probable cause may exist? What data or theories would you cite as the rationale for your answer?
8. From what you have learned in this chapter, explain what the "third party doctrine" means with respect to searching for data collected by smart devices covered under the category of the Internet of Things.
9. Although the Supreme Court of the United States has yet to definitively rule concerning whether vehicle event data recorders require warrants to make lawful searches, what are some of the reasons in favor of requiring warrants and some reasons warrants should not be required?

1. How Would You Decide?

In the Court of Appeals of Florida, Fourth District.

A Lauderhill, Florida, police officer initiated a traffic stop of a speeding vehicle that had no operational headlights being used after dark. The driver pulled the vehicle into a shopping center, making an abrupt stop. Two unidentified individuals got out of the vehicle, looked at the officer, and then successfully fled on foot.

During his investigation, the officer determined that the vehicle had been reported stolen in Sunrise. Inside the vehicle, the officer discovered a cell phone in plain view on the front passenger seat. On the cell phone's visible lock screen was a picture of an individual who looked like one of the people who ran from the vehicle. The cell phone was protected by a passcode; however, the officer did not attempt to unlock it or otherwise get into the phone's data. He turned the cell phone over to the Sunrise (Florida) Police Department in connection with the department's stolen vehicle investigation unit.

Some months later, a forensic detective opened the phone without a warrant since the belief was that the phone had been abandoned. Generally, no one has an expectation of privacy in abandoned property. Internal phone data disclosed that it belonged to the defendant, K.C. This information let to his arrest for burglary of a conveyance, but he filed a pre-trial motion to suppress. The trial court ordered the data from the cell phone suppressed despite the prosecutor's argument that it had been abandoned. Even though the cell phone was left in the stolen vehicle, defense counsel asserted that K.C. retained an expectation of privacy because he used a passcode to protect his data in the phone. Defense counsel argued that dropping the cell phone was not voluntary abandonment, because K.C. never disclaimed ownership.

The prosecution appealed the suppression of the phone data to the Court of Appeals.

Is a search warrant required for a search of a cell phone when it is passcode-protected but left in a stolen motor vehicle when phone ownership has never been denied?
The Court's Holding:

* * *

A motion to suppress evidence generally involves a mixed question of fact and law. The trial court's factual determinations will not be disturbed if they are supported by competent substantial evidence.

* * *

Although in this case, the trial court itself made no explicit findings of fact, it agreed with the defense arguments, and the facts were undisputed. Thus, the trial court either found that the cell phone was not abandoned or made the legal conclusion that police could not search the cell phone without a warrant because the abandonment exception is inapplicable to password-protected cell phones. We address the latter contention, as it is controlling.

Concluding that a warrantless search of a cell phone cannot be justified as a search incident to arrest, the Supreme Court explained in *Riley v. California*, 134 S. Ct. 2473,

189 L. Ed. 2d 430 (2014), how a cell phone is different than other objects which might be subject to a search:

> Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. . . .
>
> One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. . . .
>
> But the possible intrusion on privacy is not physically limited in the same way when it comes to cell phones. . . .

* * *

Similarly, in *Smallwood v. State*, 113 So. 3d 724 (Fla. 2013), our supreme court also noted that cell phones were a trove of personal information unlike any static object which may be searched incident to a lawful arrest.

* * *

The State, however, claims that it could search the cell phone without a warrant under the abandonment exception:

> Although warrantless searches and seizures are generally prohibited by the Fourth Amendment to the United States Constitution and article I, section 12, of the Florida Constitution, police may conduct a search without a warrant if consent is given or if the individual has abandoned his or her interest in the property in question.

Caraballo v. State, 39 So. 3d 1234, 1245 (Fla. 2010) (quoting *Peterka v. State*, 890 So. 2d 219, 243 (Fla. 2004)). Our supreme court has recognized that "[t]he test for abandonment is whether a defendant voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." [Citation omitted.] In other words, "'[n]o search occurs when police retrieve property voluntarily abandoned by a suspect in an area where the latter has no reasonable expectation of privacy.'" [Citation omitted.]

While we acknowledge that the physical cell phone in this case was left in the stolen vehicle by the individual, and it was not claimed by anyone at the police station, its contents were still protected by a password, clearly indicating an intention to protect the privacy of all of the digital material on the cell phone or able to be accessed by it. Indeed, the password protection that most cell phone users place on their devices is designed specifically to prevent unauthorized access to the vast store of personal information which a cell phone can hold when the phone is out of the owner's possession.

In light of *Riley [v. California]*, the United States Supreme Court treats cell phones differently, for the purposes of privacy protection, than other physical objects. . . . The

abandonment exception does not compel a similar conclusion that a warrantless search is authorized. There is no danger to individuals, property, or the need to immediately capture a criminal suspect where the cell phone is out of the custody of the suspect for substantial amounts of time. And there is an abundant amount of time for the police to obtain a warrant, which could then limit, if necessary, the scope of the search of the phone.

* * *

> We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. *Privacy comes at a cost*.
>
> Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency."

Id. at 2493 (emphasis added) (citation omitted). Where a cell phone is "abandoned," yet its contents are protected by a password, obtaining a warrant is even less problematic. In this case, how difficult and inefficient would it have been for the officer to obtain a search warrant, when the cell phone in question was in police possession for months?

As the Supreme Court held that a categorical rule permitting a warrantless search incident to arrest of a cell phone contravenes the Fourth Amendment protection against unreasonable searches and seizures, we hold that a categorical rule permitting warrantless searches of abandoned cell phones, the contents of which are password protected, is likewise unconstitutional.

* * *

Because both the United States Supreme Court and the Florida Supreme Court have recognized the qualitative and quantitative difference between cell phones (and their capacity to store private information) and that of other physical objects and the right of privacy in that information, we conclude that the abandonment exception does not apply to cell phones whose contents are protected by a password. Paraphrasing Chief Justice Roberts, "[o]ur answer to the question of what police must do before searching [an abandoned, password protected] cell phone . . . is accordingly simple—get a warrant." [*Riley v. California*,] at 2495.

Affirmed. See *State v. K.C.*, 207 So.3d 951, 953–958, 2016 Fla. App. LEXIS 18084 (2016).

2. How Would You Decide?

In the 6th Circuit Court of Appeals.

Grand Rapids, Michigan, police initiated an investigation concerning Mr. May-Shaw for drug sales and trafficking. Initial tips on the defendant's activity came from Silent Observer, an organization that relays information to police concerning crime.

Police observed that May-Shaw had prior drug felony convictions. Once police identified the apartment where the defendant resided, they initiated some surveillance of the communal parking lot that contained some covered parking spots that were somewhat removed from the actual apartment buildings. The covered carports were easily viewable from a public vantage point outside of the apartment complex. Police also used a camera hidden inside a van that was parked on the apartment premises with the consent of the apartment complex owner. Police also installed a surveillance pole camera that was located outside of the apartment complex but with which they could continuously view the parking lot, including the defendant's BMW. The camera recorded continuously for twenty-three days and could produce moving video and still shots. Officers could view the video feed in real time and also later, since the video was recorded.

Officers observed May-Shaw conduct what appeared to be several drug transactions, during which he and the person in a car that drove up exchanged something, and the officers on one occasion observed him leaving the front passenger side of one of the vehicles and removing cash and a bag of suspected drugs that he carried into his apartment. Police had a K-9 officer walk a drug-sniffing dog around the BMW, and the dog alerted. Much of this information, including data from the pole-based surveillance camera, was used to procure a search warrant for the defendant's apartment. Drugs and paraphernalia were discovered during the execution of the search warrant.

May-Shaw filed a motion to suppress the evidence seized pursuant to the search warrant, arguing that the warrantless surveillance through the pole camera and the warrantless sniff of the BMW by the drug-detecting dog constituted unconstitutional warrantless searches. The trial judge denied the motion, holding that the defendant possessed no reasonable expectation of privacy in the parking lot and that the area that police screened with the pole camera was not part of the constitutionally protected curtilage of the apartment. The judge noted that the sniff by trained dog was permitted under the Fourth Amendment since it was not considered a Fourth Amendment search under the circumstances. The evidence was ruled admissible at trial. The defendant pled guilty and reserved the right to appeal the search and seizure issue.

How would you rule on the defendant's contention that the long-term surveillance, including continuous use of a pole camera, of the carport and parking area of his apartment constituted a search for which a warrant was necessary?
The Court's Holding:

[The court noted that generally this type of warrantless video surveillance does not violate the Fourth Amendment because police only observed what the defendant made available to the public and to any person who would have been in the area to view his activity.]

* * *

Because the officers' use of the pole camera did not involve any sort of physical intrusion into a constitutionally protected area, May-Shaw must show that he had a reasonable expectation of privacy in the carport. Cobbling together dicta from several Fourth Amendment cases, he argues that, although police may permissibly observe the curtilage of a home for a short period of time, for example with an aerial flyover, see

California v. Ciraolo, 476 U.S. 207, 213, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986), long-term video surveillance of a home's curtilage is problematic under the Fourth Amendment, see *United States v. Anderson-Bagshaw*, 509 F. App'x 396, 405 (6th Cir. 2012). There is at least some support for that proposition, as this court and five Justices of the Supreme Court have noted concerns about the problems with long-term warrantless surveillance. See id.; see also *United States v. Jones*, 565 U.S. 400, 415, 429–30, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012) (Sotomayor, J., concurring and Alito, J., concurring).

* * *

May-Shaw contends that the pole camera did not provide the same vantage point that was readily accessible from the street. The district court, however, held that the area surveilled by the pole camera was readily accessible from a public vantage point. This is a factual finding that is reviewed for clear error. Officer Mesman testified that the vantage point from the pole camera was the same as the vantage point from the street, and nothing in the record contradicts that assertion. Therefore, the district court's factual finding that the pole camera recorded the same view enjoyed by an individual standing on Norman Avenue was not clearly erroneous.

Furthermore, the surveillance footage and photos here did not "generate[] a precise, comprehensive record of [May-Shaw's] public movements that reflects a wealth of detail about [his] familial, political, professional, religious, and sexual associations," [*United States v.*] *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring), which could raise significant Fourth Amendment concerns. Rather, the footage and photos only revealed what May-Shaw did in a public space—the parking lot. They captured images of May-Shaw moving things from his car to his apartment. The video showed when he arrived and left the apartment. In other words, the cameras observed only what "was possible for any member of the public to have observed . . . during the surveillance period." Houston, 813 F.3d at 290.

May-Shaw has not demonstrated that when the government surveilled the carport for twenty-three days, it violated his reasonable expectation of privacy and thus conducted an unconstitutional search. [Other cases, *Collins v. Virginia*, ___U.S.___, 138 S.Ct. 1663, 201 L.Ed.2d 9 (2018), have found that a carport next to a house can be included within the curtilage, but this carport was not close to the apartment building.] We find no error in the district court's judgment that the pole-camera surveillance did not violate May-Shaw's Fourth Amendment rights.

[The Sixth Circuit also held that the drug dog sniff of the BMW motor car was not a violation of the defendant's Fourth Amendment expectation of privacy.]

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97. *Florida v. Worsham*, ___ U.S. ___, 138 S.Ct. 264, 199 L.Ed.2d 125, 2017 U.S. LEXIS 5793 (2017).
98. Some data acquisition systems are referred to as an ACM, an airbag control module. A different designation may be SDM, a sensing diagnostic module.
99. See *People v. Diaz*, 213 Cal. App. 4th 743, 153 Cal. Rptr.3d 90, 2013 Cal. App. LEXIS 92 (2013). *Accord Mobley v. State*, 346 Ga. App. 641, 816 S.E.2d 769, 2018 Ga. App. LEXIS 430 (2018).
100. *Id*. at 748.
101. *Id*. at 758.
102. *United States v. Blakeney*, 949 F3d 851 (4th Cir. 2020).
103. *Id*. at 865.

Searches of Open Fields and Abandoned Property

9

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Learning Objectives

1. Under the open fields concept, give examples of the types of property that would meet the Supreme Court's definition of an open field.
2. Apply the definition of the curtilage to a self-generated fact pattern and explain why there is a greater expectation of privacy within that curtilage.
3. Articulate the rationale that supports the absence of Fourth Amendment privacy in a piece of land that qualifies as open field.
4. Explain the concept of curtilage and give an example of property that lies beyond the curtilage for which there would exist no expectation of privacy.
5. Describe why there is no expectation of privacy under the Fourth Amendment with respect to abandoned property.
6. Understand and be able to explain why abandoned property may be seized or searched by police without a warrant or other reason.
7. Articulate why proof of voluntary abandonment of property negates any reasonable contention that the property has been illegally seized under the Fourth Amendment.
8. Describe the effect that police misconduct may have on the admission in court of allegedly voluntarily abandoned personal property.

Chapter Outline

KEY TERMS

1. Abandonment
2. Curtilage
3. Intent to abandon
4. Open fields doctrine
5. Personal property
6. Real property
7. Voluntary abandonment

1. Introduction to Open Fields: No Expectation of Privacy

The Fourth Amendment guarantee against unreasonable searches and seizures, which also guarantees that people will be secure in their persons, houses, and effects, does not generally extend to what has been described in legal terms as an open field. As the Supreme Court noted in *Oliver v. United States*, "[N]o expectation of privacy legitimately attaches to open fields."[1] Precisely what qualifies as an open field has been subject to significant litigation and does not necessarily meet the English-language version of an open field, but the Supreme Court stated that "thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment."[2] A Texas court recently offered the opinion that "[a]n 'open field' need not be 'open' or a 'field' as those terms are commonly understood."[3] An open field encompasses any unoccupied or undeveloped land beyond the curtilage of a home. According to some courts, the definition of an open field can include fields that are enclosed by fences such as a horse fences, cattle fences, or barbed-wire fences. A field on which a barn is located may also be considered an open field, although the barn would present different Fourth Amendment search and seizure issues. An open field would also include a field in which crops have been planted whether those crops are short or sufficiently tall to obscure an ordinary view of the field. Farm fields that have been posted with "no trespassing" signs, fields with fences with locks on the gates, or fences topped with barbed wire qualify as open fields with respect to the Fourth Amendment. If police officers enter a field under such circumstances as the entry would be a trespass to land, the illegal entry does not require that any evidence seized would have to be suppressed because there is generally no expectation of privacy under the Fourth Amendment in an open field. Since police may enter an open field on foot, generally, they may also fly over an open field or overfly a curtilage with a fixed-wing aircraft or helicopter, so long as they are flying within lawfully navigable airspace.[4] However, using a fixed-wing aircraft to overfly a residential backyard while in lawfully navigable airspace while using a telephoto camera lens may require probable cause and a warrant, since the police are able to see more intimately into the residential

backyard than would be the case with unaided eyesight. In a recent Alaska case,[5] a reviewing court held that an unreasonable search had occurred when police used a plane and a camera with enhanced optics to discover marijuana being illegally grown at a residence.

The use of a drone to overfly an open field or private land may imply the need for a warrant in some jurisdictions. In a Michigan non-criminal case[6] that could have implications for criminal procedure, a reviewing court held that a township could not use a drone to fly near or above a landowner's property to take pictures without a warrant to prosecute a zoning violation. The reviewing court noted that

> A drone is therefore necessarily more intrusive into a person's private space than would be an airplane overflight. Furthermore, unlike airplanes, which routinely fly overhead for purposes unrelated to intentionally-targeted surveillance, drone overflights are not as commonplace, as inadvertent, or as costly. In other words, drones are intrinsically more targeted in nature than airplanes and intrinsically much easier to deploy. Furthermore, given their maneuverability, speed, and stealth, drones are—like thermal imaging devices—capable of drastically exceeding the kind of human limitations that would have been expected by the Framers not just in degree, but in kind.[7]

The Michigan court ordered the photographs suppressed on a rehearing of the matter.

2. Genesis of the Open Fields Doctrine: The *Hester* Case

The starting point for the open fields doctrine began with the case of *Hester v. United States* (Case 9.1) that arose in 1919 when federal agents charged with enforcing revenue laws encountered Hester and an associate dealing with whiskey on which the agents believed the taxes had not been paid. The agents trespassed on land belonging to Hester's father in order to be in a position to observe an illegal transaction between Hester and another man. According to the officers, Hester was transferring some untaxed whiskey to the customer and it appeared that Hester retained possession of an amount of untaxed whiskey. According to the Court of Appeals:

> The evidence indisputably shows that the defendant was seen to hand what was supposed to be a bottle of spirits to one Henderson, who ran off and broke the bottle, and that the defendant also was seen to take a jug supposed to contain a gallon of spirits from an automobile, and run away with and break the jug, scattering the contents on the ground. Two revenue officers testified that the contents of the jug, which they judged of from that on the ground, and the remnants in broken particles of glass, consisted of blockade whisky. One of the witnesses testified he knew it when he saw it, and the other witness referred to it as "new corn liquor," "untax-paid liquor—blockade liquor." Still it is manifest, from a careful review of the entire testimony, that the witnesses used the words "blockade" and "untax-paid" as synonymous terms for untax-paid spirits. This was the only suggestion in the evidence indicating that the spirits was not tax-paid.[8]

The Court of Appeals reversed the trial court's guilty verdict on the basis of a failure of the government's evidence to reach the burden of proof. When Hester's case reached the Supreme Court of the United States, somewhat different issues were argued, while the sufficiency of the evidence that was crucial to the Court of Appeals decision seemed not to be the determining factors for the Supreme Court. The Court took the view that the evidence of possession of untaxed spirits was properly admissible because the federal agents had not conducted an illegal search and seizure by entering the Hester property. The *Hester* Court determined that there was no expectation of privacy in an open field or in the abandoned containers in which the untaxed spirits were seized. Writing for the Court, Justice Holmes held the opinion that the special protections that the Fourth Amendment offered to people in their "persons, houses, papers, and effects" does not extend to an open field. With respect to the whiskey found in the broken containers, the Court noted that "there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned."[9]

Case 9.1 LEADING CASE BRIEF: NO FOURTH AMENDMENT EXPECTATION OF PRIVACY EXISTS IN AN OPEN FIELD

Hester v. United States
Supreme Court of the United States
265 U.S. 57 (1924).

CASE FACTS:

A grand jury indicted Charlie Hester, which resulted in Hester's conviction for concealing non-tax-paid distilled spirits in violation of federal revenue laws. Agents of the government walked toward the house where Hester lived with his father. Agents saw a man named Henderson drive toward the Hester house. Agents concealed themselves from view of the home when they saw Hester come out and hand Henderson a quart bottle. Hester felt that something was amiss and went to a car parked nearby and took a gallon jug from it, and he and Henderson ran away from where the agents were located. One of the officers pursued the two men and fired a pistol that caused Hester to drop his jug. Although broken, the jug contained about a quart of its illegal contents. Henderson tossed his bottle as well, but federal agents recovered it. The jug and bottle contained what the officers, as experts in illegal spirits, recognized as moonshine whiskey. The other officer entered the Hester home, but after being told there was no whiskey there left the home, but in the yard, he discovered a jar that had been thrown out of the home and broken, and the jar contained additional non-tax-paid whiskey.

The officers possessed no warrant for either a search or an arrest, so Hester argued that the evidence should be suppressed under the exclusionary rule and that by the agents taking the incriminating property, he was being forced to incriminate himself. The government did not contest the fact that the officers were on Hester's father's land.

The case came to the Supreme Court from the Court of Appeal for the Fourth Circuit that had reversed the District Court on the ground the prosecutor

failed to prove that the tax had not been paid. Constitutional issues were argued in the Supreme Court.

LEGAL ISSUE:

Did the revenue officers make an illegal Fourth Amendment seizure of the jug and bottle and their contents when they trespassed on private land and recovered them from the ground where the defendant tossed them during flight?

THE COURT'S RULING:

There was no Fourth Amendment seizure, since the agents took possession of the property after it had been abandoned by the defendant in an open field and had become property of no one.

ESSENCE OF THE COURT'S RATIONALE:

The officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible, it being assumed, on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact. It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. This evidence was not obtained by the entry into the house and it is immaterial to discuss that. The suggestion that the defendant was compelled to give evidence against himself does not require an answer. The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226.

CASE IMPORTANCE:

Abandoned property is the property of no one, and no person has a Fourth Amendment right in property which he or she does not own or have possession. Special protections under the Fourth Amendment do not extend to property found or abandoned in open fields.

While the Supreme Court in the *Hester* case determined that there was no expectation of privacy in an open field, later court cases provide a definition and limitations concerning what type of property qualified for treatment as an open field. In *Hester*, the property appeared to involve a house that was some distance from the public road in which there were fences on some parcels of the property, while other areas of the property do not appear to have been fenced.

In a similar fashion, in *Oliver v. United States*,[10] police received information that Oliver was growing marijuana on his farm, and they went to investigate. Without a warrant, they drove up to his farm and on past his house to a locked gate to which a

"no trespassing" sign had been affixed. They walked around the gate and passed a barn and camper and eventually found a marijuana patch over a mile from Oliver's farmhouse. Kentucky State police eventually arrested Oliver for manufacturing a controlled substance. The trial court conducted a pretrial hearing and suppressed evidence of the discovery of the marijuana field. Applying *Katz v. United States*, 389 U.S. 347, 357 (1967), the court found that petitioner had a reasonable expectation that the field would remain private because petitioner "had done all that could be expected of him to assert his privacy in the area of farm that was searched."[11]

Oliver had posted the "no trespassing" signs around his farm and had locked the gate at his central entrance to the farm. In addition, access to property was limited; the marijuana growing area was secluded and could not be seen from any public vantage point. The trial court ordered the evidence of marijuana manufacturing suppressed, citing the defendant's reasonable expectation of privacy under the Fourth Amendment. The Court of Appeals for the Sixth Circuit reversed the trial court, on the basis that a property owner's common law right to keep trespassers from intruding upon a person's land was insufficiently linked to a reasonable expectation of privacy that would warrant the Fourth Amendment's protection. The Court of Appeals sided with the *Hester* case and approved the continued use of the open fields doctrine, reaffirming the position that no expectation of privacy can reasonably be enjoyed in an open field.

The Supreme Court of the United States in *Oliver*[12] cited the *Hester* case, using the words of Justice Holmes,

> [The] special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law.
>
> *Hester v. United States*, 265 U.S., at 59. n6

According to *Oliver* Court, the Fourth Amendment has been interpreted to focus on a constitutionally protected view of what constitutes a socially reasonable expectation of privacy and not a subjective individual right of privacy. The only right of privacy under the Fourth Amendment is one that society is prepared to recognize as reasonable. The Court reaffirmed the validity of *Hester* by noting, "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."[13] An open field fails to offer privacy for intimate activities that would be sheltered from public view if they occurred within a home. The Court found no social interest in privacy in most open fields that are devoted to agriculture or other aspects of farming or property classified as vacant land. For those reasons, the *Oliver* court determined that there was no Fourth Amendment expectation of privacy in an open field, whether it was fenced, remote, locked, or non-accessible except by viewing it from the air. In many significant respects, the farm in *Oliver* was quite similar to the *Hester* farm, and the legal rationales proved quite similar, so the Supreme Court affirmed the lower court decision that the evidence could be used against Oliver in his trial for manufacturing marijuana.

While *Hester* and *Oliver* taught the lesson of what constitutes an open field, the Court in *Dunn v. United States* offered some additional suggestions of the limits of privacy in an open field. Dunn's dwelling house had a surrounding fence that enclosed

the area, known to the common law as the curtilage, where he could reasonably expect privacy under the Fourth Amendment. As a general principle of the common law, a person's home provides the home occupier some reasonable expectation of privacy while the occupiers are inside of the area that would commonly be fenced. Outside the area close to the home, and beyond the area that might reasonably be fenced surrounding the home, legally could be considered an open field where privacy of the owner or occupier of the field does not exist.

In order to give some additional clarity to the concept of the curtilage and the expectation of privacy that a home occupier might expect while remaining within the curtilage, the same general level of privacy that a person could expect within the home can be expected within the curtilage. Obviously, when neighbors or passersby can observe the area from a lawful vantage point, the expectation of privacy that a home occupier might have is somewhat reduced. In a North Carolina prosecution, *State v. Reed*,[14] a burglary and sex offense case, a police officer initiated a conversation with the suspect on his patio connected directly to his house. The officer wanted the suspect to give a DNA sample, which the suspect refused. The suspect smoked a cigarette that he later flicked away to a pile of trash located on his residential patio. Without the defendant's knowledge, the officer carefully flipped the cigarette butt off the patio into a grassy common area outside of the curtilage, where he later retrieved it for analysis. The defendant contended that the DNA evidence from the cigarette butt should not have been introduced at his trial because the evidence was taken from inside his curtilage where he had an expectation of privacy. The prosecution argued that the defendant had abandoned the cigarette butt by discarding it and therefore lost his expectation of privacy in the cigarette remains. The reviewing court granted the defendant a new trial based on the officer's illegal seizure of the cigarette butt from within the curtilage of the defendant's home where he possessed an expectation of privacy.

3. The *Dunn* Case and Refining the Concept of the Curtilage

While the *Hester* and *Oliver* cases taught and reaffirmed the lesson of what constituted an open field, the Court in *Dunn v. United States*[15] offered some additional suggestions concerning the limits of an open field that indirectly explained the curtilage. Since the Fourth Amendment mentioned houses in its text as being places that are protected against unreasonable searches, and open fields have been interpreted as not offering any expectation of privacy, the extent of the house privacy expectation and the concept of where an open field begins presented challenges for court determination. A dwelling house that had a surrounding fence that enclosed the area, known as the common law curtilage, provided the home occupier some expectation of privacy in the home and its immediate surroundings. However, the land deemed outside the area that would commonly be fenced around the home could be considered an open field. The curtilage generally includes porches, decks, and side gardens near a home, as well as the parts of a home's driveway that are adjacent to the dwelling and to which activities of the home extend.[16] In modern usage, the curtilage would include the

backyard of a suburban house that might encompass a barbecue or picnic area, a deck, and a hot tub or a swimming pool. On some small suburban lots, concrete block walls or wood fences might provide privacy and indicate the extent of the curtilage. The Supreme Court of Georgia referred to the curtilage as encompassing the grounds of a particular address and would include its gardens, barns, and buildings.[17] Chief Justice Burger, in explaining the basis for the curtilage expectation of privacy, noted, "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."[18] In explaining the curtilage, the United States Supreme Court has

> recognized that the Fourth Amendment protects the curtilage of a house and that the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself.[19]

The Supreme Court has noted that courts primarily look at four factors in determining if an area is within the curtilage:

> [W]e believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.
>
> *United States v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)

In *Dunn v. United States*[20] (Case 9.2), drug enforcement officers initiated an investigation because Dunn had purchased qualities of precursor chemicals used to make illegal recreational pharmaceuticals such as amphetamine. After officers observed Dunn place the chemicals in a barn on his farm, the agents warrantlessly entered the farm through open fields and, in the process, climbed over some fences that secured the perimeter of the farm. As they approached the barn, officers smelled phenylacetic acid, a precursor chemical to phenylacetone, and heard a motor running inside the structure. The officers shined a flashlight into cracks in the barn and peered inside, where they observed what appeared to be a drug laboratory. Officers obtained a search warrant and returned to seize drug-making chemicals and paraphernalia that eventually resulted in Dunn's conviction on several federal drug-manufacturing charges. The barn was located approximately 60 yards away from the house and was in a position that would have been outside of the traditional limits of the curtilage if a fence had existed. The Supreme Court of the United States upheld Dunn's conviction on the theory that the officers had not violated any legitimate Fourth Amendment expectation of privacy that he may have possessed because the barn was located in an open field beyond the scope of the curtilage, and the police officers had merely walked through an area of the farm where Dunn had no expectation of privacy. Dunn had taken no special action to secure the farm fields beyond having farm fencing, and he had taken no steps to secure the barn from prying eyes. In addition, the officers possessed objective knowledge that demonstrated the barn was not being used for

intimate activities associated with the home. Had the barn been located extremely close to the house within or encroaching the cartilage, Dunn might have had a stronger argument about an expectation of privacy.

Case 9.2 LEADING CASE BRIEF: AN OPEN FIELD MAY INCLUDE BUILDINGS NOT USED WITH THE DWELLING HOUSE

United States v. Dunn
Supreme Court of the United States
480 U.S. 294 (1987).

CASE FACTS:

The Drug Enforcement Administration discovered that respondent Dunn and another defendant appeared to be in the process of manufacturing amphetamine and phenylacetone in a barn on Dunn's property. In addition, it appeared that Dunn was in possession of amphetamine tablets with intent to distribute. With the goal of ascertaining the truth and to develop probable cause for a search warrant, DEA agents entered respondent's 198-acre ranch. The agents crossed a perimeter fence and an interior fence, where they were able to detect an odor of phenylacetic acid emanating from the barn. The officers proceeded to the larger barn, which required that they cross Dunn's barbed wire fence and his wooden fence.

When in front of one of the barn's entrances, the officers peered inside the barn and observed what seemed to be a phenylacetone laboratory. The officers returned twice more but never entered the barn prior to executing a search warrant issued on the basis of their observations. An additional source of probable cause, on which the judge who issued the search warrant relied, arose from two locating beepers originally legally installed in cans of the precursor chemicals that ended up at the ranch.

Although the District Court refused to suppress the evidence seized pursuant to the search warrant, the Court of Appeals concluded that the warrant had been based on the agents' illegal entry on the respondent's property. Following a variety of appellate maneuvers, the Supreme Court granted certiorari to consider the issue of whether respondent had an expectation of privacy in fields outside the curtilage of his ranch home sufficient to prevent officers from walking in his field to look at his barn interior. (At common law, the curtilage included the area around a dwelling house that might actually be fenced or could reasonably be fenced but was not actually fenced.)

LEGAL ISSUE:

Where a barn and other outbuildings are located in a field beyond the curtilage of a home, does the occupier of the land have an expectation of privacy in those fields absent a special effort to prevent observation or security to prevent walking through the fields?

THE COURT'S RULING:

Where a building rests within a field outside the curtilage of a home and is not fenced so as to enclose the home and where police have information that the building was not being used

intimately with the dwelling home, the occupier of the land has no expectation of privacy in the field. Generally speaking, there is little Fourth Amendment expectation of privacy in an open field, even if it is fenced.

ESSENCE OF THE COURT'S RATIONALE:

* * *

II

The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself. The concept plays a part, however, in interpreting the reach of the Fourth Amendment. *Hester v. United States*, 265 U.S. 57, 59 (1924), held that the Fourth Amendment's protection accorded "persons, houses, papers and effects" did not extend to the open fields, the Court observing that the distinction between a person's house and open fields "is as old as the common law. 4 Bl. Comm. 223, 225, 226."

* * *

Drawing upon the Court's own cases and the cumulative experience of the lower courts that have grappled with the task of defining the extent of a home's curtilage, we believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. [Citations omitted.]

* * *

First. The record discloses that the barn was located 50 yards from the fence surrounding the house, and 60 yards from the house itself. Standing in isolation, this substantial distance supports no inference that the barn should be treated as an adjunct of the house.

Second. It is also significant that respondent's barn did not lie within the area surrounding the house that was enclosed by a fence. We noted in *Oliver, supra*, that

> for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience.
>
> 466 U.S., at 182, n. 12

Viewing the physical layout of respondent's ranch in its entirety, see 782 F.2d, at 1228, it is plain that the fence surrounding the residence serves to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house. Conversely, the barn—the front portion itself enclosed by a fence—and the area immediately surrounding it, stands out as a distinct portion of respondent's ranch, quite separate from the residence.

Third. It is especially significant that the law enforcement officials possessed objective data indicating that the barn was not being used for intimate activities of the home. The aerial photographs

showed that the truck Carpenter had been driving that contained the container of phenylacetic acid was backed up to the barn, "apparently," in the words of the Court of Appeals, "for the unloading of its contents." 674 F.2d, at 1096. When on respondent's property, the officers' suspicion was further directed toward the barn because of "a very strong odor" of phenylacetic acid. App. 165. As the DEA agent approached the barn, he "could hear a motor running, like a pump motor of some sort . . ." *Id*., at 17. Furthermore, the officers detected an "extremely strong" odor of phenylacetic acid coming from a small crack in the wall of the barn. *Ibid*. Finally, as the officers were standing in front of the barn, immediately prior to looking into its interior through the netting material, "the smell was very, very strong. . . [and the officers] could hear the motor running very loudly." *Id*., at 18. When considered together, the above facts indicated to the officers that the use to which the barn was being put could not fairly be characterized as so associated with the activities and privacies of domestic life that the officers should have deemed the barn as part of respondent's home.

Fourth. Respondent did little to protect the barn area from observation by those standing in the open fields. Nothing in the record suggests that the various interior fences on respondent's property had any function other than that of the typical ranch fence; the fences were designed and constructed to corral livestock, not to prevent persons from observing what lay inside the enclosed areas.

III

* * *

Oliver reaffirmed the precept, established in *Hester*, that an open field is neither a "house" nor an "effect," and, therefore, "the government's intrusion upon the open fields is not one of the 'unreasonable searches' proscribed by the text of the Fourth Amendment." 466 U.S., at 177.

The Court expressly rejected the argument that the erection of fences on an open field—at least of the variety involved in those cases and in the present case—creates a constitutionally protected privacy interest. *Id*., at 182–193.

"[T]he term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech." *Id*. at 180, n. 11

* * *

Under *Oliver* and *Hester*, there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields.

* * *

The officers lawfully viewed the interior of respondent's barn, and their observations were properly considered by the Magistrate in issuing a search warrant for respondent's premises. Accordingly, the judgment of the Court of Appeals is reversed.

CASE IMPORTANCE:

Under the Fourth Amendment, an open field, even if fenced, is neither a house nor an effect for which an expectation of privacy is reasonable to expect unless the occupier of the property takes extraordinary efforts to prevent observation by other persons.

After the *Hester* case and most especially following the *Dunn* case, the open fields doctrine demonstrated that, as a strong general rule, no one has an expectation of privacy in land that is not used intimately in conjunction with a dwelling house. No warrant is needed to search an open field, and any evidence discovered will be admissible against a person who owns or controls the open field unless some rule of evidence requires its exclusion.

4. Expectation of Privacy and Abandoned Property

Although the Supreme Court has not had occasion to refine or revisit the aspect of privacy and the Fourth Amendment in many years, as a general rule, a person who has given up any claim to ownership or possession of real or personal property has no claim to any right or expectation of privacy with respect to the property.

> There is a very long line of caselaw establishing the principle that police may freely seize and search abandoned items, such as items thrown from vehicles during a police chase, items placed in trash containers, or items dropped by a pedestrian while fleeing from the police.[21]

As one court noted, "An expectation of privacy is the threshold standing requirement that a defendant must establish before a court can proceed with any Fourth Amendment analysis."[22] When a person abandons property, he or she becomes a legal stranger to the property and, for Fourth Amendment purposes, has no future legal interest concerning what is done to or with the property.

Demonstrative of this consequences of abandonment is a federal court of appeals case[23] where police received a report that gunfire had been exchanged between two vehicles and that one had crashed. Police observed bullet holes and a shot-out rear window and also found the vehicle's key still in the ignition and a handgun on the driver's side floorboard. Witnesses said two gentlemen had fled on foot and gave a description of them. When police found a man, Crumble, matching the description, they returned to the vehicle and seized the firearm and a cell phone found on the driver's seat. The subject denied any connection to the vehicle, indicating an intent to abandon. Police obtained a warrant to search the cell phone, with perhaps dubious probable cause, but the prosecution contended that defendant had apparently abandoned the car, his gun, and his cell phone. The reviewing court affirmed the trial court decision that the defendant had abandoned his cell phone and explained

> It is well-established that a defendant does not have a reasonable expectation of privacy in abandoned property. See *United States* v. *Tugwell*, 125 F.3d 600, 602 (8th Cir. 1997). Thus, if Crumble abandoned the cell phone, he forfeited his expectation of privacy and cannot raise a Fourth Amendment challenge to the subsequent search. See id. ("A warrantless search of abandoned property does not implicate the Fourth Amendment, for any expectation of privacy in the item searched is forfeited upon its abandonment."). "The issue is not abandonment in the strict property right sense, but rather, whether the defendant in leaving the property has relinquished [his] reasonable expectation of privacy. . . . "Id. (internal

> quotation marks omitted). A finding of abandonment depends on the totality of the circumstances, with "two important factors [being] denial of ownership and physical relinquishment of the property." Id.[24]

The reviewing court noted that leaving the vehicle and its contents, including the gun and the cell phone, indicated abandonment, which is tested by the objective facts available to the officers and not on the defendant's subjective intent. In most situations, the defendant's intention to abandon must appear from the circumstances.

Consistent with the concept of abandonment, when a person determines that personal property has no future use and ends his or her connection to that personal property, it becomes the property of no one until a new owner or possessor asserts some level of property interest in the property. Individuals who abandon personal property and have no present connection to it have no reason to complain if a police officer takes a look at it, picks it up, carefully examines it, or searches it, even if it may implicate persons in crime.[25] Consistent with abandonment, a defendant had abandoned and had no expectation of privacy in the contents of his cell phone when he left it locked at a location where he committed burglary and later cancelled the service for the phone.[26] The court found that this latter act indicated an intent to abandon. In another example, in a federal prosecution in Maryland,[27] a robbery suspect led police, while driving a stolen vehicle, onto a federal military base, where he crashed and fled on foot. While fleeing, he intentionally discarded numerous personal items, including his shirt, a hat, and a cell phone. Without a warrant, police opened up the cell phone to obtain a serial number and other identifying information that was used to determine the owner of the cell phone. They also used the cell phone to return an incoming call from the defendant's wife, who indicated that the phone belonged to her husband, whom she named. Later search warrants allowed the officers to conduct a more detailed search of the phone, but the assistance offered by their initial search and use of the phone helped establish probable cause to arrest the defendant and was obtained without a warrant. At trial and on appeal, the defendant contended that he had not abandoned his phone, that the initial search was illegal, and that the evidence thus obtained and subsequent evidence from the phone should have been suppressed. The federal court of appeals indicated that a finding of abandonment of property is not based on whether an individual has relinquished all formal property rights but whether the defendant retains a reasonable expectation of privacy in the allegedly abandoned articles. According to the court, in order to determine whether a defendant retained an expectation of privacy requires an objective analysis that considers the defendant's actions and intentions. It noted that an intent to abandon can normally be inferred from words, acts performed, and other objective facts. Abandonment could easily be found in this case because the court noted that when a fleeing suspect tosses aside personal items while attempting to evade capture and leaves his vehicle and its contents behind, as well as a bloody shirt and hat and a cell phone, it would seem that all of these items have been abandoned in the legal sense. The phone did not fall out of the shirt pocket, since it was found fifty yards away from the shirt that the defendant discarded. It would be normal and expected for any fleeing suspect to abandon his/her cell phone, because it can lead police right to his/her location. There was no evidence that the suspect attempted to retrieve his phone at any point. When

the defendant discarded his unlocked cell phone, he ran the risk that complete and total strangers would come upon it, look through it, and use it. In affirming the conviction, the court agreed with the trial court that when the defendant discarded his phone, he gave up his reasonable expectation of privacy; abandonment had clearly occurred, and the evidence was admissible.[28]

With respect to real property, although a person may be still listed as the owner of record, it is still possible to abandon the property and intend to have no future connection to it. With real property, this might be evidenced by vacating the property with no intention to return, failing to pay property tax on it combined with leaving the property without a future intent to deal with it at any time, vacating the premises and returning the key to the landlord or motel operator, or failing to pay for a motel room. Similarly, a person who enters into an abandoned house for the purposes of dividing or distributing drugs and does not live there does not generally have an expectation of privacy within the residence. In one case,[29] police entered a dilapidated residential structure that had no doors, had a window had been broken out, and had no utility service. Inside they found a brick of cocaine and marijuana hidden in a ripped and dirty couch. Police did not violate any Fourth Amendment expectation of privacy of an interloper who was in the house when police approached him on the second floor of the house. The defendant tossed an object that the officers retrieved that contained a controlled substance. The appellate court ruled that the defendant interloper possessed no reasonable expectation of privacy in the abandoned residence on either the first or second floor because he was a mere squatter in an abandoned building.

However, using an alias in sending a package containing drugs through an express company fails to indicate an abandonment of the package under the Fourth Amendment.[30] In one case, the defendant, who had concerns over a package of drugs he wanted delivered by an express company, made four or five phone calls to the express company concerning the location of the package with reference to its tracking number. Conduct demonstrating an intention not to abandon included obtaining a tracking number that allowed the defendant to use the Internet to follow the package's progress toward its destination, objectively demonstrated a continuing interest in the parcel, and did not indicate abandonment. In an Idaho federal case,[31] police had just made an outdoor arrest at a rural residence where several people were congregated. Police also observed drug paraphernalia on the ground around a motor vehicle that contained a dilapidated backpack. Police received consent from the owner of the vehicle to search the car. No one admitted owning the backpack or otherwise claimed it, but one individual indicated that previously he found it in a dumpster, and that he did not know what was inside and had not looked. Inside the bag, police found drug paraphernalia, female toddler underwear, a metal notebook with the defendant's name on the outside, and a tablet computer containing child pornography. A defendant failed in his efforts to have the evidence of the backpack's contents suppressed. The facts indicated that the defendant either did not admit owning the backpack or, if he did own it, he abandoned any legal ownership in it and therefore had no legal interest whatsoever in its contents. The defendant lost any standing to contest the search at the time he denied any ownership connection to the backpack.

5. General Proof of Intent to Abandon

As a strong general rule, abandoned property may be seized by police, and the prosecution can use the property for evidentiary purposes. In order for property to the abandoned, there must be proof that the owner or possessor intended to give up all title,[32] interest, claim, and/or right to possess. Whether property has truly been abandoned with the proper intention is generally determined by looking at the surrounding circumstances under which it appeared the property was abandoned. Merely giving property to another person to hold or store does not indicate an intention to abandon the property,[33] but leaving property with no intention to return to the property may indicate abandonment. When police contend that personal property has been abandoned, the "determination is made based on the objective facts available to the officers at the time they recovered the evidence, taking into account the totality of the circumstances."[34]

In cases involving personal property, the human conduct of placing an article in a trash can, throwing property out of a car window, or leaving the remains of a meal at a restaurant may be so obvious that no long analysis will be required. The simple act of placing articles in a personal trash can and leaving the trash can at the curb of one's residence generally is indicative of an intention to abandon the contents.[35] In a New Jersey case,[36] police received information that an individual was selling cocaine at a particular address, and they observed a trash receptacle connected to the residence but outside of and beyond the curtilage. Without a warrant, the officers looked through the trash can found a multitude of evidence of drug trafficking and some white residue that tested positive for cocaine. This evidence combined with other evidence produced a search warrant that further implicated the defendant. His motion to suppress the trash can evidence that supported probable cause for the search warrant was clearly rejected by the trial court, although the word abandonment was not used. In a similar fashion, an Alaska court noted that it would find it difficult to reach any other conclusion than that the person who placed trash in a curb receptacle intended to abandon the contents.[37] An intention to abandon a motor vehicle can be found in a situation where an individual left his car unattended in a public place, transferred the paper title to a different person, and told another person in a letter that he had no intention to return for the vehicle.[38] Merely transferring the title of an automobile to a second person can indicate the intent to abandon the vehicle.[39] A defendant indicated an intention to abandon mail that police seized from a Mail Boxes, Etc. store that the defendant had not retrieved from his Mail Boxes box for longer than a year in a situation where the defendant had made no rental payment on the box for more than a year.[40] However, in a case where police stopped a woman driving a rental car and she walked away from it, the conduct was ambiguous as far as intention to abandon the car or to abandon her suitcase that was inside the rental car's trunk.[41] The car had been rented, but the driver was not authorized to drive the car by the rental company, and the company wanted the police to impound the car. The woman was told that she could ride with police but that her belongings would have to be searched prior to placing them in the police cruiser. She declined and walked away with her personal items and a rolling suitcase. The drugs found in the trunk of the rental car had to be suppressed because she did not abandon the vehicle; it was taken from her.

A court may hold that an abandonment of personal property has occurred even where a defendant did not exhibit the intent to abandon the property at the initial time the property became separated from the defendant. In a California armed robbery case,[42] the defendant dropped his cell phone at the scene of the crime, and police eventually recovered it. Although it was locked in a way that prevented its use, police opened it to gain the serial number as a way of finding the identity of the subscriber/robber. The defendant wanted to contest the search for the serial number and suppress its fruits. In support of his continued expectation of privacy in the cell phone and the serial number, he contended that he did not abandon the phone or intend to discard it, but that he accidentally dropped it during the robbery. The trial court determined that he had abandoned his cell phone because at trial the defendant's own testimony established that he made a conscious decision not to reclaim his phone once he knew he had lost it at the scene of the robbery. His intent to abandon need not have occurred at the exact moment the defendant dropped the phone, but the intent to abandon did occur subsequently, and that intention sufficiently supported the legal concept of abandonment. With his abandonment, any expectation of privacy vanished.

In order to demonstrate that a person lacked an expectation of privacy in discarded property, courts will require the prosecution offer proof of a defendant's intention to abandon, tested by the totality of the circumstances. Abandonment is not determined exclusively by a property rights analysis, but the intention to abandon may be inferred from words, acts, and deeds that indicate the person has given up sufficient interest in the property as to no longer have an expectation of privacy in it.

6. Abandonment of Personal Property

In addition to an intention to abandon property, there must be actual abandonment sufficient to indicate that the defendant has no intention of dealing with the property in the future. A school teacher who placed a camera in a restroom to discover who had been causing a mess in the unisex bathroom and who periodically removed and replaced the camera had not abandoned it.[43] In many cases, a suspect with whom the police would like to talk runs or walks away and drops or discards drugs or other objects that the subject would not want to possess while speaking with the police. In an Illinois case,[44] a court determined that a subject had actually abandoned a firearm when police saw him with the butt of the gun sticking out of his pants beltline and moved to approach him. Upon seeing police, the subject subsequently abandoned the firearm by throwing the gun under a nearby parked car. There was an intent to abandon and actual abandonment of the firearm. A suspect possessing contraband faces a problem because if the suspect retains the drugs, gun, or other illegal item, there is the probability that possessing the evidence will be incriminating. Alternatively, if the suspect discards the property, he or she generally gives up any Fourth Amendment expectation of privacy in the discarded item and cannot successfully argue for suppression of evidence that he or she had previously abandoned.

In one case[45] police officers observed a subject who had been riding a bicycle leaning inside a motor vehicle in a manner that suggested a drug sale might be taking place.

When police approached the subject and he observed them, he attempted to ride his bicycle away in another direction, refusing a police command to stop. During his flight, the subject threw a black bag he had been carrying under a parked car. Police eventually gained control over the bicycle rider and arrested him once they retrieved the bag and discovered cocaine inside. The trial court convicted the defendant, but he appealed, contending that he should have been allowed to suppress the evidence of drug possession found in his discarded black bag. He argued that the police had observed no facts that would have given them the right to stop him and that the cocaine was the fruit of an illegal stop. The appellate court considered the facts and determined that the defendant abandoned the bag and its contents during the chase and prior to the time he was lawfully stopped, so he had no expectation of privacy in the bag at the time the officers opened it. The cocaine had been properly admitted against the defendant because he had abandoned the black bag and any expectation of privacy.

In a Florida prosecution[46] involving abandonment of personal property, where some events occurred in Colorado, officers arrived at a Colorado motel after having received information that a man who had outstanding warrants from Florida was residing at a local motel. Officers had information that the subject might have a large amount of money in a briefcase. Officers knocked on the door but were told by other occupants that the subject was in the bathroom, and the two occupants stepped outside. When the suspected felon exited the bathroom, was asked step outside, and was identified, he was arrested and secured in a police cruiser. Officers asked him if he had personal possessions in the motel room, which he admitted he did. The officers retrieved his acknowledged personal property, and they asked about whether he owned a closed silver briefcase that officers had observed in the room. Upon his denial of any connection to the silver briefcase, officers opened it and found a large amount of cash. At his Florida trial on a variety of charges, the court suppressed the contents of the briefcase. It accepted the defendant's argument that the briefcase had been illegally opened by Colorado officers because he had a reasonable expectation of privacy in the motel room and that a warrant was required to open the briefcase. The prosecution contended that he lacked standing to contest the search of the briefcase because he denied it belonged to him, in effect abandoning it. According to the reviewing court, when any defendant voluntarily abandons property or disclaims ownership, that person lacks any expectation of privacy and has no standing to challenge its search and seizure. The defendant contended that at the moment the Colorado deputies took hold of the briefcase to show it to him, they acted illegally and that an unlawful seizure occurred, rendering his disclaimer of ownership involuntary. The general rule is that when a defendant abandons property as a clear result of unlawful police conduct, the defendant does not relinquish his reasonable expectation of privacy in his property and continues to have standing to challenge the introduction of the abandoned items into evidence. In this case, the motel management told the defendant and his friends to leave, and police were merely securing any remaining personal property when they inquired about ownership of the briefcase. According to the appellate court, once the defendant disclaimed and abandoned the briefcase, he no longer had any expectation of privacy concerning it or its contents. The reviewing court reversed the trial court order of suppression because the defendant had abandoned the briefcase.

Proof of abandonment negates any contention that the property was illegally seized or that a search of the property was unlawful. In a different case,[47] an interstate Greyhound bus passenger denied that a piece of luggage bearing his name belonged to him. Police were interested in the luggage because a drug-sniffing dog had alerted to the bag while it rested in the belly of the interstate bus. In cooperation with the Greyhound Bus Company, a police officer wearing a company uniform announced that the bus had mechanical problems, the passengers would have to switch to another bus, and each passenger would have to claim his or her respective luggage. One passenger picked up the suspect baggage, and its name tag matched the name on the passenger ticket. The police officer asked the passenger why a drug dog alerted to his blue bag, but the passenger stated, "That's not my bag." He later repeated that the bag did not belong to him. The trial court admitted the 12 pounds of heroin against the defendant over his objection. On appeal, he argued that the police officer disguised as a bus employee illegally seized him when he was ordered to leave the bus and claim his baggage, that he did not voluntarily abandon his bag, and that his bag should not have been warrantlessly searched. The appellate court rejected the defendant's argument that he had been seized when the officer wearing bus company attire ordered the passengers to exit the bus and claim their baggage. According to the court, the test to be used to determine abandonment is whether "[T]he defendant has retained any reasonable expectation of privacy in the property." *United States v. Hernandez*, 7 F.3d 944, 947 (10th Cir. 1993). "Abandonment is akin to the issue of standing because a defendant lacks standing to complain of an illegal search or seizure of property which has been abandoned." *Garzon*, 119 F.3d at 1449.[48]

In this case, the abandonment was voluntary, and it was not made due to an illegal Fourth Amendment seizure of his person. Because of his abandonment of his suitcase, the heroin was properly admitted against him, according to the court of appeals.

Police may use deception to get a person to abandon personal property or other evidence when the subject may not realize that he or she is actually abandoning anything. In an Iowa case, *State v. Christian*,[49] police invited the suspect to an arranged fake job interview for the purpose of obtaining his DNA sample. During the interview, the suspect was offered and accepted a drink from a bottle of water, and he ate a piece of cake with a fork supplied by police. The defendant was none the wiser and left both the bottle of water and the fork at the interview site. Police collected the water bottle and fork and subjected them to DNA analysis, the results of which linked the defendant to a sexual assault. The court determined that no error occurred when the DNA evidence was used against the defendant in the sexual assault case because the defendant had voluntarily abandoned the materials containing his DNA profile when he left the items at the "job interview." According to the court, determining if a person voluntarily abandoned property considers whether the person intended to abandon the property, a fact that can be discerned from words, acts, or other objective facts. In this case, the defendant brought other articles, including paperwork, to the meeting and left with the paperwork, indicating that he took what he wanted from the meeting and left what he no longer wanted, which included the water bottle, the cake fork, and his DNA sample. The reviewing court approved the admission of the DNA results into evidence despite the defendant's assertion that

the seizure was illegal under the Fourth Amendment because he had not intended to abandon DNA.

7. Abandonment of Motor Vehicles

Courts apply the same constitutional procedures in cases where owners, possessors, renters, and other individuals in control of motor vehicles exhibit conduct that indicates a desire to abandon the vehicle for the future. Generally, there must be actual abandonment and proof of an intent to abandon the vehicle There may be some limitations on the expectation of privacy in a motor vehicle that many states recognize when the occupant or passenger does not own or lease the vehicle.[50] When a person who has control over a motor vehicle determines that he or she will abandon the vehicle and the conduct of the person demonstrates a permanent abandonment of the vehicle and its content, that individual will possess neither an expectation of privacy in the vehicle nor in any of the vehicle's contents. In some states, courts will not find a voluntary abandonment if police misconduct prompted the person in control of the vehicle to abandon it. In such cases, the courts will continue to recognize an expectation of privacy in the vehicle and its contents.

In a federal case out of Indiana,[51] a police officer observed a vehicle that failed to completely stop at a stop sign. After the cruiser's lights were activated, the vehicle sped away and entered an industrial area, where it left the pavement, went airborne, and crashed. The driver fled on foot after dealing with some object in the vehicle, which led the officer to believe that the subject might be armed. A foot pursuit resulted in the subject's surrender and arrest, and a search incident to arrest revealed a pistol magazine. The search of the vehicle disclosed a Ruger pistol, which a convicted felon is not permitted to possess. Among other theories to support the vehicle search, the prosecution alleged that the defendant had actually abandoned the car and had the intention to abandon since he left the keys in the ignition and the vehicle's engine remained running. The reviewing court cited numerous federal cases that held when a driver on foot flees police to avoid arrest after stopping a vehicle and leaves the keys or fob, such conduct is good evidence that the driver intended to abandon the vehicle and to abandon any Fourth Amendment expectation of privacy as well. As the federal district judge noted, "The Defendant, thus, visibly abandoned any interest in that vehicle and its contents and hence, no Fourth Amendment interest of his was implicated in the search."[52]

As noted, exiting a motor vehicle with no intention to return to the vehicle may constitute legal abandonment and eliminate any expectation of privacy and vehicle. One court determined that the defendant abandoned his motor vehicle where police initially attempted to stop defendant's van due to a broken taillight, but the van driver accelerated, which caused the officer to give chase.[53] At a point near the end of the chase, the defendant van driver turned into a residential driveway and bailed out of the van while the vehicle was still moving in excess of 30 miles per hour, with the result that the van crashed into a house. The driver of the van left the scene of the crash, but police captured him several blocks away. Pursuant to police policy, the van was impounded, and eventually an inventory search occurred that revealed a pistol hidden within the

van. The trial court admitted the pistol against the defendant over his objection that he had not abandoned the van and had only left it temporarily. On appeal, the court noted that a defendant abandons his property when he discards it, and in this case, proof of abandonment was evident when he

> jumped from the van while it was still moving. He left it crashed into a garage with the lights on, the door open, and the keys in the ignition. He never tried to return to the van and was apprehended several blocks away. Although he may not have wanted to relinquish his legal interests, he certainly shed the van when it served his more immediate interest of escape. He also admitted that he fled from the van because he did not want to be connected with the gun inside.[54]

The Court of Appeals upheld the admission of the pistol into evidence based on the fact that the defendant abandoned both the pistol and the van.

8. Police Misconduct and Abandonment of Personal Property

In some jurisdictions, police misconduct prior to abandonment of property by a suspect may destroy the voluntariness of the abandonment, while in most jurisdictions, if police misconduct coexists with abandonment, the court treats the two issues as separate concepts and allows the admission of the evidence. Where police illegally arrest or attempt to wrongfully arrest a subject and the subject abandons property, the abandonment may not be considered voluntary, and the evidence will be suppressed.

In a Florida case,[55] a police officer lawfully stopped a motor vehicle that turned in front of the officer's cruiser based on a failure to properly use a turn signal. The officer had to slow his vehicle to avoid being hit by the turning vehicle. During the stop, one officer determined to give a ticket to the front-seat passenger due to the fact that he was not wearing a seatbelt following the stop of the motor vehicle. When the officer, for no objective reason, believed that the passenger gave a false name, the officer decided to arrest the passenger. Following police directions, the passenger placed his hands on the roof of the car, but suddenly bolted away, running from the police officer. During his moments of freedom, the subject abandoned a firearm that resulted in his prosecution for being a felon in possession of a firearm. Since the officer never observed whether the passenger used the seat belt while the car was in operation, he had no reason whatsoever to issue a citation or to seize the passenger for giving a false name. Additionally, it was not a crime to give a false name to a police officer because, in this case, it did not occur during a lawful detention. Because the defendant should not have been seized, and his detention was unlawful, the court rejected the government's argument that the gun had been properly introduced against the defendant because he had abandoned it. According to the appellate court, the illegality of the police arrest caused the defendant to throw down the gun, and it should have been suppressed from his trial. This case demonstrates that some jurisdictions consider the legality of police conduct in determining whether the abandonment of evidence was the result of an illegal police act or an act of free will, unmotivated by police misconduct.

There is little chance for police misconduct that may relate to a claim of abandonment until a person has been physically seized or has submitted to police authority. Abandonment made prior to custody is generally considered to have been done voluntarily. In *Campbell v. State*,[56] the defendant tossed his gun under a car when a police spotlight illuminated him as he stood in a residential front yard. In Indiana, property abandoned due to police misconduct is generally not admissible. Police came over to question him concerning his conduct and discovered the tossed gun. The defendant alleged that he had been illegally seized when the spotlight hit him. If he were seized at the time that the spotlight illuminated him and there was no legitimate reason to make a seizure, then illegal police conduct caused him to abandon the gun, and it should have been suppressed as in the prior case. However, if the defendant was not seized at that time, no illegal police conduct made the defendant abandon the gun and it should have been admissible against him for having a concealed weapon without a permit. In Indiana, a person is seized when, by means of physical force or a show of authority, a police officer has in some way restrained the liberty of a citizen. Earlier case law on the federal level demonstrated that the shining of a light, without more, does not constitute a seizure. Other states have held a spotlight on a car combined with blocking of the defendant's car constitutes a Fourth Amendment seizure. The Indiana court held that the mere shining of a flashlight on a subject, without more, does not constitute a seizure, so the defendant's abandonment of his firearm was not done in response to illegal police conduct. Since the gun was abandoned, the police properly seized it, and the gun could properly be admitted in evidence against the defendant.

Where police make mistakes and do not have a reason to seize a person, property abandoned prior to apprehension may still be admissible where the police conduct was generally reasonable. In a recent federal prosecution for being a felon in possession of a firearm,[57] police officers wrongfully chased a subject because they thought he was somebody else. The subject walked away from the officers and then added speed to run from the non-uniformed officers, who eventually captured the subject who was the wrong person. The police officers had neither probable cause to reasonable suspicion to seize the defendant, but one officer genuinely, but erroneously, believed that the defendant was a person who was subject to arrest. During his flight from the police, the defendant discarded an assault rifle and some ammunition magazines that the prosecution introduced at the defendant's trial. The reviewing court approved the trial court use of the firearm and ammunition magazines because they were obtained due to voluntary abandonment that preceded the police illegality of wrongfully seizing the defendant's person.

9. Abandonment of Real Property, Land, Home, and Motel

Abandonment of real property occurs if the defendant intended to abandon the property, actually abandoned the property, and the abandonment was not based on police misconduct. Abandonment is often considered a matter of intent that can be inferred from words that a defendant spoke, acts they performed, or other objective evidence of conduct. Generally, when a motel guest's rental period ends, that guest no longer has a reasonable expectation of privacy in the motel room since the guest has no continued right to occupy the room.[58]

In an Ohio case,[59] police had been alerted that the defendant was staying at a particular motel in a specified room, and it was known that he had an outstanding arrest warrant. Several officers converged on the motel room. One officer spoke with a housekeeper, who identified the defendant as a guest and indicated that the defendant and another person had stayed beyond the designated checkout time. The housekeeper indicated that motel policy allowed her to kick a guest out if they stayed beyond checkout time, and the defendant had not paid for the next night. When the housekeeper confirmed that the tenancy of the defendant had not been extended, the housekeeper then led the officers to defendant's room, knocked on the door, and stated, "housekeeping." The defendant and his male friend did not respond to her knocking, and in the presence of officers, she used her master key to open the door. At that time, the officers announced their presence and entered and observed methamphetamine and drug paraphernalia in the room. Once the hotel guest has voluntarily abandoned the room, or when the rental period has expired, his status is lawfully terminated, and the guest no longer has a legitimate expectation of privacy in the hotel room. The reviewing court found that there was credible evidence presented at the suppression hearing that the defendant had relinquished and abandoned his right to be in the room because he had failed to pay the next night prior to the stated checkout time and had no expectation of privacy in the room. Therefore, the motel housekeeper properly opened the door and allowed police to enter the room, and the drug evidence was lawfully seized.

The intention to abandon occupancy in a motel room may be a contested fact in many criminal cases, and the resolution of abandonment issues determines the admissibility of evidence from the room. In *United States v. Mitchell*,[60] the defendant had rented a motel room and paid for it in advance, but checked out, according to motel employees, prior to the expiration of the rental period. The defendant denied checking out and vacating the room, and her conduct of retaining the door key indicated that she felt that she still had rights to the motel room. When asked, the motel staff told state police that the subject had checked out and left in a vehicle. A warrantless search of the motel room revealed papers and personal items, including clothing that was in a pile in the closet floor, that could indicate the defendant intended to return and had not abandoned the room and its contents. From the defendant's motel room, police officials seized stolen United States mail, a check printer, chemical bleaching solution, and other evidence that the trial court permitted to be introduced against the defendant at her trial for possessing stolen mail. The trial court found the defendant's version of events concerning the renting of the motel room and the time of her checkout not believable and chose to believe the motel staff, holding that she had abandoned her motel room prior to the warrantless government search and seizure. The appellate court upheld the trial court decision that because she had abandoned the room and its contents, she had no expectation of privacy that remained.

10. Summary

The concept that no expectation of privacy exists in open fields has such a firmly established judicial history that it is likely to endure for the foreseeable future despite the fact that many occupiers of land believe that they can expect privacy to do very personal

activities without fear of discovery. Open fields as a concept includes actual open fields but also includes forested land and land containing growing crops, even where a farmer has taken steps to discourage or to prevent trespassers from entering real property.

When a defendant abandons property, generally the defendant must have an intention to abandon the property and exhibit conduct that indicates that he or she wishes nothing further to do with the property. The intention and the act are often intertwined and in some cases may be difficult to separate, but abandonment is often the question of fact to be determined by looking at the totality of the circumstances. Words, acts, and conduct may indicate that a defendant wants no further connection with a piece of personal property or real property. A disclaimer of ownership of property suffices as a general indication of either abandonment or of never having possessed any connection with the property in question. Where a suspect disclaims ownership of a piece of luggage, a quantity of drugs, a package, or a firearm, generally there is no expectation of privacy in the property over which ownership has been denied. As a general rule, a subject must have voluntarily abandoned property and not have been prompted to abandon property by virtue of police misconduct. Courts often strain to separate abandonment that occurs prior to police misconduct from police violations of a suspect's rights. As a general rule, courts generally admit evidence that was abandoned prior to the occurrence of a constitutional violation. If the abandonment coexists with police misconduct involving a seizure of a person, many courts will suppress the evidence of the abandoned property because of law enforcement errors involving the Fourth Amendment.

REVIEW EXERCISES AND QUESTIONS

1. Police received information that a man named Jones was growing some marijuana on the edge of a cornfield on one of his farms. The information appeared to be from a reliable source, and police wanted to check it out prior to obtaining a search or arrest warrant. One evening two officers, without a warrant, walked past his home and near his hot tub at the back of the house but walked on a dirt road that had been posted with no trespassing signs. When the officers reached the area in question, they found marijuana plants ready for harvest. The officers would like to use the evidence of marijuana manufacturing against Mr. Jones. Explain whether the officers have violated Mr. Jones's Fourth Amendment rights by the manner in which they discovered the marijuana plants.
2. Why have courts determined that there is little expectation of privacy in an open field?
3. In the case *United States v. Dunn* (Case 9.2), would the outcome of the case have been different if Mr. Dunn's barn had been located immediately behind his house and he had located a family hot tub within the barn that was regularly used? In this altered fact pattern, Mrs. Dunn used a room in the downstairs area of the barn for her quilting hobby. Would the Court have ruled the same way?

4. In many cases involving abandoned personal property, a defendant is under some strain and motivation to throw away property that might be indicative of criminal activity. On the assumption that abandonment must be a voluntary act, when a suspect discards crack cocaine during a police chase, does such conduct indicate voluntary or involuntary abandonment of the drugs? Explain.
5. Construct a scenario or fact pattern in which a defendant will be deemed to have voluntarily abandoned a motor vehicle and for which he or she will have no remaining Fourth Amendment expectation of privacy in the vehicle or its contents.
6. As a general rule, in order for property to be considered abandoned, the abandonment must have been done freely and voluntarily. A criminal who inadvertently misplaces a cell phone or forgets to finish a cookie and leaves it, partially eaten, at a crime scene has not consciously or intentionally abandoned the property. Can lost or misplaced property qualify as "abandoned" property for purposes of admission into evidence under the Fourth Amendment?
7. Can police misconduct have any effect on the admissibility into evidence of property that a defendant abandoned where the abandonment was directly related to or prompted by police misconduct? Explain.

1. How Would You Decide?

Supreme Court of the United States.

In Albemarle County, Virginia, during the investigation of two traffic incidents that involved an orange and black motorcycle that twice eluded the police, officers learned that the motorcycle was probably stolen and that it was in the possession of a man whom officers found on Facebook. One of the photographs on Facebook showed an orange and black motorcycle that appeared to be similar to the one that was allegedly stolen and that police had chased. An officer drove to the defendant's home and parked on the public street, where he observed what appeared to be the particular motorcycle from the photograph. It was partially covered by a white tarp, which obscured the license plate and other identifying characteristics. Without a search warrant, an officer walked up onto the driveway, removed the tarp, checked the VIN, and ran the license plate to discover that the motorcycle was definitely stolen. The officer took a photograph of the uncovered motorcycle and replaced the tarp. When the resident, one Collins, returned, the officer placed him under arrest for receiving stolen property.

Prior to trial, the defendant's motion to suppress the evidence of the stolen motorcycle, based on a violation of the Fourth Amendment, was rejected by the trial court. Essentially, the defendant's legal position was that the officer warrantlessly trespassed upon the curtilage of the defendant's home to make the search involving the motorcycle. The defendant contended that the warrantless search exception for motor vehicles did not apply to allow a warrantless entry on his curtilage. The trial

court convicted the defendant, and the reviewing court did not disturb the conviction. After the Supreme Court of Virginia affirmed the conviction, defendant Collins appealed to the Unites States Supreme Court, contending that a violation of his Fourth Amendment rights had occurred when the officer encroached upon the curtilage of his home.

How would you rule on the defendant's contention that the evidence of the stolen motorcycle should have been suppressed from his trial because the police officer violated the Fourth Amendment rights of the defendant when the officer trespassed and searched within the curtilage of the defendant's home without a warrant?

The Court's Holding:

Justice Sotomayor delivered the opinion of the Court.

This case presents the question whether the automobile exception to the Fourth Amendment permits a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein. It does not.

I

We granted certiorari, 582 U.S. ___, 138 S. Ct. 53, 198 L. Ed. 2d 780 (2017), and now reverse.

II

* * *

[Some internal citations, divisions, and section designators in the opinion have been omitted.]

The Court has held that the search of an automobile can be reasonable without a warrant. The Court first articulated the so-called automobile exception in *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, T.D. 3686 (1925).

* * *

The Court upheld the warrantless search and seizure, explaining that a "necessary difference" exists between searching "a store, dwelling house or other structure" and searching "a ship, motor boat, wagon or automobile" because a "vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." Id., at 153, 45 S. Ct. 280, 69 L. Ed. 543.

* * *

When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. [*Florida v.*] *Jardines*, 569 U.S., at 11, 133 S. Ct. 1409, 185 L. Ed. 2d 495. Such conduct thus is presumptively unreasonable absent a warrant.

* * *

With this background in mind, we turn to the application of these doctrines in the instant case. As an initial matter, we decide whether the part of the driveway where Collins' motorcycle was parked and subsequently searched is curtilage.

According to photographs in the record, the driveway runs alongside the front lawn and up a few yards past the front perimeter of the house. The top portion of the driveway that sits behind the front perimeter of the house is enclosed on two sides by a brick wall about the height of a car and on a third side by the house. A side door provides direct access between this partially enclosed section of the driveway and the house. A visitor endeavoring to reach the front door of the house would have to walk partway up the driveway, but would turn off before entering the enclosure and instead proceed up a set of steps leading to the front porch. When Officer Rhodes searched the motorcycle, it was parked inside this partially enclosed top portion of the driveway that abuts the house.

The "'conception defining the curtilage' is . . . familiar enough that it is 'easily understood from our daily experience.'" Jardines, 569 U.S., at 7, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (quoting Oliver, 466 U.S., at 182, n. 12, 104 S. Ct. 1735, 80 L. Ed. 2d 214). Just like the front porch, side garden, or area "outside the front window" [Citation omitted], the driveway enclosure where Officer Rhodes searched the motorcycle constitutes "an area adjacent to the home and 'to which the activity of home life extends,'" and so is properly considered curtilage.

In physically intruding on the curtilage of Collins' home to search the motorcycle, Officer Rhodes not only invaded Collins' Fourth Amendment interest in the item searched, i.e., the motorcycle, but also invaded Collins' Fourth Amendment interest in the curtilage of his home. The question before the Court is whether the automobile exception justifies the invasion of the curtilage. The answer is no.

Applying the relevant legal principles to a slightly different factual scenario confirms that this is an easy case. Imagine a motorcycle parked inside the living room of a house, visible through a window to a passerby on the street. Imagine further that an officer has probable cause to believe that the motorcycle was involved in a traffic infraction. Can the officer, acting without a warrant, enter the house to search the motorcycle and confirm whether it is the right one? Surely not.

The reason is that the scope of the automobile exception extends no further than the automobile itself. See, e.g., *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S. Ct. 2485, 2485, 135 L. Ed. 2d 1031 (1996) (per curiam) (explaining that the automobile exception "permits police to search the vehicle"); *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999) ("[T]he Framers would have regarded as reasonable (if there was probable cause) the warrantless search of containers within an automobile"). Virginia asks the Court to expand the scope of the automobile exception to permit police to invade any space outside an automobile even if the Fourth Amendment protects that space. Nothing in our case law, however, suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant. Expanding the scope of the automobile exception in this way would both undervalue the core Fourth Amendment protection afforded to the home and its curtilage and "'untether'" the automobile exception "'from the justifications underlying'" it. [Citations omitted.]

Similarly, it is a "settled rule that warrantless arrests in public places are valid," but, absent another exception such as exigent circumstances, officers may not enter a home to make an arrest without a warrant, even when they have probable cause. *Payton v. New York*, 445 U.S. 573, 587–590, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). That is because

being " 'arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home.' " [Citation omitted]. Likewise, searching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage.

Just as an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant, and just as an officer must have a lawful right of access in order to arrest a person in his home, so, too, an officer must have a lawful right of access to a vehicle in order to search it pursuant to the automobile exception. The automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage.

* * *

Virginia argues that this Court's precedent indicates that the automobile exception is a categorical one that permits the warrantless search of a vehicle anytime, anywhere, including in a home or curtilage. Specifically, Virginia points to two decisions that it contends resolve this case in its favor. Neither is dispositive or persuasive.

***

Second, Virginia points to [*Pennsylvania v.*] *Labron*, 518 U.S. 938, 116 S. Ct. 2485, 135 L. Ed. 2d 1031, where the Court upheld under the automobile exception the warrantless search of an individual's pickup truck that was parked in the driveway of his father-in-law's farmhouse. [Citations omitted.] But Labron provides scant support for Virginia's position. Unlike in this case, there was no indication that the individual who owned the truck in Labron had any Fourth Amendment interest in the farmhouse or its driveway, nor was there a determination that the driveway was curtilage.

***

The Court, though, has long been clear that curtilage is afforded constitutional protection. See *Oliver* [*v. United States*], 466 U.S., at 180, 104 S. Ct. 1735, 80 L. Ed. 2d 214 [1984]. As a result, officers regularly assess whether an area is curtilage before executing a search. Virginia provides no reason to conclude that this practice has proved to be unadministrable, either generally or in this context. Moreover, creating a carveout to the general rule that curtilage receives Fourth Amendment protection, such that certain types of curtilage would receive Fourth Amendment protection only for some purposes but not for others, seems far more likely to create confusion than does uniform application of the Court's doctrine.

* * *

IV

For the foregoing reasons, we conclude that the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein. We leave for resolution on remand whether Officer Rhodes' warrantless

intrusion on the curtilage of Collins' house may have been reasonable on a different basis, such as the exigent circumstances exception to the warrant requirement. The judgment of the Supreme Court of Virginia is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

See *Collins v. Virginia*, 584 U.S. ___, 138 S.Ct. 1662, 201 L.Ed.2d 9, 2018 U.S. LEXIS 3210 (2018).

2. How Would You Decide?

United States District Court for the Eastern District of Missouri.

Police stopped defendant Travis Norman as he was driving his car after he drove over a highway lane divider, an act that constituted a moving traffic violation. The stop of defendant Norman's car was based on a legitimate moving violation and could not have been considered a pretextual stop. The police officer involved had been following Norman for the purpose of waiting until he committed a traffic violation and then had plans to stop him if and when a violation occurred. Upon being stopped, defendant Norman fled the scene of the traffic stop on foot and, while fleeing, discarded a bag of crack cocaine, which was retrieved by the police officer. Law enforcement officers arrested Norman for possession of a controlled substance. As incident to his arrest, the car from which he fled was searched, revealing another bag of cocaine that police seized. The United States magistrate recommended that Travis Norman's motion to suppress be denied by the district judge. Norman's attorney filed objections to the magistrate's recommendation.

How would you rule on the defendant's contention that the evidence that he discarded and that was found in his car be suppressed from his upcoming drug trial?

The Court's Holding:

Defendant has filed written objections to the Report and Recommendation arguing that Judge Mummert's Report and Recommendation is against the weight of the evidence and the law.

* * *

Defendant presumably objects to the entire Report and Recommendation since no specific finding or conclusion is presented. Further, defendant presents no specific authority for his position, rather, he generally argues, in his motion to suppress, that his constitutional rights would be violated without suppression.

* * *

Defendant does not attack the credibility of the witnesses who testified at the hearing. Defendant also did not present any evidence to controvert the testimony of the witnesses. The Report and Recommendation submitted by Judge Mummert clearly and accurately sets forth the facts from the testimony of these witnesses.

Defendant, in objecting to Judge Mummert's recommendation, states that Judge Mummert's ruling was against the weight of the evidence and law. Defendant incorporates by reference all arguments he made in his Motion to Suppress Evidence and Statements, with no specific objections as to Judge Mummert's conclusions.

As the testimony established, defendant was stopped for the traffic violation of crossing over a lane divider on November 24, 2004 by Officer Hart. Officer Hart had been following defendant at the time in order to stop him if he violated a traffic law. After being stopped, defendant fled and, while fleeing, discarded a bag of crack cocaine that was retrieved by Officer Taylor. Defendant was arrested for possession of a controlled substance. His car was searched incident to this arrest. A bag of cocaine was discovered and seized.

The traffic stop was not pretextual. "It is well established, however, that any traffic violation, no matter how minor, provides an officer with probable cause to stop the driver of the vehicle." *United States v. Pereira-Munoz*, 59 F.3d 788, 791 (8th Cir. 1995). Furthermore, defendant abandoned the crack cocaine while he was fleeing from the police and a warrantless search of the abandoned property does not violate the Fourth Amendment. *United States v. Segars*, 31 F.3d 655, 658 (8th Cir. 1945). The search of defendant's vehicle incident to his arrest and the seizure of the cocaine were proper. *United States v. Fladten*, 230 F.3d 1083, 1085–86 (8th Cir. 2000).

See *United States v. Norman*, 2006 U.S. Dist. LEXIS 51443(E.D. MO. 2006).

Notes

1. 466 U.S. 170, 179 (1984).
2. *Ibid*., 181.
3. *Nowlin v. State*, 2021 Tex. App. LEXIS 1529 at *7–8 (2021).
4. See *California v. Ciraolo*, 476 U.S. 207 (1986) and *Florida v. Riley*, 488 U.S. 445 (1989).
5. *McKelvey v. State*, 474 P. 3d 16, 19, 2020 Alas. App. LEXIS 71 (Alaska App. 2020).
6. *Long Lake Twp. v. Maxon*, 2021 Mich. App. LEXIS 1819 (2021).
7. *Id*. at *19–20.
8. *Hester v. United States*, 284 F. 487, 488 (1922).
9. *Id*. at 58.
10. 466 U.S. 170 (1984).
11. *Id*. at 173.
12. *Id*. at 222.
13. *Id*. at 224.
14. 641 S.E.2d 320, 2007 N.C. App. LEXIS 474 (2007).
15. 480 U.S. 294, 1987 U.S. LEXIS 1057 (1987).
16. *Collins v. Virginia*, 584 U.S. ___, ___, 138 S.Ct. 663, 1871, 201 l.Ed.2d 9, 12, 2018 U.S. LEXIS 3210 (2018).
17. See *Gordon v. State*, 277 Ga. App. 247, 249 626 S.E.2d 214, 215, 2006 Ga. App. LEXIS 53 (2006). Note that barns may not be within the curtilage per *Dunn* if they are very far from the home and are not being used intimately with the dwelling house.
18. *California v. Ciraolo*, 476 U.S. 207, 213 (1986).
19. *United States v. Dunn*, 480 U.S. 294, 300 (1987), citing *United States v. Oliver*, 466 U.S. 170, 180 (1984).
20. *Ibid*.
21. *State v. Dubose*, 164 Ohio App. 3d 698, 707, 708, 2005 Ohio 6602, 843 N.E.2d 1222, 1230, 2005 Ohio App. LEXIS 5928 (2005).

22. *United States v. Samboy*, 433 F.3d 154, 161 (1st Cir. 2005).
23. *United States v. Crumble*, 878 F.3d 656, 2018 U.S. App. LEXIS 14 (8th Cir. 2018).
24. *Id*. at 659.
25. See *United States v. Denny,* 441 F.3d 1220, 2006 U.S. App. LEXIS 7565 (2006), where a subject who denied that drugs in a bag on a train seat were his had the drugs introduced against him because he had abandoned the drugs.
26. *State v. Brown*, 423 S.C. 519, 527, 815 S.E.2d 761, 766, 2018 S.C. LEXIS 75 (2018). Officers were able to easily look at the phone's contents since the lock code was 1–2–3–4.
27. *United States v. Small,* 944 F. Supp.3d 490 (2019).
28. *Id*. at 504.
29. See *State v. Linton*, 356 N.J. Super. 255, 812 A.2d 382; 2002 N.J. Super. LEXIS 510 (2002).
30. See *People v. Pereira*, 150 Cal. App. 4th 1106, 58 Cal. Rptr. 3d 847, 2007 Cal. App. LEXIS 756 (2007).
31. See *United States v. Gage*, 423 F.Supp. 3d 984 (D. Idaho 2019), aff'd, 2021 U.S. App. LEXIS 11185 (9th Cir. 2021).
32. A Louisiana court stated the legal title requirement slightly differently when it noted that "Abandonment for purposes of the Fourth Amendment differs from abandonment in *property* law; . . . the analysis examines the individual's reasonable expectation of privacy, not his *property* interest in the item." *State v. Stephens*, 917 So. 2d 667, 673, 2005 La. App. LEXIS 2565 (2005).
33. *United States v. James*, 353 F.3d 606, 616 (8th Cir. 2003).
34. *United States v. Simpson*, 439 F3d 490, 494 (8th Cir. 2006), quoting *United States v. Hoey*, 983 F.2d 890, 892–93 (8th Cir. 1993).
35. See *California v. Greenwood*, 486 U.S. 35 (1988), where the Court failed to find any expectation of privacy under the Fourth Amendment when a homeowner placed his trash at the curb for normal refuse collection.
36. See *State v. Peart*, 2021 Del. Super. LEXIS 243 (2021).
37. *State v. Beltz*, 160 P. 3d 154; 2007 Alas. App. LEXIS 126 (2007).
38. *People v. Sutherland*, 223 Ill. 2d 187; 860 N.E.2d 178; 2006 Ill. LEXIS 1650 (2006).
39. See 1 W. LaFave, Search & Seizure § 2.5(a), at 649–50 (4th ed. 2004).
40. See *United States v. Thomas*, 451 F.3d 543, 546 (2006), where federal agents seized mail from a private mailbox which the defendant had abandoned.
41. See *United States v. Eden*, 190 Fed. Appx. 416, 2006 U.S. App. LEXIS 16337 (6th Cir. 2006). Drivers of rental cars who are not listed as drivers may have no expectation of privacy in the car in some states.
42. *People v. Daggs*, 133 Cal. App. 4th 361, 365, 34 Cal. Rptr. 3d 649, 652, 2005 Cal. App. LEXIS 1589 (2005).
43. See *State v. Esnes*, 2021 N.J. Super. Unpub. LEXIS 866 (2021).
44. *People v. Pugh*, 2021 Il App (1st) 181981-U, P38, 2021 Ill. App. Unpub. LEXIS 557 (2021).
45. See *Wilson v. State*, 825 N.E.2d 49, 2005 Ind. App. LEXIS 558 (2005).
46. *State v. Miller*, 281 So.3d 583, 2019 Fla. App. 15576 (2019).
47. See *United States v. Ojeda-Ramos*, 455 F.3d 1178; 2006 U.S. App. LEXIS 19175 (10th Cir. 2006).
48. *Ibid*., 1187.
49. 2006 Iowa App. LEXIS 1031 (2006).
50. See *Rakas v. Illinois*, 9 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387, 1978 U.S. LEXIS 2452 (1978). See also *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132, 2007 U.S. LEXIS 7897 (2007).
51. *United States v. Aron*, 2021 U.S. Dist. LEXIS 91483 (N.D. Ind. 2021).
52. *Id*. at *10.
53. *People v. Michigan*, 2007 Mich. App. LEXIS 456 (2007).
54. *Ibid*.
55. *Cooks v. State*, 901 So. 2d 963, 964, 2005 Fla. App. LEXIS 6768 (2005).
56. 841 N.E.2d 624, 2006 Ind. App. LEXIS 131 (2006).
57. See *United States v. Simpson*, 439 F.3d 490, 494, 495, 2006 U.S. App. LEXIS 4934 (8th Cir. 2006).
58. *United States v. Ross*, 964 F.3d 1034, 1041 (11th Cir. 2020).
59. See *State v. Bollheimer*, 2020-Ohio-60, 2020 Ohio App. LEXIS 48 (2020).
60. 429 F.3d 952, 2005 U.S. App. LEXIS 25106 (10th Cir. 2005).

Special Needs Searches

10

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Learning Objectives

1. Understand and be able to describe the different needs that support administrative, inventory, airport, school, and work searches.
2. Articulate the justification for searches under the common law "police" powers of states and local jurisdictions.
3. Be able to explain what the term "closely regulated" industry or business means and give three examples.
4. Analyze and explain why the Supreme Court originally did not require administrative search warrants for ordinary homes but later determined that warrants were generally required for administrative searches of private residences.
5. Distinguish between administrative probable cause and traditional criminal probable cause and be able to give two examples of each.
6. Describe the three rationales that courts use to hold that inventory searches do not require proof of traditional criminal probable cause to make inventory searches reasonable under the Fourth Amendment.
7. Articulate the reasons the Supreme Court determined that in order to make inventory searches reasonable, police agencies must have a written inventory search policy that must be routinely followed.
8. Be able to explain the circumstances under which public school students may be searched for violating school rules or criminal law.
9. Identify the basis for warrantless and suspicionless searches of airport passengers and their baggage.
10. Describe why border searches stand on a completely different basis than other traditional searches designed to uncover criminality.

Chapter Outline

KEY TERMS

1. Administrative probable cause
2. Administrative search: business
3. Administrative search: home
4. Airport passenger search
5. Closely (heavily) regulated industry
6. Emergency administrative search
7. Functional equivalent of international border
8. International border search
9. Inventory search: motor vehicle
10. Inventory search: personal property
11. Inventory search policy
12. Private employer search
13. Reasonable basis to suspect
14. Reduced expectation of privacy: juveniles
15. Suspicionless public school search
16. Suspicionless workplace search
17. FISA searches

1. Introduction to Administrative, Special Needs, Inventory, School, Airport, and Work Searches

This chapter explores governmental searches that promote social needs and are often directed toward discovery or acquiring data that assists many executive branches in meeting their respective goals and missions. These missions vary from zoning to border security concerns as well as school and airport security. In a variety of contexts, local, state, and federal governmental agencies possess informational needs that can be met by searches that do not necessarily have as their primary goal the discovery of criminal activity. The Fourth Amendment to the Constitution grants to individuals the right to be free from unreasonable searches and seizures, not to be free from all searches and seizures. It follows from this that a government may be relatively free to conduct any type of search so long as it is deemed reasonable under the circumstances. For example, when necessary to implement social programs and to structure public policy, governments may conduct searches and request information in ways that do not offend the Fourth Amendment. In a variety of contexts, some searches have been described as "special needs" searches, where a branch of government is attempting to promote a policy, promote social interests, protect property and society, or accomplish a variety of goals expected of governments. However, in pursuing some special needs searches, where Fourth Amendment interests are clearly implicated, the nature of particular searches may dictate the use of warrants.

Special needs searches include administrative searches covering a wide variety of topics, including searches of houses for zoning compliance, scrutiny of ordinary

businesses for fire and safety issues, and searches of closely regulated industries. Some of the special needs searches may require warrants; others do not because of the nature of the search or the need for immediacy. Searches of pervasively or closely regulated industries and businesses may not require a search warrant and may not require probable cause due to the fact that conducting these businesses requires a relinquishment of some Fourth Amendment protections. In all cases of administrative searches, emergency or exigent circumstances will excuse the procurement of the warrant that might have otherwise been necessary.

The Supreme Court has upheld warrantless special needs searches in a variety of contexts. For example, in *Vernonia School District 47J v. Acton*,[1] the Court approved a warrantless special needs search where student athletes could be randomly tested for drugs in specified circumstances, but school officials were not permitted, without a warrant, to pull out a student's underwear to find if she had pills stored when there was no reason to suspect that she had drugs in her underwear.[2] However, in a different context, administrative suspicionless and warrantless drug tests for United States Customs Service employees were permitted when the employees were seeking promotions or lateral transfers to specified positions according to the majority in *Treasury Employees v. Von Raab*.[3] Under a similar rationale, but involving private employees, since railroad operations involve risks to many people, the Court approved warrantless and suspicionless drug and alcohol tests for privately employed railroad workers involved in significant train accidents or who were found to be violating specific safety regulations.[4]

Warrantless inspections of the physical property of "closely regulated" businesses even in the absence of any suspicion, such as automobile recyclers, have been approved by the Court in *New York v. Burger*.[5] Special needs searches that are warrantless and suspicionless have limitations, at least in the medical arena. In *Ferguson v. City of Charleston*, at a government-owned hospital, pregnant women were being drug tested against their will to determine whether they had injected illegal drugs prior to obtaining obstetrical care at South Carolina hospitals. This type of suspicionless, warrantless search was beyond any sort of civil administrative search and focused on the criminal side of law,[6] and women who tested positive for illegal drugs were arrested and prosecuted. Similarly, the City of Indianapolis had a program involving warrantless and suspicionless stopping of motorists to determine if they possessed or were using illegal drugs, similar to a sobriety checkpoint,[7] but this kind of search was designed for criminal interdiction and was not merely administrative or ameliorative. In striking down the Indianapolis plan, the Court noted, "While reasonableness under the Fourth Amendment is predominantly an objective inquiry, our special needs and administrative search cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue."[8] In this case, the stops and searches were more than mere administrative stops and could not be justified on general criminal detection principles. Under the theory of an administrative search, police may not warrantlessly look at hotel registration information on the rationale that places of accommodation are "closely-regulated" industries.[9]

Under fairly settled Supreme Court decisional law, police may conduct warrantless inventory searches after they have lawfully taken custody of personal property where police retain a level of responsibility for the property's safekeeping. For example, where an individual has been arrested and police have taken control of an automobile, it may be

reasonable to impound the vehicle to keep it from harm, loss of its contents, and damage. In addition, such a search has been found to be reasonable since the contents of the automobile may include valuables for which a police agency might have responsibility. It is generally considered reasonable, so long as the law enforcement agency has an inventory search policy and routinely follows the directives in that policy, to conduct an inventory of the automobile to ensure the security of any of its contents. If by some chance evidence of criminality appears, such evidence will usually be admissible in court. An inventory search may also be applied to personal property taken from an arrestee such as a purse, wallet, backpack, or similar item. Once again, it is generally considered reasonable to catalog the contents of these items and secure them until they are ready to be delivered to the individual from whom they were taken. Paramount justifications for inventory search include the protection of property, the protection of police from dangerous items or ordinance, and the protection of police against false claims of loss while the property is not in the owner's possession.

The protection of schoolchildren provides the justification for a variety of school-based special needs searches of both student property and the student personally. A large percentage of legal cases involving searches of school-age children concern drug use and sale within the context of the public schools. While it has been held by the United States Supreme Court that children possess Fourth Amendment rights, case law is also very clear that children do not enjoy the exact same Fourth Amendment rights as adults. Courts on many levels have approved the search of persons, purses, backpacks, and lockers for items that offend the criminal law and/or for evidence that school rules have been broken. In many instances, individual suspicion that a particular student has transgressed the law or violated school rules may allow search of that student and/or his or her possessions. In other contexts involving secondary-school athletes and students involved in extracurricular activities, suspicionless drug testing has been approved as meeting the reasonableness standard under the Fourth Amendment.

Special needs searches include workplace searches of individuals whether conducted by a private employer or a state or federal government agency. In some cases, the government agency requires that employees desiring transfers or promotions submit to a drug-screening test despite the absence of any individualized suspicion. In the context of private employers who may be required by the federal government or a state government to conduct drug searches of their employees, suspicionless testing has been approved. The general rationale involves the weighing of the employees' expectation of privacy against the significant needs of the government for a drug-free workplace and for the private employer who must meet government-mandated drug testing guidelines. In situations where a government employee may be required to carry a firearm and/or deal with drug interdiction, suspicionless testing has been mandated. Federal regulations require that operators of instrumentalities of interstate commerce, such as railroads, be subject to drug testing following an accident involving a specified level of property damage. As a general rule, many of these workplace drug-testing searches have been upheld as reasonable under the Fourth Amendment.

Various types of searches involving airline passengers, crew, and other workers have received court approval under the category of special needs searches. For the past several decades, persons wishing to board domestic commercial airliners have been forced to

choose between submitting to a personal and baggage search prior to boarding or finding alternative means of transportation. Searches of passenger baggage, both carry-on and checked, have been based on either a consent theory or an administrative search basis. Extensive new types of technology have been implemented at airports to enhance airline safety. Prospective airline passengers do not suffer a Fourth Amendment injury when forced to choose between technologically advanced electronic or radiological screening and a traditional pat-down of clothing, according to a federal appeals court.[10] In order to litigate, a person must present a colorable claim of a deprivation of a constitutional right.

International border searches may be considered within the special needs search category because the requirements of national sovereignty allow extreme scrutiny over items entering or leaving the United States. As a means of enforcing the international boundary, persons crossing a border of the United States possess diminished Fourth Amendment rights and may be searched for any reason without a showing of probable cause. Searches at an international border and its functional equivalent, an international airport, are generally subject to identical rules concerning searches. As one moves inland from a border, Fourth Amendment rights begin to have full application. Permanent stations along the major highways leading to and from the border allow government agents to scrutinize traffic passing through the choke point and to stop individuals where evidence appears that the person may not be entitled to be in the United States. Roving patrols near the border have been allowed to make stops based on reasonable suspicion that a person, a person's possessions, or a vehicle's content offends the law. In conducting a special needs stop and search, federal border officials possess much leeway in their activity, but their overall conduct inside the United States remains subject to the Fourth Amendment concept of reasonableness.

Some types of special needs searches are not covered in this chapter. Parolees and probationers, as a condition of their release, can be required to submit to searches based on a lower standard than that traditionally required by the Fourth Amendment. Persons in prisons have reduced expectations of privacy and are subject to search at any time. Special needs searches mentioned in this chapter are, therefore, not exclusive, and a variety of others exist that are beyond the scope of this book.

2. Administrative Searches: General Principles

The states especially and, to a lesser extent, the federal government are empowered with the authority to promote the general welfare, public health, and safety. This power frequently has been called the "police" power and is used not in its traditional law enforcement fashion but to denote a government's power to promote and ensure the common good of society. The Fourth Amendment limitation against unreasonable searches and seizures has been held to apply to people who have connections to commercial structures used in business and industry and who can legitimately expect some level of privacy involving the structures. The expectation of privacy in commercial operations includes protection against criminal investigatory searches and also applies to searches designed to implement and enforce social regulatory schemes.[11] These social objectives range from protecting water supplies to preventing conditions that could

cause a conflagration to ensuring worker safety in commerce, industry, and transportation. If a governmental administrative search encompasses a secondary desire to procure evidence of criminal activity, such a search is generally valid so long as the facts and circumstances justify a proper administrative search. However, when the searching individual may have the authority to conduct both administrative searches and criminal investigative searches, care must be exercised to ensure that an administrative search has not been conducted by reliance on or exercise of law enforcement powers.[12]

Probable cause is generally required for administrative searches, although in some contexts, such as food service inspections or welfare compliance inspections, warrants may not be required. Where an administrative search requires a warrant, the warrant must be based on a special category of probable cause called administrative probable cause. It is a reduced or "watered down" level of probable cause and was described in *Camara v. Municipal Court* when dealing with housing inspections as:

> "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house) or the condition of the entire area, but they do not necessarily depend upon specific knowledge of the condition of the particular dwelling.[13]

While the Supreme Court has not had occasion to rule on significant new challenges to administrative searches in recent years, the principles pertaining to these searches are fairly well known, and litigants have probed most of the parameters. Numerous cased have clearly indicated that administrative searches are regulated by the Fourth Amendment.[14]

3. Administrative Searches of Ordinary Businesses and Industries

Administrative searches are designed and implemented to help ensure compliance with administrative laws, rules, and regulations that are applied to commerce and industry. Fourth Amendment expectations of privacy in business or commercial settings differ from those expected in a personal residence or in an automobile in the sense that in a commercial or industrial setting, there is a reduced level of privacy that society is prepared to recognize as reasonable. Businesses invite customers to visit parts of their premises, and manufacturing entities sometimes have thousands of employees who enter the physical plant each day. Many commercial operations are subject by law to certain inspections for health and safety so that the operators understand that agents of the government will enter the property on occasion. However, operators of ordinary businesses and industries can choose to require governmental inspectors to possess warrants[15] prior to gaining admission. The fact that a business entity has the right to insist on a warrant in most cases, however, does not mean that most operators of businesses will always demand or require a warrant prior to governmental entry for inspection.

4. Ordinary Commercial Business: Search Warrant Required

Although some businesses might seem to fall into the category of closely regulated industries because of federal or state safety requirements, not every business need submit to warrantless inspections. For example, in *Marshall v. Barlow's, Inc*., 436 U.S. 307 (1978), federal inspectors attempted to make a warrantless inspection of Barlow's company, an electrical and plumbing business. Barlow refused to allow the Occupational Safety and Health Administration (OSHA) inspector into private areas of the firm and sued the federal government seeking injunctive relief from warrantless OSHA inspections. The trial court held that a warrant for the type of search involved here was necessary, absent consent, under the Fourth Amendment and that the OSHA statutory authorization for warrantless inspection was unconstitutional. Barlow may have had an expectation of privacy in his business that was reduced somewhat by virtue of inviting employees onto his property. According to the *Barlow's* Court:

> The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents.
>
> *Barlow's* at 315

The Court proved unwilling to allow governmental inspection of businesses in the absence of warrant or consent where the businesses were not traditionally pervasively regulated under traditional and long-standing legislative formulations.

In a more recent case, where the Court followed its rationale in *Barlow's, Inc., City of Los Angeles v. Patel*,[16] the Court held that hotel and motel operators can require a warrant or an administrative subpoena (that the validity can be litigated) for police to search their guest registration data. Los Angeles city code permitted police to obtain guest information by merely asking for it in person, and a failure to comply subjected the motel/hotel operator to an immediate arrest for refusal. In *Patel*, the court emphasized that the "Court has held that absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker."[17] The essential holding of the court was that the hotel owner has to be given an opportunity to have a neutral and detached decision-maker review an officer's demand to search hotel registry data before any employee can be subjected to criminal penalties for refusal. When faced with an *ex parte* administrative subpoena for a search, the hotel operator could move to quash the subpoena before any search could lawfully take place. The *Patel* Court concluded with the note that

> hotel operators remain free to consent to searches of their registries and police can compel them to turn them over if they have a proper administrative warrant—including one that was issued *ex parte*—or if some other exception to the warrant requirement applies, including exigent circumstances.[18]

5. Administrative Searches of Closely Regulated Industries

While most businesses may be searched only with a warrant, absent consent, one category of commerce is subject to inspection without warrant. Businesses or industries classified as closely or heavily regulated industries possess a diminished expectation of privacy over all or some of their operations. Precisely what causes a business to be known as a closely regulated industry may be discerned on a case-by-case basis. In making a determination whether a particular business or industry qualifies as a closely regulated, the Supreme Court has looked to various factors, including history and duration of the regulatory tradition, the comprehensive scheme regulatory regime, and the imposition of similar regulations in other jurisdictions.[19] Coal mining has been found to fit the pattern,[20] as have businesses dealing in firearms,[21] manufacture of alcohol,[22] and operating an automobile wrecking yard.[23] Some businesses that would not seem to qualify as closely regulated operations may still fall into the category. In Virginia, the manufacture and sale of goat cheese falls into the list of closely regulated industries because each cheese entity makes food products for human consumption. In at least two cases,[24] farmers were convicted of refusing to allow Commonwealth health inspectors to search their respective premises to look for violations of the health code. The Virginia courts appear to rely on three factors to determine whether a particular business or industry qualifies as closely regulated. According to Virginia courts, the government must have a substantial interest that informs the regulatory scheme under which the inspection will be made, the warrantless inspection must be necessary to advance the regulatory scheme, and the inspection program must advise or give notice to the owner or operator of the commercial or business premises that the search complies with the law and has a defined scope that will not be exceeded.[25] In order to determine whether a particular business or industry might fall into the closely or heavily regulated category, a consultation with the particular jurisdiction's case law may be required.

While it may be impossible to construct a list of the types of businesses covered under pervasive or close regulation, it is arguable that as enhanced governmental regulation occurs, more businesses and industries may come under the description of being closely regulated industries, for which a diminished expectation of privacy will be the rule.

A primary example of a closely regulated industry is the manufacture, transport, and sale of intoxicating spirits. In *Colonnade Catering Corporation v. United States*,[26] the Court noted that in England and its colonies, which later became the United States, inspectors were permitted to enter brewing houses and similar establishments upon request and without a warrant. Subsequent federal law allowed officials, without a warrant, to enter and inspect distilling premises and those of companies that imported spirits. The sale and disposition of firearms, while not traditionally regulated as pervasively as alcohol, has been held to be an example of a closely regulated industry. In *United States v. Biswell*,[27] the Court allowed as reasonable under the Fourth Amendment a warrantless inspection of a federally licensed firearm dealer under the theory that the law authorizing the inspection would constitute only a limited threat to the pawnshop operator's expectation of privacy. The *Biswell* Court noted:

> When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.
>
> 406 U.S. 311, 316 (1972)

The general rule that has emerged appears to indicate that persons and corporate entities engaged in pervasively or closely regulated businesses or industries possess a reduced level of Fourth Amendment protections.

6. Administrative Searches of Homes: Warrant Required

An appropriate starting point in the consideration of administrative searches of residences and private homes is *Frank v. Maryland*,[28] where the Supreme Court upheld a criminal conviction that resulted from the refusal by a dwelling's occupier to permit a warrantless inspection of private residential premises. Prompted by a citizen complaint, the government desired to conduct a warrantless inspection to ascertain whether a public nuisance involving rats existed. When the occupier persisted in refusing to allow warrantless admission, an arrest for refusal to allow an inspection followed. The city code provided as follows:

> Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar, or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars.
>
> § 120 of Art. 12 of the Baltimore City Code. *Frank v. Maryland* at 361

A trial court found Frank guilty of violating the Baltimore health code. When the case arrived at the Supreme Court of the United States, the Court upheld the statute authorizing a warrantless arrest[29] for refusing to allow the inspectors access to the home. It noted that there was a long history of warrantless housing-type inspections, and modern requirements of health and sanitation dictate that due process has not been violated by the provision for warrantless admission to a private home upon a complaint.

The lesson of *Frank* indicated that warrantless searches of private premises for administrative purposes did not require a warrant and that a refusal to allow entry might be followed by criminal legal proceedings. The only method to determine whether a governmental agent could lawfully enter involved refusal and risking a criminal prosecution. The *Frank* Court felt that the Fourth Amendment was designed to have primary effect when criminal investigations were involved. Consequently, the Court held that the privacy interests under *Frank* "touch[ed] at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion."[30] For those reasons, as an exception to the usual requirements of a warrant, no warrant was required to conduct a residential inspection.

The Supreme Court indicated a significant change in direction when it decided *Camara v. Municipal Court* (see Case 10.1).[31] A housing inspector repeatedly had been

refused entrance to private premises following a complaint that the commercial leasehold was being used for private residential purposes. Camara sued the district court in Superior Court for a writ of prohibition of enforcement of the municipal code but had no success in the California court system. The Supreme Court in *Camara* took the view that the interests at stake when the government desired to enforce zoning restrictions were different than when the Court decided *Frank v. Maryland*. Instead of believing that privacy interests being protected were peripheral to the Fourth Amendment protections, the *Camara* Court determined that the privacy interests were quite a bit more important than was believed in *Frank*. Warrantless administrative searches cannot be justified, according to the Court, on the grounds that they make minimal demands on occupants. The Court stated:

> [W]e hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches, when authorized and conducted without a warrant procedure, lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections.
>
> *Camara v. Municipal Court*, 387 U.S. 523 at 534

The *Camara* Court allowed a "watered-down" version of probable cause to be sufficient for procuring an administrative warrant. Clearly, criminal probable cause would be a difficult standard to meet in the administrative setting, so the Court indicated that administrative inspections must meet a special standard of probable cause fitting this type of intrusion. According to the Court:

> "[P]robable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.
>
> *Camara v. Municipal Court*, 387 U.S. 523 at 538

Case 10.1 LEADING CASE BRIEF ENTRY TO PRIVATE RESIDENTIAL PREMISES REQUIRES AN ADMINISTRATIVE WARRANT

Camara v. Municipal Court
Supreme Court of the United States
387 U.S. 523 (1967).

CASE FACTS:

Following the receipt of a complaint, an inspector of the San Francisco Division of Housing Inspection attempted to enter the first floor of an apartment building on which apartment living was not allowed. The building manager had informed the inspector that the appellant was using the street-level premises as a personal

place of residence in contravention of the building's occupancy permit. When the inspector confronted Camara with a request to inspect the premises, he refused to permit the inspection unless the housing inspector possessed a search warrant.

Acting on the same complaint, the building inspector returned to attempt a search without a warrant and requested admission to the building, on which Camara maintained his original position. Following local protocol, the inspector caused a citation to be mailed requesting Mr. Camara to appear at the district attorney's office. When the appellant ignored this request, two inspectors visited appellant a third time to inform him of his duty under Section 503 of the municipal code.

> Sec. 503. **RIGHT TO ENTER BUILDING.** Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.

When Camara refused to permit the two inspectors to enter the premises, prosecutors filed a complaint charging him with refusing to permit a lawful warrantless inspection of his premises in violation of Section 503. Camara brought an action in Superior Court alleging that he had been charged criminally for violating the San Francisco Housing Code by refusing to permit a warrantless search of his residence. He requested that the Superior Court issue a writ of prohibition to the criminal court because the authorization of warrantless searches permitted by the ordinance was unconstitutional on its face. The Superior Court refused, a position that continued through the California state court system, resulting in a writ of certiorari being issued by the Supreme Court of the United States.

LEGAL ISSUE:

Consistent with the Fourth Amendment, and absent an emergency or other exception to the warrant requirement, may the occupier of real property require that a government possess a warrant permitting entry where the purpose is an administrative search?

THE COURT'S RULING:

Since significant privacy interests are attached to residential dwellings, the Court determined that a governmental agent must have a warrant to enter private residential premises or possess some other reasonable basis to enter in the absence of a warrant.

ESSENCE OF THE COURT'S RATIONALE:

I

* * *

In *Frank v. State of Maryland*, this Court upheld the conviction of one who refused to permit a warrantless inspection of private premises for the purposes of locating and abating a suspected public nuisance. . . . the *Frank [v.*

Maryland] opinion has generally been interpreted as carving out an additional exception to the rule that [warrants are generally required for searches under the Fourth Amendment].

To the *Frank* majority, municipal fire, health, and housing inspection programs touch at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusions, 359 U.S. at 367, because the inspections are merely to determine whether physical conditions exist which do not comply with minimum standards prescribed in local regulatory ordinances. . . .

We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. For this reason alone, Frank differed from the great bulk of Fourth Amendment cases which have been considered by this Court. But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely "peripheral." It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.

* * *

The *Frank* majority suggested, and appellee reasserts, two other justifications for permitting administrative health and safety inspections without a warrant. First, it is argued that these inspections are "designed to make the least possible demand on the individual occupant." . . . In addition, the argument proceeds, the warrant process could not function effectively in this field. The decision to inspect an entire municipal area is based upon legislative or administrative assessment of broad factors such as the area's age and condition. Unless the magistrate is to review such policy matters, he must issue a "rubber stamp" warrant which provides no protection at all to the property owner.

In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment. Under the present system when the inspector demands entry the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area. Yet only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search. And even if the occupant possesses sufficient fortitude to take this risk, as appellant did here, he may never learn any more about the reason for the inspection than that the law generally allows housing inspectors

to gain entry. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.

The final justification suggested for warrantless administrative searches is that the public interest demands such a rule: it is vigorously argued that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and that the only effective means of enforcing such code is by routine systematized inspection of all physical structures. [However], the question is not . . . whether these inspections may be made, but whether they may be made without a warrant. . . .

It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive.

In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual. . . .

* * *

II

* * *

[The city argued that the inspection process would not work if it had to show probable cause for each structure it wished to inspect. The Court noted that all interested parties agreed that inspections were essential to enforcement of municipal codes. The Court found that area inspections were also necessary to enforce building codes and that probable cause need not be limited to one structure but could be an area-wide probable cause.]

* * *

Having concluded that the area inspection is a "reasonable" search of private property within the meaning of the Fourth Amendment, it is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house) or the condition of the entire area, but they do not necessarily depend upon specific knowledge of the condition of the particular dwelling. It has been suggested that so to vary the probable cause test from the standard applied in criminal cases would be to authorize a "synthetic search warrant" and thereby, to lessen the overall protections of the Fourth Amendment. But we do not agree. The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate

standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. . . . [The use of this procedure] neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake. . . .

III

Since our holding emphasizes the controlling standard of reasonableness nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations. [Citations omitted. The deleted citations refer to cases dealing with particular emergency situations: seizure of unwholesome food, compulsory smallpox vaccination, health quarantine, and summary destruction of tubercular cattle.] On the other hand, in the case of most routine area inspections, there is no compelling urgency to inspect at a particular time or on a particular day. Moreover, most citizens allow inspections of their property without a warrant. Thus, as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry.

* * *

The judgment is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CASE IMPORTANCE:

The Court reconsidered earlier Fourth Amendment interpretations concerning whether a warrant was required for residential entry by government officials and determined that the privacy in a home was an important and central Fourth Amendment protection for which a warrant was necessary. The Court reaffirmed that a person's home is where he or she may expect the greatest privacy from governmental intrusion whether the person is home, away, or suspected of a crime.

In a companion case to *Camara, See v. City of Seattle*, 387 U.S. 541 (1967), government inspectors wanted to gain entry to inspect a warehouse. The Court held that the administrative fire inspectors were required to procure a warrant to gain entry to a commercial warehouse because the Court found that Fourth Amendment protections found in *Camara* extended to commercial locations. According to the Court's rationale, the defendant in the case, See, had been improperly convicted of violating a local ordinance that made it a crime to refuse to allow a warrantless entry by a fire inspector. The words of the Seattle ordinance empowered fire inspectors to conduct routine inspections without probable cause and without possession of a warrant. The *See* Court held that "administrative entry, without consent, upon the portions

of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure."[32] *See* extended similar *Camara* residential protection under the Fourth Amendment to business and business buildings.

The administrative probable cause criterion, while using identical language to that of criminal probable cause, in practice has proven to be a lower standard and fairly easy to meet. Administrative probable cause may mature due to complaints by citizens, employees within an industry, or labor unions or by observations derived from routine governmental activities. When courts are faced with a request for an administrative warrant, they must weigh the governmental need to search against the reasonable expectation of privacy and will normally issue warrants, practically as a mere formality.

As is the case with traditional searches under the Fourth Amendment, exceptions to the administrative warrant exist. The clearest case arises when the occupier of premises gives a free and voluntary consent for the administrative search. The standards for judging whether the property occupier has rendered valid consent are arguably cloudy, but better judgment requires that the "totality of the circumstances" test, as illustrated in *Schneckloth v. Bustamonte*,[33] be used as a clear benchmark. Under the *Schneckloth* standard of the "totality of the circumstances" for determining voluntariness, the government need not prove that the person possessed knowledge of the right to refuse granting of consent.

In addition to the consent theory, exigent circumstances or emergency situations permit warrantless administrative searches and seizures. The *Camara* Court clearly contemplated continued used of emergency administrative searches when it observed:

> [N]othing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations.
>
> *Camara v. Municipal Court*, 387 U.S. 523, 539

Demonstrative of this principle, the *Camara* Court noted with approval searches and seizures of unwholesome food, compulsory smallpox vaccination, health quarantine, and summary destruction of tubercular cattle.

In applying an emergency rationale for some administrative searches, the Sixth Circuit approved a search that firefighters conducted following a residential fire that involved some exigencies or potential emergencies.[34] Firefighters had been called to extinguish a residential fire but remained on the scene following the end of the fire. The fire investigators checked for water damage that might cause electrical shorts or structural damage and for the dangers of carbon monoxide. While conducting these checks during the first hour after the fire had been extinguished, firefighters encountered some commercial-grade fireworks stored in a basement room in plain view. The homeowner lacked the proper licenses to be able to possess the particular fireworks under federal law. According to *Camara* and later cases, the federal district judge noted that the case law seemed to require some exigent circumstance to allow a warrantless search but determined that water seeping in that might cause other damage or danger and potential electrical short circuit problems met the definition of an emergency or exigency.

On appeal, the Sixth Circuit referred to *Michigan v. Clifford* where, in *Clifford*, Justice Powell noted that:

> [t]he aftermath of a fire often presents exigencies that will not tolerate the delay necessary to obtain a *warrant* or to secure the owner's consent to inspect fire-damaged premises. . . . [T]he *warrant* requirement does not apply in such cases. For example, an immediate threat that the blaze might rekindle presents an exigency that would justify a warrantless and nonconsensual post-fire investigation.[35]

The Sixth Circuit Court of Appeal upheld the conviction and the decision of the trial judge that exigent circumstances permitted the search of the home for hidden dangers, and the Court of Appeals particularly found that the firefighter decision to survey for hidden electrical damage and dangers justified the search of rooms that may have not clearly been affected by the fire. In most cases, an administrative search significantly later after a fire has been extinguished would have required an administrative search warrant, but in this case, the firefighters had never left the scene and were investigating potential hazards to the home occupiers following the fire, allowing the court to recognize the exigent or emergency circumstances exception to administrative searches.

Searches that are based on an administrative theory cannot be converted or subverted into criminal searches. In a California case,[36] zoning and code enforcement officials obtained an administrative warrant for residential property that was believed to be used for noncomplying business purposes. The home occupier reportedly had illegal firearms, and he had secured the property with tarps, cameras, and fencing that was noncompliant. Code enforcement officials had concerns about their safety when the inspection occurred, with the result that seven officers entered the home accompanied by the inspectors. At that time, police entered the home and conducted an initial search, but they had no criminal warrant. The basic sweep for security reasons would have been appropriate, according to the reviewing court, but the officers stayed in the home fifteen to twenty minutes looking for evidence of crime, which they found. The Ninth Circuit Court of Appeal approved that officers could give security to administrative searchers but held that the officers' primary reason for entering the home was to conduct a criminal investigation, as evidenced by the home occupier's initial arrest before the search and the use of so many officers. The only warrant was an administrative warrant that did not allow for a criminal investigation. It also noted that administrative searches are so easily diverted from their narrowly defined purposes that government officials have a clear responsibility to keep them from being misused. Ultimately, the order of suppression by the district court was affirmed.

To summarize, administrative searches trigger Fourth Amendment concerns and, in the absence of consent or other exception, generally require warrants based on probable cause. The quantum of proof necessary to constitute administrative probable cause has been reduced to the point that extreme specificity concerning either the reasons for the search or the precise place to be searched proves an easy burden to meet. The relaxed standards under probable cause are justified, since the administrative search is directed not toward the uncovering of criminal wrongdoing but toward the furthering of health, safety, and welfare regulations of municipalities, the states, and the federal government.

7. Inventory Searches: Probable Cause Not Required

An inventory search is a special type of search under the Fourth Amendment because it does not require, as its basis, the finding of probable cause. The inventory search is considered reasonable in the absence of probable cause due to the fact that other rationales beyond finding evidence of crime support its use. When property lawfully comes into the hands of law enforcement personnel, they are under a duty of safekeeping for the property until it is returned to the rightful possessor. An inventory of an arrestee's possessions can be justified under the need to protect an owner's property while police have it in custody; to ensure or assure against false claims of lost, stolen, or vandalized property; and to protect the police from any danger that the property might pose.[37] As is often the case, property comes to the police within different types of containers. A purse or backpack may contain valuable personal property; a car may hold hidden treasures or stolen property, and these types of personal property may hide illegal drugs, harmful ordinance, noxious gases, or other dangerous items. Once a person and property come under the dominion and control of the police, it is reasonable under the Fourth Amendment that the property be inventoried, cataloged, and securely stored, whether on a person or in a vehicle. During this process, if additional evidence of the possessor's criminality becomes evident, generally this evidence may be used in a criminal trial. Since the police are not looking for evidence of crime but inadvertently stumble upon it while conducting a reasonable inventory, there should be no constitutional impediment to its use. The inventory search occurs most frequently when motor vehicles are involved or where individuals have been arrested while in possession of personal property and accoutrements.

8. Vehicle Inventory Searches

Some vehicle searches may follow valid arrests of the driver or passenger using the theory of search incident to arrest,[38] and other warrantless searches may be justified under an inventory search theory. The inventory search[39] stands on a different footing and is designed to protect the property of the arrestee from loss and the police from false claims of loss, as well as to protect the police and property custodians from any dangerous substance or ordinance that might be contained within a motor vehicle. Inventory searches have been approved in several cases, including *South Dakota v. Opperman*[40] and *Colorado v. Bertine*[41] (Case 10.2), where the search parameters were directed by a written policy (see Case 10.2). Where motor vehicles have been lawfully impounded, the Court approved the use of inventory searches as reasonable responses even in the absence of probable cause.

In *Opperman*, the defendant had parked his car in a place where it was unlawful to do so, and in due course, police had it towed to an impound lot. Since the automobile contained some personal items, the officer who noticed the valuables had the car unlocked and initiated an inventory using a standard inventory form pursuant to the department's normal procedure. The officer discovered some marijuana in addition to some valuables. While the trial court refused to suppress the criminal evidence because it considered the

search reasonable, the Supreme Court of Colorado reversed the conviction, concluding that the evidence had been obtained in violation of the Fourth Amendment prohibition against unreasonable searches and seizures. The Supreme Court of the United States reversed the decision of the Supreme Court of Colorado and found the inventory search met reasonable standards under the Fourth Amendment as regulated by the police department's inventory search policy.[42]

According to the Court, the police procedures followed in *Opperman* did not involve an unreasonable search in violation of the Fourth Amendment. The Court noted that there is a diminished expectation of privacy in a motor vehicle and that police departments for many years have possessed inventory policies that are followed when securing valuables taken into custody. The Court noted:

> When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger. The practice has been viewed as essential to respond to incidents of theft or vandalism. [Internal citations omitted.]
>
> *Opperman* at 369

The *Opperman* Court approved the concept of the inventory search, which had been used by many police departments in many states. The principle was followed in *Colorado v. Bertine*,[43] where a police officer arrested a driver for driving under the influence of alcohol. Inside the vehicle, the officer could observe visible personal property, presumably belonging to the driver or owner of the car. While waiting for a tow truck, and in accordance with local procedures, the backup officer inventoried the van's contents.[44] He opened a closed backpack in which he found containers that held controlled substances, cocaine paraphernalia, and a large amount of cash. The officer was acting in good faith and attempting to follow his department's policy under the circumstances. The Supreme Court upheld the admission into evidence in *Bertine* because the police were operating their inventory search in an objectively reasonable manner for the purpose of protecting valuables and protecting police officers from harm.[45]

Case 10.2 LEADING CASE BRIEF: INVENTORY SEARCH POLICIES MAY GIVE OFFICERS SOME DISCRETION AS TO WHETHER TO SEARCH AND TO THE EXTENT OF A SEARCH

Colorado v. Bertine
Supreme Court of the United States
479 U.S. 367 (1987).

CASE FACTS:

A Boulder, Colorado, police officer possessing probable cause arrested Bertine for operating a motor vehicle under the influence of alcohol. The officer called for a tow truck to remove Mr. Bertine's motor vehicle and, pursuant to a written policy, proceeded to conduct an immediate inventory search of the contents of the motor vehicle. The

policy required that the officer follow standard procedures for impounding vehicles and mandated that a detailed inventory involving the opening of containers be conducted, which required the listing of all contents. Inside the vehicle, the officer discovered a backpack that contained various controlled substances, money, and cocaine paraphernalia. The officer did not have probable cause to search the motor vehicle and its contents at the time of the inventory. The search conducted by the officer followed local police department requirements which required a detailed inspection and inventory of all impounded vehicles but gave the officer on the scene discretion concerning whether to impound a vehicle.

Although the search was "somewhat slipshod" in the manner in which it was conducted, the trial court held that neither the inventory search policy nor the inventory search violated the dictates of the Fourth Amendment. Interestingly, the trial court held that the inventory search as conducted in this case *violated relevant portions of the State of Colorado constitution*. With a slight twist in legal theory, the Supreme Court of Colorado upheld the trial court decision but based the affirmation and the exclusion of evidence on the Fourth Amendment rather than on the Colorado state constitution. The Supreme Court of the United States granted Colorado's petition for a writ of certiorari.

LEGAL ISSUE:

Consistent with the Fourth Amendment, where police officers have some limited discretion pursuant to a departmental inventory search policy of either conducting an inventory search of an impounded vehicle and its contents or not impounding the vehicle, does such discretion leave the inventory search policy without sufficient standards?

THE COURT'S RULING:

An inventory policy may give police some discretion both as to when to conduct an inventory and some discretion as to the extent of the search necessary to produce the inventory without violating the reasonableness standard of the Fourth Amendment.

ESSENCE OF THE COURT'S RATIONALE:

* * *

[A]n inventory search may be "reasonable" under the Fourth Amendment even though it is not conducted pursuant to warrant based upon probable cause. In *[South Dakota v.] Opperman* [428 U.S. 364 (1976)], this Court assessed the reasonableness of an inventory search of the glove compartment in an abandoned automobile impounded by the police. We found that inventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger.

* * *

In our more recent decision, *[Illinois v.] Lafayette* [462 U.S. 640 (1983)], a police officer conducted an inventory search of the contents of a shoulder bag

in the possession of an individual being taken into custody. [In *Lafayette*, the officer who took the defendant's backpack could have placed it entirely inside a property bag rather than conducting an inventory of the contents, including drugs.] In deciding whether this search was reasonable, we recognized that the search served legitimate governmental interests similar to those identified in *Opperman*. [In *Opperman*, police towed a car that had valuables clearly visible for the purposes of safekeeping of the vehicle and conducted a reasonable inventory search.] We determined that those interests outweighed the individual's Fourth Amendment interests and upheld the search.

* * *

In the present case, as in *Opperman* and *Lafayette*, there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation. In addition, the governmental interests justifying the inventory searches in *Opperman* and *Lafayette* are nearly the same as those which obtain here. In each case, the police were potentially responsible for the property taken into their custody. By securing the property, the police protected the property from unauthorized interference. Knowledge of the precise nature of the property helped guard against claims of theft, vandalism, or negligence. Such knowledge also helped to avert any danger to police or others that may have been posed by the property.

* * *

The Supreme Court of Colorado also expressed the view that the search in this case was unreasonable because Bertine's van was towed to a secure, lighted facility and because Bertine himself could have been offered the opportunity to make other arrangements for the safekeeping of his property. But the security of the storage facility does not completely eliminate the need for inventorying; the police may still wish to protect themselves or the owners of the lot against false claims of theft or dangerous instrumentalities.

* * *

Bertine finally argues that the inventory search of his van was unconstitutional because departmental regulations gave the police officers discretion to choose between impounding his van and parking and locking it in a public parking place. The Supreme Court of Colorado did not rely on this argument in reaching its conclusion, and we reject it. Nothing in *Opperman* or *Lafayette* prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. There was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity.

While both *Opperman* and *Lafayette* are distinguishable from the present case on their facts, we think that the principles enunciated in those cases

govern the present one. The judgment of the Supreme Court of Colorado is therefore ***Reversed.***

CASE IMPORTANCE:

Inventory search policies that are routinely followed and that give police officers some discretion are permissible and consistent with the Fourth Amendment. A policy may give an officer some limited discretion in whether to make an inventory search and in the way the search is performed without violating the Fourth Amendment. The Court reaffirmed that inventory searches are reasonable when police conduct searches by following a police department policy governing such searches.

An inventory search of a motor vehicle requires that the police agency have and follow an inventory search policy. In the absence of a policy regulating this process, individual officers would have unlimited discretion so that a particular inventory search could evolve into a ruse for conducting a general search. The policy regulating inventory searches must be designed to produce an inventory rather than permitting the inventory officer so much latitude that no standards exist.

Consistent with other vehicle inventory search cases is the case *Florida v. Wells*,[46] where an arrested driver gave police permission to open the trunk of his impounded car. An inventory search of the car revealed marijuana within a suitcase. The *Wells* Court approved the state court decision holding that the evidence should have been suppressed on the ground that the Florida Highway Patrol possessed no written governing standards or policy covering the opening of closed containers found within motor vehicles. In the absence of an inventory policy, the officer could search wherever he desired, which could turn an inventory search into general snooping without any purpose or rationale. Without a written inventory search policy, a police search based on an inventory theory is deemed unreasonable, and the evidence seized will generally be excluded from court. The *Wells* Court ruled that the evidence of drug possession should have been excluded from Wells's trial.

Under the vehicle inventory theory, to perform a valid search requires that the particular law enforcement agency have a clear inventory search policy that police routinely follow. The policy must contain general guidelines for police practice and can allow a police officer some discretion concerning the scope of the search. Situations that may be fatal to inventory searches are the absence of an inventory policy, a failure to routinely follow the policy, or a policy that gives the inventory officer virtually unbridled discretion in the scope of the search.

9. Post-Arrest Inventory Searches of Personal Property

Whereas inventory searches usually develop where police have lawfully impounded a motor vehicle, the legal principle is not so limited and can be applied following an arrest at the booking stage. The principle has been applied to search the effects of an

arrestee who was in the process of being booked into jail following his arrest. In *Illinois v. Lafayette*,[47] a police officer responding to a dispatch about a disturbance at a movie theater found Lafayette involved in an altercation with the manager. The officer arrested Lafayette for disturbing the peace, handcuffed him, and took him to the police station along with a purse-type shoulder bag. Lafayette's purse-type shoulder bag arrived with Lafayette at the booking area inside the police station. The booking officer conducted an inventory search of all of Lafayette's personal possessions, including his purse. The inventory/search revealed some cigarettes removed by Lafayette from the bag, and the officer found some amphetamine tablets within the packaging normally surrounding cigarettes. The presence of the drugs resulted in a charge of violating the Illinois Controlled Substance Act. The officer searched the bag and the other materials as a result of the department's standard procedure to inventory everything brought to the jail by a person under arrest.

The trial court ordered suppression of Lafayette's drug evidence recovered from the shoulder bag because it rejected the theory that the station house search could be justified as a search incident to arrest, since it occurred much later. Therefore, the station house procedure could not qualify as a valid inventory search. The Supreme Court granted certiorari and reversed the state court decision by approving of the inventory search theory. As the *Lafayette* Court stated the issue:

> The question here is whether, consistent with the Fourth Amendment, it is reasonable for police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police station house incident to booking and jailing the suspect.
>
> *Lafayette* at 644

According to the Court, since an inventory search is merely an incidental administrative step during the booking process that follows arrest, it constitutes a reasonable search under the Fourth Amendment. When the interest of privacy of the individual is weighed against the needs and desires of the government to maintain a secure jail and protect property, courts have arrived at the inescapable conclusion that it is quite appropriate to conduct inventory searches of personal property under the circumstances, and such searches appear to be reasonable under the Fourth Amendment[48] according to the *Lafayette* Court.

Similarly, in an Eleventh Circuit case[49] in Florida, a vehicle was lawfully stopped because the passenger was not wearing a seatbelt. The passenger had no identification, but once police discovered his identity, they learned that the beltless occupant had two outstanding warrants, and they then arrested him. A subsequent search of his backpack revealed several counterfeit $100 bills, and a search of his wallet, which he actually possessed, revealed two more fake $100 bills. Officers followed the local police policy that required all property taken into custody had to be documented on a receipt, regardless of whether the property constituted evidence or was an arrestee's personal property. The defendant unsuccessfully argued that the traffic stop had been unreasonably extended (his lies concerning identity caused the delay) and he contended that his detention became illegal and he would not have been arrested otherwise. The appeals court held that the detention, the arrest, and the search incident to arrest were all valid,

which supported the admissibility of the evidence disclosed during the inventory search of his back pack.

10. Public School Searches: Based on Fourth Amendment Reasonableness

The Fourth Amendment has been held applicable in cases where officials at public schools and law enforcement officials conduct searches whether the school is public or private. Children as well as adults have rights under the Fourth Amendment, but their rights have been deemed more limited than those enjoyed by adults. Searches of children in school may fall into a variety of categories, since the goals of school officials differ according to the program being implemented. The goal of a search may be to discover recreational pharmaceuticals in a student's locker, purse, or backpack; other types of searches may be much more intrusive, such as where the school system desires to ensure that student leaders and athletes remain drug free and that members of school clubs are drug free. The standards for reasonable suspicion[50] will normally be a prerequisite to a search of the personal property of the public school student, but in many cases, there will be no individualized suspicion prior to a urine test for an athlete. Depending on how student lockers are assigned, a student may or may not have an expectation of privacy in the locker itself. If, at the time of the assignment, it is made clear to the student that there will be no relinquishment of authority over the interior of the locker, he or she may have no expectation of privacy unless there is a container within the locker, such as a personal backpack. On the other hand, if the locker has been granted to or rented to the student as a private place to store school-related items, the student may retain an expectation of privacy under the Fourth Amendment. It must be noted that if school authorities allow a drug-sniffing dog under the control of the police to walk down school hallways, this approach does not constitute a search[51] because the animal is detecting the odors that are outside of a particular locker and is not searching inside the locker.

In an early test of the Fourth Amendment involving public school students, the Court held that a student's possessions could be searched by school officials (government employees) where there were reasonable grounds for believing that the contents of the student's possessions violated either a school rule or the law.[52] In *New Jersey v. T.L.O.*,[53] a student had been under reasonable suspicion for smoking tobacco in the school rest room. A principal eventually searched the student's purse on the theory that she possessed tobacco. The results of that search did disclose tobacco, and a later, deeper search revealed marijuana, rolling paper, money, and a customer list. Following juvenile proceedings, the case was eventually heard by the Supreme Court of the United States to determine whether the search was reasonable under the circumstances.

The *T.L.O.* Court suggested a two-step approach that it would consider: first, whether the search was justified at its inception and, second, whether the search as actually conducted was reasonably related in scope to the circumstances that justified the interference in the first place. Since there had been a credible accusation that the student had been smoking in the rest room, the school official possessed sufficient suspicion to conduct a search of the student's purse. The items that were initially disclosed

suggested the need for a deeper inquiry. The results that come from this case include the concept that school officials need not obtain a warrant before searching a public school student and that the search of a student by a school official will be justified where there are reasonable grounds for suspecting that the search will turn up evidence that the student has transgressed either the law or the rules of the school. Reasonable suspicion or reasonable grounds appear to be synonymous terms supporting the threshold of public school searches.

In applying *T.L.O.* in a later case, the Court kept with the two-step approach. In *Safford Unified Sch. Dist. #1 v. Redding*,[54] a female student was reasonably suspected of distributing pain medication, some prescription strength and some over the counter, to other students in violation of the school rules. The principal gained possession of a zippered day planner, taken from a different student, that belonged to the female student at issue here and contained knives and a cigarette. The student contended that the day planner had been loaned days ago to another student and did not then contain the prohibited items. She denied owning the pills that the principal had obtained from another student who implicated the female student. An agreed search of her backpack proved negative, so a school nurse took the student to a different area and had her disrobe down to her underwear, disclosing nothing prohibited. Then the nurse required her to pull out her bra and shake it and pull out the elastic on her under pants. Nothing was discovered, but privacy was compromised. The student's mother sued civilly, on behalf of the child, complaining of a violation of the student's Fourth Amendment rights to be free from unreasonable search and seizure.

The Ninth Circuit Court of Appeals held that the schoolgirl's rights had been violated, and the school district appealed to the Supreme Court. Following the *T.L.O.* rationale, the court found that reasonable suspicion was all that was required to search her outer clothing and her backpack for contraband. That standard was met by other students telling the principal that the student in question had been giving out pills. The second part of the *T.L.O.* rationale required that the method and extent of the search be reasonable. The Court characterized the search of her underwear as a "strip search" that was not considered reasonable under the circumstances, especially since adolescent vulnerability intensified the intrusiveness of the exposure to the nurse. The Court noted

> The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in T. L. O., that "the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place." 469 U.S., at 341, 105 S. Ct. 733, 83 L. Ed. 2d 720 (internal quotation marks omitted). The scope will be permissible, that is, when it is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." Id., at 342, 105 S. Ct. 733, 83 L. Ed. 2d 720.[55]

The Court found no emergency basis for the intrusive search and that the type of pills would not justify the intensive body search since non-dangerous school contraband did not rise to the level of a danger to students; there was no evidence that the students typically hid pills in their underwear or that the particular student had drugs hidden in intimate places. In affirming the decision of the appeals court, the Supreme Court stated, "[T]he content of the suspicion failed to match the degree of intrusion."[56]

11. Public School Drug Searches: Drug Testing of Athletes and Other Students

In a case involving no individualized suspicion, a school system decided to implement drug tests for all students who participated in interscholastic athletics.[57] In Oregon, the Vernonia School District 47J determined that all athletes desiring to participate in a sport must submit to a drug test at the beginning of the season before playing their respective sports. At a subsequent time, all athletes were to have their names placed in a pool from which 10% of them would be selected for random drug testing on the day of the drawing. In no case was there to be a requirement of individualized suspicion of drug use prior to testing. When one student's parents refused to consent to drug screening, the school prohibited him from participating in sports. The family filed suit, alleging a violation of the Fourth Amendment as applied to the states through the Fourteenth Amendment's Due Process Clause.

When the case reached the Supreme Court in *Vernonia School District 47J v. Acton*,[58] the Court first determined that personal drug screening of public school students constituted a search under the Fourth Amendment. The Court then had to determine whether the school district was operating in a reasonable fashion with respect to the drug tests by balancing the expectation of privacy of the students against the needs of the school system. According to the Court, drug use had expanded within the school system, and students had become more unruly. In addition, it was believed that allowing participation in sports by students who were under the influence of drugs could result in increased injuries or even death. The *Acton* Court considered that public school students have some reduced expectation of privacy because they can be required to be vaccinated and to take school physicals prior to admission. The Court also looked at the privacy measures built in to the drug tests so that the urine could be collected without the teacher actually watching the student produce it. The Court considered the need to reduce drug usage and the reasonable attempts by the school under this policy to have drug-free athletes. On balance, the *Acton* Court concluded that the school district's policy was reasonable under the Fourth Amendment.[59] While public school students do possess a reasonable expectation of privacy, that privacy can be reduced where students wish to play sports, an activity that places them in a role model position. Students who do not wish to play sports generally are under no duty to submit to any sort of drug screen or test.

Following *Acton*, public school districts had the authority to screen high school sports participants for drug use and abuse even in the absence of any individualized suspicion unless a state law or constitution dictated otherwise. After the *Acton* case, a Washington school district determined to follow the dictates of the decision and use suspicionless drug testing for its athletes. Parents of some students believed that the privacy rights of their children were being violated by the school policy. In a case decided by the Washington Supreme Court,[60] the justices held that a "special needs" exception did not exist under the Washington State Constitution to allow suspicionless or random student athlete drug testing.

In a later decision, *Board of Education v. Earls*[61] (Case 10.3), the Supreme Court of the United States approved an extension of *Acton* to all middle and high school students whose districts required a drug test prior to engaging in any extracurricular activity.

The Tecumseh, Oklahoma, School District adopted a drug policy that required students who were interested in participating in extracurricular activities to consent to urinalysis. The actual practice of the school district had been to test all the athletes engaging in competitive sports, but the policy allowed the district to test other individuals involved in extracurricular activities. Pursuant to the drug testing policy, covered students were required to take a drug test prior to initiating an extracurricular activity; the school district mandated that students submit to random drug testing while participating in that activity, and covered students had to agree to be tested at any time upon facts that created a reasonable suspicion of drug use.

In a different case, students alleged that their civil rights under the Fourth and Fourteenth Amendments had been violated by a public school's drug testing policy. In *Board of Education v. Earls*, several students and their parents brought a legal action against the school district under 42 U.S.C. Sec. 1983, alleging that their civil rights had been violated by the drug testing policy and that the policy violated their rights under the Fourth Amendment. The students argued that, while it might be reasonable to test school athletes, as in *Acton*, it was not reasonable to require suspicionless testing for other activities when the school district had failed to identify any special need or problem common to students engaged in nonathletic extracurricular activities. The federal district court found for the school district because the judge felt that there was a certain history of drug abuse in the school system that created a legitimate cause for concern and could be effectively addressed by testing the students involved in extracurricular activities. The Court of Appeals for the Tenth Circuit reversed because it believed that the school district failed to show that a serious drug problem existed among nonathletes engaged in extracurricular activities. The Supreme Court granted certiorari to consider the reasonableness of testing such students under the circumstances.

The Supreme Court, in *Earls*, cited *Delaware v. Prouse*[62] and noted that it generally determines the reasonableness of a search and seizure by balancing the nature of the intrusion against the individual's privacy with the promotion of reasonable government interests but that the Fourth Amendment does not always require an individual level of suspicion. The respondent schoolchildren argued that they possessed a stronger interest in privacy than athletes because they did not have to disrobe in front of fellow participants. This argument did not have much effect on the majority of the Court, which observed that undressing in close proximity to fellow students is a frequent part of some nonathletic extracurricular activities and that any related distinction was not a cornerstone of the Court's decision in *Acton*.[63] Additionally, the Court noted that the sole outcome of a failed drug test involved a limitation on that student's participation in extracurricular activities. Justice Thomas, writing for the Court, stated, "Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant."[64] The Court essentially found that a school system's interest in ensuring a safe and drug-free educational experience outweighed an individual student's Fourth Amendment right to privacy. Consequently, the *Earls* Court reversed the court of appeals by rejecting its view that the Fourth Amendment prohibited drug testing under the circumstances; it also upheld the right of a school district to require consent to submit to a drug test as a prerequisite for participation in extracurricular activities.

Case 10.3 LEADING CASE BRIEF: SUSPICIONLESS DRUG TESTING FOR PUBLIC SCHOOL STUDENTS INVOLVED IN EXTRACURRICULAR ACTIVITY PERMITTED

Board of Education v. Earls
Supreme Court of the United States
536 U.S. 822 (2002).

CASE FACTS:

The Tecumseh, Oklahoma, School District adopted a policy which required all middle and high school students to consent to urinalysis drug testing in order to participate in any extracurricular activity. In actual practice, the school board did not apply drug testing except for competitive extracurricular activities sponsored by the state sanctioning body. Several high school students who objected to the drug-testing policy filed suit in a federal district court alleging that under 42 U.S.C. Sec. 1983, they were eligible for equitable relief, and they contended that the policy violated their rights guaranteed by the Fourth Amendment.

The district court believed that the case, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), controlled because of similarities in the drug testing policy. In *Vernonia*, the Supreme Court of the United States upheld the drug testing of school athletes in the absence of any individual suspicion. Thus, the district court granted summary judgment in favor of the Tecumseh, Oklahoma, School District. The student plaintiffs appealed to the Court of Appeal for the Tenth Circuit, which disagreed with the lower court and found in favor of the students, holding that the drug testing policy violated the Fourth Amendment. According to the Court of Appeal, a school district must demonstrate some identifiable drug abuse before imposing a suspicionless drug-testing program. The Court held that the Tecumseh, Oklahoma, School District had failed to show that its children possessed a drug problem among students participating in the competitive extracurricular activities offered by the school system.

The Supreme Court of the United States granted the school district's petition for certiorari.

LEGAL ISSUE:

Does the school district policy of requiring student consent for suspicionless drug testing of all students who wish to participate in extracurricular competitive activities violate the Fourth Amendment prohibition against unreasonable searches and seizures?

THE COURT'S RULING:

After the Court conducted a fact-specific balancing of the level of the intrusion of the Fourth Amendment rights of school children who participated in extracurricular activities against the promotion of legitimate government interests, the Court determined that suspicionless drug searches based on required parental consent did not violate the Fourth Amendment.

ESSENCE OF THE COURT'S RATIONALE:

* * *

II

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Searches by public school officials, such as the collection of urine samples, implicate Fourth Amendment interests. See *Vernonia* [*School Dist. v. Acton*, 515 U.S. 646], at 652; *cf. New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985). We must therefore review the School District's Policy for "reasonableness," which is the touchstone of the constitutionality of a governmental search.

* * *

Given that the School District's Policy is not in any way related to the conduct of criminal investigations, respondents [the students] do not contend that the School District requires probable cause before testing students for drug use. Respondents instead argue that drug testing must be based at least on some level of individualized suspicion. It is true that we generally determine the reasonableness of a search by balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests. But we have long held that "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

* * *

Significantly, this Court has previously held that "special needs" inhere in the public school context. See *Vernonia, supra*, at 653; *T.L.O., supra*, at 339–340. While schoolchildren do not shed their constitutional rights when they enter the schoolhouse, see *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969), Fourth Amendment rights . . . are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. *Vernonia, supra*, at 656.

In particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing.

In *Vernonia*, this Court held that the suspicionless drug testing of athletes was constitutional. The Court, however, did not simply authorize all school drug testing, but rather conducted a fact-specific balancing of the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests. Applying the principles of *Vernonia* to the somewhat different facts of this case, we conclude that Tecumseh's Policy is also constitutional.

* * *

A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults. See *T.L.O., supra*, at 350 (Powell, J., concurring) ("Without

first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern").

*Respondents argue that because children participating in nonathletic extracurricular activities are not subject to regular physicals and communal undress, they have a stronger expectation of privacy than the athletes tested in Vernonia. See Brief for Respondents 18–20. This distinction, however, was not essential to our decision in Vernonia, which depended primarily upon the school's custodial responsibility and authority.

In any event, students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. Some of these clubs and activities require occasional off-campus travel and communal undress. All of them have their own rules and requirements for participating students that do not apply to the student body as a whole. For example, each of the competitive extracurricular activities governed by the Policy must abide by the rules of the Oklahoma Secondary Schools Activities Association, and a faculty sponsor monitors the students for compliance with the various rules dictated by the clubs and activities. This regulation of extracurricular activities further diminishes the expectation of privacy among schoolchildren. *Cf. Vernonia, supra*, at 657 ("Somewhat like adults who choose to participate in a closely regulated industry, students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." (internal quotation marks omitted.)) We therefore conclude that the students affected by this Policy have a limited expectation of privacy.

B

Next, we consider the character of the intrusion imposed by the Policy. Urination is "an excretory function traditionally shielded by great privacy." *Skinner*, 489 U.S. at 626.

* * *

Under the Policy, a faculty monitor waits outside the closed restroom stall for the student to produce a sample and must listen for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody.

* * *

Moreover, the test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences. Rather, the only consequence of a failed drug test is to limit the student's privilege of participating in extracurricular activities. Indeed, a student may test positive for drugs twice and still be allowed to participate in extracurricular activities.

* * *

Given the minimally intrusive nature of the sample collection and the

limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant. . . . Additionally, the School District in this case has presented specific evidence of drug use at Tecumseh schools. Teachers testified that they had seen students who appeared to be under the influence of drugs and that they had heard students speaking openly about using drugs.

* * *

Given the nationwide epidemic of drug use and the evidence of increased drug use in Tecumseh schools, it was entirely reasonable for the School District to enact this particular drug testing policy.

* * *

Finally, we find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use. While in *Vernonia* there might have been a closer fit between the testing of athletes and the trial court's finding that the drug problem was "fueled by the 'role model' effect of athletes' drug use," such a finding was not essential to the holding. *Vernonia* did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school's custodial responsibilities. Evaluating the Policy in this context, we conclude that the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District's interest in protecting the safety and health of its students.

III

Within the limits of the Fourth Amendment, local school boards must assess the desirability of drug testing schoolchildren. In upholding the constitutionality of the Policy, we express no opinion as to its wisdom. Rather, we hold only that Tecumseh's Policy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

CASE IMPORTANCE:

Under the Fourth Amendment, public school officials have significant discretion to require that students who wish to participate in any activity beyond the required school attendance consent to suspicionless drug testing as a precondition to participation in extracurricular activities or programs. The drug testing under these circumstances does not violate the Fourth Amendment.

When *Acton* and *Earls* are considered together, public schools may initiate drug-testing policies covering every student who steps forward to become involved in any optional school activity. The drug policy need not focus on individual suspicion in requiring testing and may appropriately involve random decisions on which students to subject to a test. These tests are, arguably, based somewhat on consent of the parent or

guardian and consent of the student, since a prior agreement to submit to the drug testing program remains an essential precursor to participation in an extracurricular activity. The Court has approved drug testing as a reasonable approach, consistent with the Fourth Amendment, to the perceived national problem of drug abuse by schoolchildren. As of the current state of jurisprudence, unconsented drug screening of all public school children does not appear reasonable under the Fourth Amendment.

Although the Supreme Court had not directly ruled on the suspicionless searching all public school students upon entry to school buildings, some schools have implemented testing of entering students by requiring them to walk through metal detectors. In addition, many schools also require students to submit to physical and visual inspection of the contents of their carry in backpacks and purses for items that might offend the law or school rules. While not directly related to drug testing, finding and seizing drugs or weapons is part of the rationale for student searches. In a Missouri case,[65] a student was discovered attempting to bring a loaded revolver into the secure area of his public high school. He had passed the separate metal detector screening, but security personnel found the firearm by physically searching his backpack. He appealed the denial of a motion to suppress the gun from his juvenile trial, but the Missouri reviewing court found that the school policy of suspicionless searching was constitutional and did not run afoul of the Fourth Amendment. The reviewing court noted that under *Vernonia Sch. Dist. 47J v. Acton*, the federal Supreme Court has found that public schools fall under the rubric of a "special needs" category that exempts schools from the typical probable cause and warrant requirements usually required when state actors are involved. Schools are charged with maintaining a safe environment for students, and searching items being brought inside a school reasonably helps meet this goal. The court concluded,

> After weighing the nature of the privacy interest allegedly compromised, the character of the intrusion imposed, and the nature and immediacy of the government's concerns and the efficacy of the search method in meeting them, we conclude that the search of L.E.'s backpack was reasonable and that L.E.'s Fourth Amendment rights were not violated.[66]

The theory is that suspicionless searching of student carry-in bags and purses does not offend any Missouri law or the federal constitution.

12. Government Searches in the Government Workplace

While the Fourth Amendment clearly provides a diminished expectation of privacy to juvenile schoolchildren in public schools, the same reduced constitutional expectations have not traditionally applied to adults in a government workplace. In order to implement national policies to promote drug-free workplaces, both the private sector and governments at various levels have created plans and developed other programs to prevent drug-using prospective employees from being hired and to remove existing drug-using employees from service. As a general rule, the private sector is not regulated by the rules dictated by the Fourth Amendment, but the same cannot be said for governmental

employers. Whether state or federal, the Fourth Amendment has full impact on governments, and adults generally have full constitutional rights. In order for a government program involving searches and seizures to pass constitutional muster, the search program must be reasonable given the circumstances. In evaluating the constitutionality of governmental personnel workplace searches, courts tend to indulge in a weighing process whereby the interests of individuals are balanced against the needs of the governmental employer. If a plan involving search and seizure for government employees is to gain judicial approval, courts must determine that the search or seizure contemplated is objectively reasonable.

In an early case involving suspicionless employee searches by the federal government, *National Treasury Employees Union v. Von Raab*,[67] the Customs Service, which assists in enforcing drug laws involving smuggling, embarked upon a plan requiring urine tests of selected employees seeking transfer or promotion to positions with direct involvement in drug interdiction or requiring the employee to carry a firearm or to deal with classified material. The results of the testing were not to be used in criminal prosecutions, but adverse results could affect employment and curtail opportunities for advancement. The labor union representing some of the employees filed suit, alleging that the drug tests required for employees violated the guarantees of the Fourth Amendment against unlawful searches and seizures. The *Von Raab* Court considered the interests at stake and determined a warrant procedure was not a constitutional requirement. The Court evaluated the needs of the government and balanced those needs against the loss of privacy of the employees, concluding that the equities favored the government. The testing program contained general guidelines sufficient to alert employees when testing might occur and to guide the testing process to ensure that reasonable standards would be met. The government position appeared to gain added justification when the Court noted that a warrant procedure in this area would dissipate precious government assets. According to the Court, it is reasonable for employees who apply for promotion to particular positions to be tested for drug use in the absence of a requirement of probable cause or some level of individualized suspicion. From the thrust of the *Von Raab* decision, it is clear that governmental units may conduct drug tests on less than individualized suspicion so long as the government makes the case that its operations require drug-free employees due to the sensitive nature of their position of employment.

Consistent with the *Von Raab* rationale, a Kansas juvenile detention center had a drug-testing protocol designed to ensure that persons working in sensitive positions were not using illegal drugs. The governmental agency had a random testing procedure that applied to all persons who interacted with juveniles, and the employment policy indicated that a failure to pass the random drug screen could result in termination. An employee, Washington, failed his random drug test, and a second test confirmed that he had cocaine metabolites in his urine. Management terminated him for failing drug tests after his internal appeals failed. In filing his civil rights suit in the local federal district court,[68] he alleged, among other causes of action, that his Fourth Amendment rights had been breached by the conduct of his public employer by searching his urine for illegal drugs. The federal district court granted summary judgment to the defendant public employer, and plaintiff employee appealed. The court of appeals noted that ordinarily a search must be based on individualized suspicion but that when a government asserts a

"special need" beyond ordinary crime detection, suspicionless, warrantless drug testing can be reasonable where the government's interests outweigh the individual employee's privacy interests. When a governmental entity has a need distinct from general law enforcement, where there is no individualized suspicion, and where the health or safety of the employee or others (juveniles here), a "special need" may be recognized. In this case, the county employer needed to ensure that the guardians of juveniles in its custody were not impaired in the exercise of their jobs, and the random order of testing helped ensure compliance with a drug-free workplace, The 10th Circuit Court of Appeals affirmed the district court dismissal of the complaint on, among other grounds, lack of a Fourth Amendment violation.[69]

13. Government-Mandated Private Employer Workplace Searches

Whereas *Von Raab* directly involved governmental workplace searches, the federal government decided to take additional steps to help ensure a drug-free work place for many American workers. The federal government moved to require some private employers to conduct searches of their employees pursuant to federal law or administrative regulation. Under some of these programs, the government required private employers to conduct drug tests on employees under certain conditions or occurrences.

Demonstrative of private employee searches was the program authorized by the Federal Railroad Safety Act of 1970. This law authorized the secretary of transportation to set standards for all areas of railroad safety. Pursuant to this authority and because there had been some drug- or alcohol-related accidents, the secretary promulgated regulations that required certain railroad employees of private companies to be tested for drugs or alcohol subsequent to reportable major train accidents. The regulations mandated that both blood and urine samples would be required to meet the goals of the drug-testing program. Employees who refused to provide the required blood or urine samples were not eligible to work in their particular positions for nine months, but individual employees could request a hearing concerning the merits of the refusal to give the requested samples of body fluids. If an employee declined to give a blood sample, the regulations allowed the railroad corporation to presume drug impairment. All the drug tests were to be administered in the absence of probable cause to believe that an employee was under the influence of drugs or alcohol.

The Railway Labor Executives' Association and various of its member labor organizations brought suit because they believed that required searches and seizures on less than probable cause constituted a violation of railroad employees' rights under the Fourth Amendment.[70] The trial court granted summary judgment for the government, but the court of appeals reversed on the authority that the Fourth Amendment required individualized suspicion prior to drug or alcohol testing. The Supreme Court of the United States accepted the case and reinstated the trial court decision in favor of the government.

The Court determined that the Fourth Amendment did have application to railroad workers who might be detained and required, for all practical purposes, to give a blood or urine sample. Although railroad workers are, for the most part, private employees, the

Court determined that since the government required the use of drug tests, the railroads were acting in the position of the government, and for that reason, the workers possessed Fourth Amendment protections. According to the Court, when intrusions are made into the body for the purposes of gathering body fluids, such conduct constitutes a search. The next aspect of the case that the Court was required to consider involved a determination of whether such intrusion could be deemed reasonable under the circumstances. The *Skinner* Court analyzed the practicalities of the situation and determined that a warrant system would not be feasible in this context because in the length of time it would take to procure a warrant to search body fluids, much of the evidence would be carried away from the body in the normal elimination process. The Court also determined that any requirement of individualized suspicion would frustrate the goals of determining drug or alcohol impairment. The *Skinner* Court held:

> We conclude that the compelling Government interests served by the FRA's [Federal Railroad Administration's] regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee. In view of our conclusion that, on the present record, the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations of privacy of covered employees, the Government's compelling interests outweigh privacy concerns.
>
> *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 633 (1989) (Case 10.4)

The essence of the decision turns on the fact that safety in railroad operations is of such paramount importance to the government, to business, and to everyone in general that a search of those employees constitutes a reasonable approach under the Fourth Amendment even in the absence of individualized suspicion and without a warrant. The principle of this case may easily be taken to other areas of transportation, as well as to other businesses where there has been extensive federal government regulation.

Case 10.4 LEADING CASE BRIEF: GOVERNMENT-REQUIRED PRIVATE SEARCHES BY EMPLOYERS IS CONSTITUTIONAL IN SOME SITUATIONS

Skinner v. Railway Labor Executives' Association
Supreme Court of the United States
489 U.S. 602 (1989).

CASE FACTS:

The Congress granted the secretary of transportation power under the Federal Railroad Safety Act of 1970 to prescribe rules and regulations for all areas of railroad safety. Pursuant to that statute, the secretary made a finding that alcohol and drug abuse by railway employees posed an ongoing threat to railway safety. The secretary instituted regulations that permitted blood and urine tests for employees who were on the job when specified railway events and accidents occurred. In addition, the Federal Railroad Administration (FRA) adopted regulations that would allow railroad companies to administer breath and urine tests to employees who violate specified safety rules, even in the

absence of an accident. These blood, urine, and breath tests were to be administered without any individualized suspicion of alcohol or drug impairment. If an employee refused to participate in the tests, that employee could not participate in specifically regulated work for the railroad for nine months.

In the present case, the specific portions of the regulations required toxicological testing of blood and urine following every "major train accident" and after all "impact accidents" involving a reportable human injury. The results of the tests were to be given to the employees involved and the railroad.

The respondents, the Railway Labor Executives' Association and several labor unions, brought suit to enjoin the Federal Railroad Administration's regulation on Fourth Amendment (and other) grounds.

The federal district court granted summary judgment on behalf of the petitioner railroad employee organizations, but the Court of Appeals for the Ninth Circuit reversed the trial court. The theory behind the reversal of the district court concerned the emergencies involving accident situations required swift testing without the requirement of a warrant. In addition, the Court of Appeals held that "accommodation of railroad employees' privacy interest with the significant safety concerns of the government did not require adherence to a probable cause requirement." The Court of Appeals did not require that the government have any particularized suspicion or probable cause prior to testing any railroad employee.

The Supreme Court granted certiorari to consider the Fourth Amendment issues.

LEGAL ISSUE:

Where governmental regulations require testing of certain privately employed workers' body fluids and breath without either probable cause or particularized suspicion in an industry where impairment by drugs may have catastrophic consequences, does such a search violate the Fourth Amendment?

THE COURT'S RULING:

The Supreme Court found that the Fourth Amendment had application but that a government requiring a private employer to test its employees for drug usage was a minimal intrusion when conducted in a medical facility and did not violate the lessened Fourth Amendment expectation of privacy of private railroad workers.

ESSENCE OF THE COURT'S RATIONALE:

* * *

We granted the Government's petition for a writ of certiorari to consider whether the regulations invalidated by the Court of Appeals violate the Fourth Amendment. We now reverse.

* * *

Our precedents teach that where, as here, the Government seeks to obtain physical evidence from a person, the Fourth Amendment may be relevant at several levels.

* * *

We have long recognized that a "compelled intrusio[n] into the body

for blood to be analyzed for alcohol content" must be deemed a Fourth Amendment search. See *Schmerber v. California*, 384 U.S. 757, 767–768 (1966).

* * *

Unlike the blood-testing procedure at issue in *Schmerber*, the procedures prescribed by the FRA regulations for collecting and testing urine samples do not entail a surgical intrusion into the body. It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests.

* * *

To hold that the Fourth Amendment is applicable to the drug and alcohol testing prescribed by the FRA regulations is only to begin the inquiry into the standards governing such intrusions.

* * *

The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, "likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Griffin v. Wisconsin*, 483 U.S., at 875.

* * *

An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents. A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope. [Citations omitted.] A warrant also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case. See *United States v. Chadwick, supra*, 433 U.S., at 9. In the present context, however, a warrant would do little to further these aims. Both the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them, and doubtless are well known to covered employees.

* * *

By and large, intrusions on privacy under the FRA regulations are limited. To the extent transportation and like restrictions are necessary to procure the requisite blood, breath, and urine samples for testing, this interference alone is minimal given the employment context in which it takes place.

* * *

The breath tests authorized by Subpart D of the regulations are even less

intrusive than the blood tests prescribed by Subpart C. Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment. Further, breath tests reveal the level of alcohol in the employee's bloodstream and nothing more.

* * *

A more difficult question is presented by urine tests. Like breath tests, urine tests are not invasive of the body and, under the regulations, may not be used as an occasion for inquiring into private facts unrelated to alcohol or drug use. We recognize, however, that the procedures for collecting the necessary samples, which require employees to perform an excretory function traditionally shielded by great privacy, raise concerns not implicated by blood or breath tests. While we would not characterize these additional privacy concerns as minimal in most contexts, we note that the regulations endeavor to reduce the intrusiveness of the collection process. The regulations do not require that samples be furnished under the direct observation of a monitor, despite the desirability of such a procedure to ensure the integrity of the sample.

* * *

We do not suggest, of course, that the interest in bodily security enjoyed by those employed in a regulated industry must always be considered minimal. Here, however, the covered employees have long been a principal focus of regulatory concern. As the dissenting judge below noted:

> [t]he reason is obvious. An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs.
>
> 839 F.2d, at 593

Though some of the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts, logic and history show that a diminished expectation of privacy attaches to information relating to the physical condition of covered employees and to this reasonable means of procuring such information. We conclude, therefore, that the testing procedures contemplated by Subparts C and D pose only limited threats to the justifiable expectations of privacy of covered employees. By contrast, the government interest in testing without a showing of individualized suspicion is compelling. Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.

* * *

We conclude that the compelling government interests served by the FRA's regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee. In view of our conclusion that, on the

present record, the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations of privacy of covered employees, the Government's compelling interests outweigh privacy concerns.

* * *

Alcohol and drug tests conducted in reliance on the authority of Subpart D cannot be viewed as private action outside the reach of the Fourth Amendment. Because the testing procedures mandated or authorized by Subparts C and D effect searches of the person, they must meet the Fourth Amendment's reasonableness requirement. In light of the limited discretion exercised by the railroad employers under the regulations, the surpassing safety interests served by toxicological tests in this context, and the diminished expectation of privacy that attaches to information pertaining to the fitness of covered employees, we believe that it is reasonable to conduct such tests in the absence of a warrant or reasonable suspicion that any particular employee may be impaired. We hold that the alcohol and drug tests contemplated by Subparts C and D of the FRA's regulations are reasonable within the meaning of the Fourth Amendment.

The judgment of the Court of Appeals is accordingly reversed.

CASE IMPORTANCE:

In special needs searches, where a statute or regulation provides the broad authority to conduct searches and where employees have been subject to a strong regulatory history, requiring drug screening without individualized suspicion or production of a warrant does not violate the reasonable expectation of privacy of the covered workers, given the compelling governmental interest in safety. This theory can be applied to similar work situations involving significant governmental regulation to allow warrantless and suspicionless searches.

The rationale of *Skinner* was followed very shortly in a Ninth Circuit Court of Appeals decision that concerned the warrantless and suspicionless testing of private aviation employees that was mandated by the federal government.[71] The Federal Aviation Administration (FAA) required that the employees of private commercial air carriers, including flight crewmembers, flight instructors, flight attendants, and maintenance personnel, as well other listed employees, be randomly screened for use of marijuana, cocaine, and some other illegal drugs. A positive test required that the employee be removed from his or her respective position. Aviation employees and organizations brought suit, contending that the FAA's administrative decision to drug test was unreasonable and violated their Fourth Amendment rights. The appeals court noted that *Skinner* recognized that government-mandated private employer drug testing constituted governmental action that implicated the Constitution. In rejecting the petitioner's claims, the court noted that FAA drug testing serves "special needs" that are beyond normal law enforcement, and the program indicated that the tests cannot be used in a criminal prosecution of the employee without the employee's consent. The testing protocol is

designed to deter drug use among individuals who hold safety-sensitive positions in the private airline industry. The court made an analogy that noted the government's interest in preventing drug use by employees holding airline safety-sensitive positions is certainly at least as important and compelling as the government interests asserted in *Natn'l Treasury Emp. Union v. Von Raab* that involved sensitive employment positions where employees carried firearms and searched for drugs. The fact that the FAA required immediate random testing was different from *Von Raab*, where there was a five-day notice given prior to testing. The court found that the random, immediate testing served the FAA goal of unimpaired aviation employment, approved the testing regime, rejected the Fourth Amendment claims of the airline employees, and upheld the decision of the Federal Aviation Administration to institute drug testing.[72]

In summary, where a governmental agency requires a private employer to conduct drug screening, the testing does implicate the Constitution and the Fourth Amendment. The testing procedure will be considered constitutional when it serves special governmental needs that cannot be otherwise met by different approaches. For employment positions where the private employee performs in a "safety sensitive" situation and carries a duty firearm or where the job may involve the safety of other persons and a government mandates drug testing, such programs will generally be upheld against constitutional challenges.

14. Airport, Subway, and Transportation Searches

For the past several decades, airplane hijacking and terrorist activity have dictated that persons boarding scheduled commercial aircraft within and departing from or to the United States be subjected to searches. In promoting aviation safety, the searches involved personal passenger screening complete with searches of checked baggage and carry-on luggage. The routine searching of luggage and of passengers has been upheld as reasonable under the circumstances. As Judge Friendly noted in upholding the constitutionality of airline passenger searches:

> When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage, and with reasonable scope, and the passenger has been given advance notice of his liability to such a search, so that he can avoid it by choosing not to travel by air.
>
> *United States v. Edwards*, 498 F.2d 496, 500 (CA2 1974)

Similarly, the Ninth Circuit in *United States v. Davis* held that airport security measures must meet the standard of reasonableness requirements under the Fourth Amendment. The court noted:

> An airport screening search is reasonable if: (1) it is no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives; (2) it is confined in good faith to that purpose; and (3) passengers may avoid the search by electing not to fly.
>
> 482 F.2d 893, 913 (CA9 1973)

Until changes in federal law that occurred following the 2001 terrorist attacks,[73] much airport scrutiny and most passenger searches were conducted by employees of the airlines following federal directives. For the foreseeable future, however, searches of airline passengers and flight crews will be conducted by employees of the federal government and a few contract screeners in small airports. When the federal government mandates a search, the Fourth Amendment has application because federal officers are conducting the screening, and this is also true even where the searching is actually conducted by a private contractor on behalf of the government. However, there is another way to look at airport screening because each search may be deemed consensual, since a person can avoid any search by deciding not to board an aircraft or pass into the sterile area of an airport. Once a person gives consent by placing bags or carry-on luggage on the screening devices, generally the consent cannot be withdrawn. With the federal government's Transportation Security Administration (TSA) conducting passenger screening and baggage searching, an administrative search or consent theory should remain a valid justification for upholding reasonable airport searches.

With the present policy of screening airport passengers as they enter boarding concourses and with the posting of written notices that all baggage, personal effects, and persons are subject to search at any time after a person passes a certain point in the airport concourse, these TSA searches fall under a consent theory or an administrative search rationale[74] under the Fourth Amendment. Passengers who have entered the airport but have not passed beyond security screening will generally not be deemed to have consented to give up their Fourth Amendment rights. Consent may be obtained by placing visible warnings to all persons who might enter an airport that their entry and transit beyond a particular point signifies consent to search by governmental agents. Airport security and search and seizure have been litigated, and the reasonableness of passenger screening has become settled law.

Where litigation occurs, it has not been based on allegations that such searches are constitutionally illegal, but rather it has generally been based on the way a search has occurred or has involved a scope that a passenger believed violated an expectation of privacy. For example, in a case[75] that arose from passenger screening at the Los Angeles International Airport, an x-ray machine alerted a TSA worker to an oversized liquid or gel that was in a passenger's carry-on luggage, which prompted a required secondary screening. When the TSA employee opened the bag, an unsealed, folded envelope became visible. Since it could have contained prohibited items such as a flat explosive initiator or a knife, the screener maintained that she was searching for safety hazards when she briefly looked inside and thumbed through the contents to make sure contraband was not inside. The envelope held several different credit cards with visible multiple names on them that did not match the passenger. The appellate court held that the scope of the search was reasonable, and the evidence was not suppressed.

In order to protect the subway systems in New York City after the 9–11 attacks, the government of New York City initiated a program to search some subway passengers

who were carrying parcels large enough to conceal explosives.[76] In keeping with the special needs type of search theory, the New York Container Inspection Program was designed to deter terrorists from carrying out explosive-based terrorist plans and, to a smaller extent, to uncover any plans prior to implementation. Under the plan:

> the NYPD establishes daily inspection checkpoints at selected subway facilities. A "checkpoint" consists of a group of uniformed police officers standing at a folding table near the row of turnstiles disgorging onto the train platform. At the table, officers search the bags of a portion of subway riders entering the station.[77]

The overall operations are random concerning site selection, and persons selected are chosen by a supervisor as every fifth or tenth person, depending on passenger traffic and the staffing levels at a particular location. Police explain the program and indicate that it is voluntary, but a selected person must submit or leave the subway system. The officers possess virtually no discretion concerning how to search or which person to detain and search.

Several aggrieved subway riders filed a suit alleging, among other causes of action, that the search protocol violated their Fourth and Fourteenth Amendments and sought a declaratory judgment and an injunction. The district court held a two-day trial and found the New York City program constitutional and consistent with the special needs exception to the Fourth Amendment.[78]

On appeal, the Second Circuit found that the New York program met constitutional standards by analyzing the unique situation faced by society. A special need for the searches was established by the government as a method of deterring terrorists, and the container inspection protocol served as the method of implementing the deterrence of terrorists. The court considered the searches reasonable since they only targeted parcels large enough to hide explosives, the searches were minimally intrusive, and the individuals were free to leave the subway area without being searched. Thus, after a full evaluation, the Court of Appeals held:

> that the Program is reasonable, and therefore constitutional, because (1) preventing a terrorist attack on the subway is a special need; (2) that need is weighty; (3) the Program is a reasonably effective deterrent; and (4) even though the searches intrude on a full privacy interest, they do so to a minimal degree.[79]

While constitutional limitations may exist with respect to special needs searches, when the alternative to deterrent searches may be catastrophic terrorist damage, such limitations have yet to be determined. If other jurisdictions have instituted a search protocol similar to the New York subway approach, evidence of litigation has not appeared in the press or in the reported cases. This issue has not been litigated in the Supreme Court of the United States, but given the difficulty of protecting subway riders and the inability to screen even a small percentage or all of them, as is done at airports, this approach appears to be a reasonable one under the circumstances. Therefore, it appears that courts will be likely to recognize a special needs search where significant lives or property damage may be at stake and the program sufficiently addresses the danger in a way that seeks to diminish the threat while being careful to minimize the intrusiveness of such searches.

15. Border Searches: Sovereignty and the Fourth Amendment

Searches by governmental agents at the international borders of the United States are deemed reasonable because the federal government has the right to control the items that leave or enter the nation. These searches, which may occur at every border, point of entry, or its functional equivalent, like an internal airport, do not require probable cause or reasonable suspicion, and a warrant is not necessary.[80] It overstates the case to say that nobody has any Fourth Amendment rights at the border, but it is somewhat close. Obviously, a strip search may not be conducted in a public place near the border, and body cavity searches will require some additional justification. According to one federal court of appeal, an advanced forensic search of a cell phone crossing the border with its owner requires some reasonable suspicion to be lawful,[81] while the First Circuit recently held that a minimum basic manual search of data on a cell phone without using external software did not require reasonable suspicion and that advanced software searches do require reasonable suspicion but do not require warrants.[82] The standards for cell phone border searches would appear to apply as well to personal computers, tablets, iPads, and similar devices.

While most border crossings and searches are rather swift, the duration of detention may be lengthy where there is suspicion that a person is a smuggler. In *United States v. Montoya de Hernandez*,[83] the subject was detained for about sixteen hours as a suspected alimentary canal drug smuggler. Suspicion arose due to the nature of her current travel plans and past travel patterns, all of which pointed to her as a probable drug smuggler. Reasonable suspicion was the minimum standard to allow her detention. Pursuant to a warrant, medical personnel eventually assisted in retrieving a balloon containing a foreign substance. After she was arrested, she passed more balloons that contained cocaine. The drugs were ruled to have been lawfully obtained.

In addition to actual border searches at points of entry, the federal government may set up fairly fixed checkpoints on roads many miles from border areas. A permanent checkpoint that has been created for the primary purpose of immigration control to intercept illegal aliens and not for general criminal interdiction serves a special need, and where there is a minimal showing of suspicion, the individual may be lawfully forced to submit to a secondary screening.[84] At these locations, vehicles moving through the area are subjected to an intermediate level of scrutiny. The officers may ask routine questions of the occupants and evaluate their responses to determine if additional inquiries should be pursued. The questioning at the checkpoints may be conducted in the absence of any individualized suspicion of any occupant of a motor vehicle, but to conduct an additional and more intrusive search requires some minimal level of suspicion or some other legal justification.

Since fixed borders and fixed checkpoints on major highways can easily be bypassed by determined individuals, courts have deemed reasonable the practice of using roving patrols and stops by federal officials.[85] However, where governmental officials patrol border areas, the officers may stop vehicles only if they possess specific articulable facts and couple those facts with rational inferences therefrom, giving rise to reasonable

suspicion that the vehicles may contain illegal aliens[86] or contraband items. Subsequent to a stop, federal officials may ask the driver and any passengers about their citizenship and whether the individuals are in the United States lawfully. Any additional detention or deeper search beyond the plain view requires either consent or probable cause to search.

The standard of reasonable suspicion sufficient to stop vehicles near the border was originally borrowed from the stop and frisk line of cases beginning with *Terry v. Ohio*.[87] The Supreme Court reaffirmed this legal theory in 2002 in *United States v. Arvizu*,[88] a case in which a border patrol agent developed reasonable suspicion to believe that Arvizu was engaged in illegal trafficking in drugs. According to the Court, when an officer engages in the process of making a determination of reasonable suspicion, the officer should consider the totality of the circumstances in reaching a conclusion. Arvizu, the driver of a minivan, was making every effort to avoid any officer by driving back roads in a remote part of southeastern Arizona, specifically avoiding all checkpoints. Border patrol agents moved so as to intercept the suspicious vehicle. As Arvizu passed the officer's vehicle positioned on the side of the road, he did not react to the officer the way local people usually did, which seemed odd. Instead of waving, the driver's posture was stiff, and he clearly avoided looking at the officer's vehicle. The children, riding in the heavily loaded minivan, had their feet on top of some cargo that was where their feet should have been. Since the driver took a route typical of a person who wished to avoid the Immigration Service officers in the area, the officer could look at the totality of the circumstances to conclude that reasonable basis to suspect criminal activity existed. This justified the initial stop of the vehicle in *Arvizu*.

In summary, when a person crosses the international border leading to or from the United States, no suspicion is required to conduct a search of the person or his or her belongings. More intimate personal searches involving body cavity searches will require probable cause and a court order. At permanent checkpoints, officers may stop vehicles in the absence of individualized suspicion and visually observe the occupants of the vehicle. Only where probable cause matures, consent is granted, or some other theory allows a search may a search of a vehicle or person be considered lawful. Where the government observes suspicious individuals at some distance from the border, probable cause will allow a stop and search, but a vehicle may be stopped on less than probable cause, using the stop and frisk standard of reasonable basis to suspect criminal activity.

16. National Security and Anti-Terrorism Searches

In a variety of contexts and in numerous situations after the Middle Eastern Muslim terrorist attacks on the United States on September 11, 2001, Congress passed and then President Bush signed a variety of legislative acts designed to enhance the internal security of the United States by giving additional tools and powers to federal law enforcement agencies. Consistent with these developments, Congress strengthened the Foreign Intelligence Surveillance Act[89] to allow enhanced electronic gathering of foreign intelligence that might affect the United States. Currently, the president, through the attorney general, may authorize electronic surveillance without any court order to acquire foreign intelligence information for up to one year when the attorney general has certified under

oath that the surveillance will be directed at communications between or among foreign powers.[90] There cannot be any substantial likelihood that the surveillance will result in the acquiring of the contents of communication to which a United States person is a party. Where there is a need to surveil a United States person, there is a provision for obtaining a court order. When the surveillance target is an agent for a foreign power, a judge of the FISA court, prior to issuing a surveillance warrant, must have received assurances that indicate the "target of the electronic surveillance is a foreign power or agent of a foreign power" and that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power."[91] The order permitting electronic eavesdropping also requires that common carriers such as telephone companies and Internet service providers assist federal agents in accomplishing the goals of the warrant.[92] In emergency situations, the attorney general may initiate surveillance and make an application for the warrant to the FISA court within 72 hours for a warrant that has retroactive effect.[93]

The intention of Congress in enacting the FISA statute was to allow the federal government to gather foreign intelligence that included information that concerned national security or might harm the ability of the United States to protect the nation against a real or potential attack by foreign powers or operatives. Such information could include sabotage or clandestine intelligence gathering and can include information that might harm the defense or security of the United States or involve intelligence that might affect the conducting of foreign affairs by the federal government. While targeted at foreigners, electronic surveillance could certainly involve United States citizens who might be working for a foreign power in a manner that would be inconsistent with the interests of our national government.[94]

FISA initiated a process whereby the federal government could, in a more clandestine manner than traditional searches obtained from federal district courts, obtain warrants for electronic surveillance that basically met the federal constitutional requirements but through a quicker and more streamlined procedure that did not provide for disclosure to the targets at the end of the surveillance. In another part of the federal code, 50 USCS § 1821, Congress made provisions for physical searches of foreign agents and their operatives. According to § 1821,

> "Physical search" means any physical intrusion within the United States into premises or property (including examination of the interior of property by technical means) that is intended to result in a seizure, reproduction, inspection, or alteration of information, material, or property, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

Similar to ordinary physical intrusion warrants, federal agents had to apply to the FISA court for an order that approved the physical search following approval by the attorney general. Among other requirements, the application for the FISA warrant had to include a recitation of the authority under which the warrant was being sought and a statement of the facts and circumstances that justified the intrusion and search and that the purpose of the intrusion was to gain foreign intelligence information.[95] The applicant had to include a statement concerning the nature of the foreign intelligence sought and

the manner in which the physical search was to be conducted. Where the judge determined that the application was authorized by the president and a federal official had applied for the warrant with the approval of the attorney general, the FISA judge could issue a warrant if the judge believed probable cause existed that the target of the physical search was a foreign power or an agent for a foreign power and the premises were owned or controlled by a foreign power or its agents.[96] When evidence obtained pursuant to a FISA warrant is to be introduced against a criminal defendant, the prosecution must disclose that the relevant information came from using a FISA warrant.[97] The federal statute allows an aggrieved defendant to move for suppression of the information if it has been collected improperly.

One hurdle that a litigant faces in attempting to suppress FISA court-approved warrant results is that when a FISA application is made and has been approved by a FISA court judge, "it carries a strong presumption of veracity and regularity in a reviewing court."[98] In a federal case in Michigan,[99] the defendant faced four counts of wire fraud based on food stamp irregularities. He had been notified that the government intended to use some information obtained from using a FISA court-approved warrant, and he filed a motion to suppress the evidence thus obtained. The defendant contended that the use of the FISA evidence was improper, and normally, a court would simply review the motion as it would in any other criminal case. However, when the attorney general of the United States files an affidavit declaring that the disclosure of the evidence or an adversarial hearing on the motion would harm the national security of the United States, the court must move more carefully. Under such circumstances, the district court judge has a duty to consider the materials presented, in camera, and to review the ex parte application to the FISA court and the FISA order for the surveillance (or physical search) as may be necessary for the trial court to determine if the surveillance (or physical search) of the defendant's person was lawfully authorized and conducted. The trial court must review the FISA application, the FISA court order, and the FISA judge's determination of probable cause. In this particular case, the judge found that the FISA application originally filed in the FISA court met the requirements of law, that it contained a statement of the proposed mitigation procedures to prevent harm to other persons, and that a significant purpose of the surveillance or search was to obtain foreign intelligence information, and the court found that the physical search complied with FISA statutes. Accordingly, the federal district court refused to suppress the evidence obtained from the FISA court-approved warrant and ordered it admitted in the federal food stamp fraud case.

In other earlier cases, Fourth Amendment issues have been litigated that involved perceived electronic eavesdropping by the National Security Agency (NSA) on electronic messages between terrorist organizations and their sympathizers who exchange information by e-mail, fax, and telephone. The president of the United States acknowledged the existence of a program that the NSA carried into operation. As the Sixth Circuit Court of Appeal noted,

> Sometime after the September 11, 2001, terrorist attacks, President Bush authorized the NSA to begin a counter-terrorism operation that has come to be known as the Terrorist Surveillance Program ("TSP"). Although the specifics remain undisclosed, it

> has been publicly acknowledged that the TSP includes the interception (i.e., wire-tapping), without warrants, of telephone and email communications where one party to the communication is located outside the United States.[100]

Numerous Michigan plaintiffs had a vague idea that their electronic communications had been intercepted by the federal government.[101] Consequently, they sued for a permanent injunction to prevent future warrantless interceptions, alleging, among other wrongs, that the government use of the ongoing interception program violated their First Amendment and Fourth Amendment rights because they felt that they were the type of persons whose communications were probably being warrantlessly intercepted. The National Security Agency refused to reveal whether any of the plaintiffs had been the subjects of the surveillance, citing the State Secrets Doctrine[102] that contended that the information was privileged and could not be released. Even though the information that would have demonstrated the personal injury that each plaintiff may have suffered could not be forcibly given to the plaintiffs, the federal district court held that the Fourth Amendment had to be interpreted as demanding that all interceptions require warrants prior to making an interception and granted the injunction against the NSA from continuing the program. The injunction was not enforced pending the appeal.

On cross appeals by both parties to the Sixth Circuit, the court held that the injunction was improper because it found that no plaintiff could prove standing to sue the NSA, meaning that no individual plaintiff could prove that he or she had been personally injured or directly affected by the government's admitted program of intercepting international communications. No plaintiff could prove an individual injury because the NSA invoked the State Secrets Doctrine that prevented any plaintiff from discovering that the person had experienced an individual wrong. As the appeals court noted, "the plaintiffs do not—and because of the State Secrets Doctrine cannot—produce any evidence that any of their own communications have ever been intercepted by the NSA, under the TSP, or without warrants."[103] The court also considered that where one of the plaintiffs alleged that he was afraid to communicate because of harm that could come to him in the future, such an allegation did not indicate that the plaintiff had standing to sue in an action for a declaratory judgment and injunction. The court rejected the fear of harm to self or to the person with whom the person might be communicating in a foreign land as sufficient to demonstrate a real "injury in fact" and rejected any individual standing to litigate the issues. Ultimately, the Court of Appeals vacated the district court's injunction against the NSA and remanded the case to the district court with orders to dismiss the case.

Searches that produce evidence under the Foreign Intelligence Surveillance Act (FISA, 1978) may be admissible against criminal defendants, even thought the primary goal of the Act was to facilitate national security through the collection of foreign intelligence. The United States PATRIOT Act provided amendments to FISA in 2001 to allow interceptions where a "significant purpose of the surveillance is to obtain foreign intelligence information"[104] rather than when the purpose was purely for foreign intelligence gathering. The interpretation that logically could be given to the changes brought about by the PATRIOT Act to the Foreign Intelligence Surveillance Act is that evidence gathered for national security purposes should be useable in domestic criminal cases.

In *United States v. Said Assam Mohamad Rahim*,[105] based on some information obtained under a FISA court warrant, the defendant had been charged with several counts

of making false statements to federal officials, attempting to provide material support for a designated foreign terrorist organization, and a conspiracy to do the same. When the federal government notified the defendant that it intended trial use and disclosure of some of the information from electronic surveillance discovered by using a FISA warrant, the defendant filed a motion to suppress the evidence or to have the detailed FISA materials revealed to him. Defendant Rahim alleged that a significant purpose of investigation was not to obtain foreign intelligence information but to build a domestic criminal case against him. Additionally, Rahim contended that he did not act as the agent of any foreign power. The attorney general issued a declaration that was submitted to the trial court in which the attorney general concluded that revealing the FISA materials in court would harm national security. That declaration triggered special scrutiny of FISA materials by the federal district court. Upon an in-chambers review, the federal judge determined that the surveillance was lawfully authorized and had been properly conducted and that a significant purpose of the authorized surveillance was indeed to gather foreign intelligence information. In addition, the court found sufficient probable cause that the targeted defendant was an agent of a foreign power. The reported case content is rather conclusory in nature because the actual facts that drove the judge's conclusions could not be publicly disclosed or otherwise revealed.

In August 2007, Congress enacted legislation, the Protect America Act of 2007, that permits the federal government to eavesdrop on e-mails, telephone conversations, and other electronic communication involving a source in the United States and a foreign destination, provided the foreign destination involves a person the government has reason to monitor. Although the new act expired in early 2008, the Protect America Act provided a legal framework for surveillance that has been done without warrant in the immediate past. Prior to the new legislation,[106] the federal government arguably needed search warrants approved by the FISA court to eavesdrop on phone conversations and e-mail communications that originated or terminated within the Unites States. The law gives the attorney general of the United States, with the director of national security, the authority to approve international surveillance rather than the FISA court prior to the monitoring, but the FISA court will review and approve the procedures that the federal government follows after the surveillance has been conducted.[107] If a resident of the United States becomes a primary target of the eavesdropping, the law requires that government agents procure a warrant from the FISA court. In the years since 2007, parts of the Patriot Act have expired (2015) and have been periodically renewed, but political wrangling eventually resulted in some parts not being renewed. For example, Section 215 of the Patriot Act that had been interpreted to allow warrantless bulk telephone metadata collection and some financial transaction records expired on March 15, 2020 and has not been renewed.

17. Summary

Special-needs searches encompass administrative searches, inventory searches, airport searches, and some workplace searches where the search has been mandated by a government regulator or a legislature. Administrative searches are conducted based on the police power that is inherent to any state government, although the federal government does not have broad police powers. The searches are designed not to discover

criminal wrongdoing but to enforce civil governmental programs such a zoning, fire, and safety rules, among other goals. Although administrative searches originally did not require the use of an administrative search warrant and were enforced by criminal penalties upon refusal, present Supreme Court interpretations contemplate the use of administrative warrants where the occupier of property refuses to allow a government official to enter the premises provided that administrative probable cause can be demonstrated. Administrative probable cause, based on a lower standard than criminal probable cause, may be based upon the passage of time or the condition of an entire area or vary with the type of governmental program being enforced.

Searches of ordinary commercial and business establishments may require administrative warrants where consent is not forthcoming by the property occupier. However, closely regulated industries that have been historically heavily regulated by governments, such as the manufacture, transportation, and storage of explosives, alcohol, and firearms, may be searched without probable cause and without a warrant. The theory is that by engaging in businesses and industries that have a history of intense governmental regulation, persons and entities conducting those categories of business or engaging in closely regulated industries possess a reduced expectation of privacy.

Inventory searches of motor vehicles that lawfully come into possession of law enforcement officials do not require probable cause to search. Case law indicates that such warrantless searches are reasonable to protect police from false claims of theft, protect the property of those who have been arrested, and prevent police from harboring noxious or dangerous chemicals, explosives, or ordinance taken from arrestees or their property. In order to make a lawful inventory search of seized motor vehicles, a police agency must have a written inventory search policy that it routinely follows. Inventory searches of personal property of persons who have been arrested is generally permitted, even in the absence of probable cause to search, although most departments have written regulations that cover post-booking searches of property.

Searches of public schoolchildren and their property are regulated by the Fourth Amendment, but schoolchildren may be searched on less than probable cause. Where there is a reasonable suspicion to believe that a public-school child possesses contraband, has broken a school rule involving possession of particular objects, or has violated a law, school officials may search that person and his or her possessions. In situations where school policy requires that parents consent to random drug tests for students who have stepped forward from the main student body to play sports or other extracurricular activities, those students may be searched pursuant to the policy. Extracurricular activity student searches need not be based on reasonable suspicion and may be conducted pursuant to a random, suspicionless decision to test.

The federal government may require suspicionless tests for workers who are involved in some types of private employment and in public employment. Private employment drug testing mandated by the federal government is covered by the Fourth Amendment and must meet a standard of reasonableness even in the absence of a warrant. Federal employees can be subjected to warrantless drug testing where their employment involves carrying weapons or other sensitive positions such as drug interdiction. Promotion and lateral transfers for some government employees may lawfully trigger suspicionless drug testing that is consistent with the Fourth Amendment.

REVIEW EXERCISES AND QUESTIONS

1. What are some examples of special needs searches that fall under the category of administrative searches?
2. Why did the Supreme Court decide that administrative searches of residential property generally require a warrant or some other exception to a warrant before a government agent may conduct a search?
3. What is the difference in the warrant requirement for ordinary businesses and for those businesses or industries classified as "closely regulated"?
4. Explain the reasons a warrantless inventory search that is not based on probable cause is usually considered reasonable under the Fourth Amendment.
5. Consider the following situation. Police officers properly stopped a defendant's car and properly arrested him when he admitted to operating a vehicle with a suspended driver's license. The police proceeded to search the car for evidence of ownership in accordance with a claimed departmental policy of performing such searches of cars that were being impounded and found large quantities of cocaine. The prosecution argued that that the cocaine was admissible as having been found in plain sight during a legal inventory search. In order for an inventory search to be legal, the prosecutor must produce a copy of the police department's written inventory policy pursuant to which the search was conducted. No evidence of the existence of the policy was ever entered in evidence. Should the evidence of the cocaine be admitted against the defendant? Why or why not? See *Commonwealth v. Silva*, 61 Mass. App. Ct. 28, 807 N.E.2d 170; 2004 Mass. App. LEXIS 441 (2004).
6. Under what circumstances may public school officials search the personal effects of public school students? What is the legal standard that public school officials must meet to allow a search?
7. Airport passenger searches are generally conducted without a warrant and in the absence of probable cause. How can these searches be justified under the Fourth Amendment?
8. Has legislation under the Foreign Intelligence Surveillance Act and the Patriot Act amendments given the federal government too much power to initiate eavesdropping without proper court oversight? Why or why not?

1. How Would You Decide?

In the United States Court of Appeals for the Ninth Circuit.

While on routine patrol, a Kansas state trooper pulled over Robert J. Herrera to conduct an inspection of his pickup truck. The police officer believed that he was acting lawfully pursuant to a Kansas regulatory scheme that allows the police to conduct random inspections of some classes of commercial vehicles. Herrera's pickup truck did not qualify as a commercial vehicle that could be subjected to such inspections. Although the

Fourth Amendment has been interpreted to allow warrantless administrative inspections of pervasively or closely regulated businesses in some instances, the searches generally require that the person have some notice that he or she is conducting the type of business that is subject to warrantless, suspicionless searches. Herrera's truck was not a commercial vehicle under state law because it weighed 10,000 pounds and commercial vehicles started at 10,001 pounds and heavier.

After stopping Herrera, the officer arrested him for failure to carry proof of insurance and conducted an inventory search of the vehicle. During that inventory search, the police officer recovered twenty-three kilograms of cocaine hidden among cargo residing in the truck's cargo bed.

Herrera filed a motion to suppress the drug evidence, as well as his admissions of guilt that he made to police after the officers stopped his truck. Among other theories, the government attempted to justify the warrantless stop as an administrative warrantless stop permitted under state law regulating stops of motor carriers. After the district court denied Herrera's motion to suppress, he entered a guilty plea to the drug charges but reserved his right to appeal the trial court's denial of his suppression motion.

How would you rule on the defendant's contention that his drugs should have been excluded from admission against him because he should never have been stopped due to the fact that he was not a participant in a heavily regulated industry and that his truck failed to meet the standards of a commercial vehicle?

The Court's Holding:

"The Fourth Amendment's prohibition against unreasonable searches [still] applies to administrative inspections of private commercial property." *Donovan v. Dewey*, 452 U.S. 594, 598, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981). But under the Fourth Amendment, an administrative search is very different from a search based upon individualized suspicion.

> A regulatory search . . . does not require probable cause as defined traditionally by the courts. In general, probable cause, and the less stringent standard of reasonable suspicion, require *particularized* suspicion—that is, the officer must have some articulable basis to believe that the individual to be searched or seized has committed or is committing a crime. In contrast, a regulatory search is justified if the state's interest in ensuring that a class of regulated persons is obeying the law outweighs the intrusiveness of a program of searches or seizures of those persons.
>
> Seslar, 996 F.2d at 1061 (emphasis in original)

The Supreme Court has further distinguished a regulatory search of commercial property from "searches of private homes, which generally must be conducted pursuant to a warrant in order to be reasonable," holding that "legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment." Donovan, 452 U.S. at 598 (emphasis added). The Court has recognized that the "expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home. This expectation is particularly attenuated in commercial property employed in 'closely regulated' industries."

* * *

[The Court of Appeals noted that operators of closely regulated businesses have a reduced Fourth Amendment expectation of privacy so that where the privacy interests of those involved have been recognized as weakened and the government's interests have been enhanced, a warrantless inspection may be reasonable under the Fourth Amendment.]

This warrantless inspection, however, even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met. First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made.

Second, the warrantless inspections must be necessary to further the regulatory scheme. . . .

Finally, the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.

* * *

The problem this case presents is that Herrera's truck did not fall within Kansas's definition of a commercial vehicle subject to these random regulatory seizures and searches. Herrera was not engaging in a closely regulated industry and, thus, would not have had any reason to know that his truck could be subject to a random inspection.

[The ruling of the appellate court noted that Herrera's truck was not subject to a regulatory search because it did not meet the regulatory scheme. The officer's stop of the truck was unreasonable under the Fourth Amendment, and the evidence should have been suppressed. The Court of Appeal sent the case back to the trial court with instructions to vacate his conviction and sentence.] See *United States v. Herrera*, 444 F.3d 1238, 2006 U.S. App. LEXIS 9830 (9th Cir. 2006).

2. How Would You Decide?

In the 2nd District Ohio Court of Appeals.

While on routine patrol in a marked cruiser around midnight, police officers observed a car stopped in the middle of a city street while an individual exited from the passenger side of the vehicle. The driver continued on the street and made a right-angle turn onto a different street, whereupon the officers noticed that the license plate was unreadable either because the light was inoperable or it was too dim. Upon initiating a traffic stop, Allen, the driver, presented a state identification card but had no driver's license because it had been suspended. He was placed uncuffed in the rear seat of the cruiser. Since the driver could not lawfully operate the vehicle and no one else was present in the car, police requested a tow truck to remove the vehicle from the public street, and the police officer initiated an departmentally required inventory search prior to the vehicle's removal. The search revealed a bag of marijuana, some handgun magazines, and ammunition. After finding a loaded handgun under the driver's seat, police had probable cause for arrest

due to the fact that the subject had a prior felony conviction. At this point, the subject was arrested and taken into custody because he had a weapon under a disability. A grand jury indicted him on the weapon charge.

Defendant Allen pled guilty, but reserved, among other issues, the right to contest the validity of the inventory search on appeal. To satisfy the requirements of the Fourth Amendment, an inventory search must be conducted routinely and in good faith and must follow police department policy. Allen argued that because he was not listed as the registered owner of the vehicle, the policy should have required police to contact the owner of the vehicle before preparing to tow and prior to performing an inventory search. As written, the tow policy does not allow the officers this discretion to contact the owner and then wait for the owner to arrive to take possession of the vehicle. To support a lawful inventory search based on standard police practice, the evidence presented in court must demonstrate that the police department had a standardized, routine policy; demonstrate the substance of that policy in court; and show how the officer's conduct conformed to that policy. He argued that the motion to suppress should have been granted because this department's tow policy was unreasonable; that it violated his Fourth Amendment rights; and that a proper tow policy would not have removed this car and, therefore, there would have been no inventory search.

How would you rule on the defendant's contention that the inventory that police conducted violated the Fourth Amendment based on his argument that the policy was not adequate to meet due process standards consistent with the Fourth Amendment?

The Court's Holding:

[The appellate court noted that the departmental policy allowed the officers to tow the car for safekeeping. It then addressed the defendant's contention relating to the alleged improper inventory search policy and how it was improperly implemented by the officers. The reviewing court considered relevant parts of the inventory search policy.]

* * *

[Part of the Policy.]

IV. PROPERTY INVENTORY OF A TOWED MOTOR VEHICLE

A. Prior to towing any motor vehicle (excluding Abandoned Vehicles), conduct an inventory of the contents and note the information on the MDC screen or complete a Tow-In/Liability [**9] Waiver Card F-472. A property inventory is an administrative, caretaking function, which itemizes and secures property in a seized or impounded vehicle. The United States Supreme Court has ruled that an inventory of a lawfully seized motor vehicle conducted to safeguard property and not merely as a pretext to search without a warrant is reasonable and does not violate Fourth Amendment Rights against illegal searches.

B. Inventory of a Towed Vehicle—Arrest Situation

* * *

3. Seize contraband or criminal evidence discovered during an inventory.

* * *

5. Inventory the contents of closed containers (boxes, bags, and unlocked suitcases), prior to locking them in the trunk.

* * *

Id.

The aforementioned tow policy permits Dayton police officers to inventory and tow "[v]ehicles operated by driver's without an operator's license." It is undisputed that Officer Campbell verified that Allen's driver's license had been suspended prior to making the decision to have the vehicle towed and before he initiated the inventory search. The tow policy states a preference for towing vehicles operated by drivers who do not have an operator's license. [Citation omitted.] Furthermore, the tow policy provides that an inventory of the vehicle's contents should be performed prior to the towing of the motor vehicle.

In his brief, Allen argues that because he was not listed as the registered owner of the vehicle, Officer Campbell had a duty to contact the owner of the vehicle before performing an inventory search and then having the vehicle towed. However, the tow policy does not grant the officers discretion. . . . A critical aspect of an inventory search in Ohio is that it must be conducted in accordance with an existing policy. Inventory searches may constitutionally extend to a search of closed containers "if there is in existence a standardized policy or practice specifically governing the opening of such containers." Hathman, 65 Ohio St.3d 403, 604 N.E.2d 743 (1992), paragraph two of the syllabus; *State v. Reese*, 2d Dist. Champaign No. 2018-CA-10, 2019-Ohio-399, ¶ 14. The tow policy specifically states that "[i]f the driver is the registered owner or the registered owner is on the scene and gives permission to another properly licensed driver to drive their vehicle, the officer may release the vehicle rather than tow it." In the instant case, the registered owner of the vehicle was not present, and Officer Campbell had no duty to contact the owner to come to the scene and retrieve the vehicle.

Allen also argues that the vehicle he was driving "only partially" fell under the category "of vehicles taken into custody" for purposes of community-caretaking, which "include those that have been in accidents, . . . and those that cannot be lawfully driven." Reese at ¶ 9. Therefore, Allen argues that since the vehicle he was driving was not in an accident or disabled and could be legally driven away from the scene, it was improper for Officer Campbell to have the vehicle towed and its contents inventoried. . . .

Allen also argues that Officer Campbell impermissibly extended the scope of the inventory search to a closed compartment where the officer located the marijuana, firearm magazines, and ammunition. However, Officer Campbell did not testify that he searched a closed container in order to find the aforementioned items.

* * *

Furthermore, assuming the compartment Officer Campbell described was closed, we conclude that he properly looked inside it as part of the inventory search. "If, during

a valid inventory search of a lawfully impounded vehicle, a law-enforcement official discovers a closed container, the container may only be opened as part of the inventory process if there is in existence a standardized policy or practice specifically governing the opening of such containers." [Source omitted.].

Previously stated, the Dayton Police Department Tow Policy, which was admitted into evidence, provides at Section IV(B)(1), in pertinent part, as follows: "B. *Inventory of a Towed Vehicle—Arrest Situation* . . . 1. Inventory property inside the vehicle's passenger compartment, glove box, console, and trunk prior to towing." . . . (Italics added.) Thus, the tow policy specifically provides for inventorying property inside a compartment, and Officer Campbell therefore properly looked inside the compartment, even assuming it was closed, under Hathman. [Citation omitted.]

As aforementioned, the Ohio Supreme Court has explained that an inventory search is reasonable when it is performed in good faith pursuant to standard police policy and "when the evidence does not demonstrate that the procedure involved is merely a pretext for an evidentiary search of the impounded vehicle." [Citation omitted.] Here, Officer Campbell testified that he performed an inventory search of the subject vehicle in order "to mark valuables or anything like that, just any notable items in the car. Just to document that." Suppression Tr. 19. Upon review, we conclude that Officer Campbell conducted the inventory search of the vehicle in accordance with reasonable standardized procedure as set forth in the Dayton Police Department's tow policy. The policy also indicates the inventory search cannot be a pretext for an investigative search. The policy conforms to law and nothing in the record suggests the inventory search was a pretext for an investigative search.

Allen's first assignment of error is overruled.

* * *

See *State v. Allen*, 2020-Ohio-947.2020 Ohio App. LEXIS 868 (2020).

Notes

1. 515 U.S. 646 (1995).
2. *Safford Unified School Dist. #1 v. Redding*, 557 U.S. 364, 375, 129 S.Ct. 2633, 174 L.Ed.2d 354, 2009 U.S. LEXIS 4735 (2009).
3. 489 U.S. 656 (1989).
4. See *Skinner v. Railway Labor Executives' Assn*., 489 U.S. 602).
5. 482 U.S. 691 (1987).
6. 532 U.S. 67 (2001).
7. See *City of Indianapolis v. Edmond,* 531 U.S. 32 (2000).
8. *Id*. at 47.
9. See *City of Los Angeles v. Patel*, 576 U.S. 409, 425–426, 135 S.Ct. 2443, 192 L.Ed.2d 435, 2015 U.S. LEXIS 4065 (2015).
10. *Corbett v. Transp. Sec. Administration*, 930 F.3d 1225, 1227 (11th Cir. 2019).
11. *New York v. Burger,* 482 U.S. 691, 699 (1987).
12. A Massachusetts court held that a police officer acting like an administrative searcher, who did not have criminal probable cause, illegally searched the subject's tack room where the subject stored leather horse harnesses and saddles. The cocaine he discovered should have been excluded from evidence,

since the officer had crossed over from conducting an administrative search to executing a criminal search, which required a warrant or a substitute for a warrant. See *Commonwealth v. Rosenthal,* 52 Mass. App. Ct. 707; 755 N.E.2d 817 (2001).

13. *Camara v. Municipal Court,* 387 U.S. 523, 538 (1967).
14. *Michigan v. Tyler*, 436 U.S. 499, 501 (1978); *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 617 (1989); and *New Jersey v. T.L.O*, 469 U.S. 325, 333 (1985).
15. See *Marshall v. Barlow's Inc.,* 436 U.S. 307 (1978).
16. *City of Los Angeles v. Patel*, 576 U.S. 409, 135 S.Ct. 2443, 192 L.Ed.2d 435, 2015 U.S. LEXIS 4065 (2015).
17. *Id*. at 420.
18. *Id*. at 423.
19. *Id*. at 432.
20. *Donovan v. Dewey,* 452 U.S. 594 (1981).
21. *United States v. Biswell,* 406 U.S. 311 (1972).
22. *Colonnade Catering Corporation v. United States,* 397 U.S. 72 (1970).
23. See *Illinois v. Krull*, 480 U.S. 340, 346, 107 S.Ct. 1160, 94 L.Ed.2d 364, 1987 U.S. LEXIS 1061 (1987). See also *New York v. Burger*, 482 U.S. 691, 693, 107 S.Ct. 2636, 96 L.Ed.2d 601, 1097 U.S. LEXIS 2725 (1987).
24. See *Hill v. Commonwealth*, 47 Va. App. 442, 624 S.E.2d 666, 2006 Va. App. LEXIS 16 (2006) and *Solem v. Courter*, 57 Va. Cir. 143, 2001 Va. Cir. LEXIS 326 (2001).
25. *Id*. at 453.
26. 397 U.S. 72 (1970).
27. 406 U.S. 311 (1972).
28. 359 U.S. 360 (1959).
29. At this time, the Fourth Amendment had not yet been incorporated into the Due Process Clause of the Fourteenth Amendment, so *Frank* was argued under due process protected by the Fourteenth Amendment. See *Mapp v. Ohio,* 367 U.S. 643 (1961).
30. *Frank v. Maryland,* 359 U.S. 360, 367 (1959).
31. 387 U.S. 523 (1967).
32. *See v. City of Seattle,* 387 U.S. 541, 546 (1967).
33. 412 U.S. 218 (1973). In determining whether a free and voluntary consent has been given under the "totality of the circumstances" test, a variety of factors have been considered. The factors "taken into account have included the youth of the accused, *e.g., Haley v. Ohio,* 332 U.S. 596; his lack of education, *e.g., Payne v. Arkansas,* 356 U.S. 560; or his low intelligence, *e.g*., *Fikes v. Alabama,* 352 U.S. 191; the lack of any advice to the accused of his constitutional rights, *e.g*., *Davis v. North Carolina*, 384 U.S. 737; the length of detention, *e.g., Chambers v. Florida, supra;* the repeated and prolonged nature of the questioning, *e.g., Ashcraft v. Tennessee,* 322 U.S. 143; and the use of physical punishment such as deprivation of food or sleep, *e.g., Reck v. Pate,* 367 U.S. 433." *Schneckloth* at 226.
34. *United States v. Buckmaster*, 485 F.3d 873, 2007 U.S. App. LEXIS 10776 (6th Cir. 2007).
35. *Michigan v. Clifford*, 464 U.S. 287, 293 (1984).
36. *United States v. Grey*, 959 F.3d 1166, 1184 (9th Cir. 2020).
37. *Birchfield v. North Dakota*, 579 U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560, 2016 U.S. LEXIS 4048 (2016), referring to *Colorado v. Bertine*, 479 U.S. 367, 372, 107 S.Ct. 738, 93 L.Ed.3d 739 (1987).
38. For examples of searches incident to arrest of drivers of motor vehicles, see *United States v. Robinson*, 414 U.S. 218 (1973), and *Gustafson v. Florida,* 414 U.S. 260 (1973).
39. An inventory search may be conducted after an automobile has been lawfully impounded, as occurred in *Florida v. White,* 526 U.S. 559 (1999), where the officers, conducting a routine inventory search, discovered illegal drugs within the automobile.
40. 428 U.S. 364 (1976).
41. 479 U.S. 367 (1987).
42. *South Dakota v. Opperman,* 428 U.S. 364, 375 (1976).
43. 479 U.S. 367 (1987).
44. *Id*. at 369.

45. *Id*. at 376.
46. 495 U.S. 1 (1990).
47. 462 U.S. 604 (1983).
48. *Id*. at 648.
49. See *United States v. Forget*, 2021 U.S. App. LEXIS 12479 (11th Cir. 2021).
50. See *New Jersey v. T.L.O*., 469 U.S. 325 (1985).
51. A "sniff test" by a trained narcotics dog is not considered a search within the meaning of the Fourth Amendment because it does not require physical intrusion onto the object being sniffed, and it does not expose anything other than the contraband items. *United States v. Place,* 46102 U.S. 696, 706–707 (1983).
52. See *New Jersey v. T.L.O*., 469 U.S. 325 (1985).
53. *Ibid*.
54. 557 U.S. 364, 129 S. Ct. 2633, 174 L. Ed. 2d 354, 2009 U.S. LEXIS 4735 (2009).
55. *Id*. at 375.
56. *Ibid*.
57. *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646 (1995).
58. *Ibid*.
59. *Id*. at 665.
60. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 299, 178 P. 3d 995, 997, 2008 Wash. LEXIS 249 (2008).
61. 536 U.S. 822 (2002).
62. 440 U.S. 648 (1978). According to the *Prouse* Court, "[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Prouse* at 654.
63. *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).
64. *Board of Education v. Earls,* 536 U.S. 822, 834 (2002).
65. In the Interest of L.E., 589 S.W.3d 593, 2019 Mo. App. LEXIS 1418 (2019).
66. *Id*. at 804.
67. 489 U.S. 656 (1989).
68. *Washington v. Unified Gov't*, 847 F.3d 1192, 2017 U.S. App. LEXIS 2983 (10th Cir. 2017).
69. *Id*. at 1201.
70. See *Skinner v. Railway Labor Executives' Assn*., 489 U.S. 602 (1989).
71. *Bluestein v. DOT*, 908 F.2d 451(1990).
72. *Id*. at 458.
73. On November 19, 2001, President Bush signed the Aviation and Transportation Security Act, which established a new Transportation Security Administration under the control of the Department of Transportation. The Transportation Security Administration presently has authority for searching and screening of airline passengers and passenger property in the United States. In a few airports, companies under contract with the Transportation Security Administration conduct passenger screening. See Public Law 107–71, 107th Congress.
74. See *United States v. de los Santos Ferrer,* 999 F.2d 7, 9 (1st Cir. 1993), where passenger airport searches were characterized as being administrative searches conducted for limited and exigent purposes.
75. See *United States v. Camacho*, 728 Fed. Appx. 698 (9th Cir. 2018).
76. *MacWade v. Kelly*, 460 F.3d 260 (2nd Cir. 2006).
77. *Id*. at 264.
78. *MacWade v. Kelly*, 2005 U.S. Dist. LEXIS 39695 (S.D.N.Y. 2005). The special needs exception covers extraordinary circumstances where ordinary law enforcement use of warrants and probable cause are impractical of impossible and a court is permitted to weigh the competing interests and the Fourth Amendment in place of the intent of the Framers of the Fourth Amendment.
79. *MacWade v. Kelly*, 460 F.3d 260, 275 (2nd Cir. 2006).
80. *United States v. Kolsuz*, 890 F.3d 133, 136 (4th Cir. 2018).
81. See *United States v. Aigbekaen*, 943 F.3e 713, 2019 U.S. Ap. LEXIS 34659 (4th Cir. 2019).
82. See *Alasaad v. Mayorkas*, 988 F.3d 8 (1st Cir. 2021).

83. 473 U.S. 531 (1985).
84. See *United States v. Carrasco*, 813 F.App'x 275, 277–278 (9th Cir. 2020).
85. See *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).
86. *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973).
87. 392 U.S. 1 (1968).
88. 534 U.S. 266 (2002).
89. 50 USCS § 1801.
90. *Id*. at § 1802.
91. 50 USCS § 1805(a)(3)(A) and (B).
92. 50 USCS § 1805(c).
93. 50 USCS § 1805(f).
94. 50 USCS § 1801(e).
95. 50 USCS § 1823.
96. 50 USCS § 1824.
97. 50 USCS § 1806(d).
98. See *United States v. Mohammad*, 339 F. Supp. 3d 724, 736 (N.D. Ohio 2018).
99. *United States v. Nassif Sami Daher*, 2020 U.S. Dist. LEXIS 242252 (E.D. Mich. 2020).
100. *ACLU v. NSA*, 2007 U.S. App. LEXIS 16149, 2007 FED App. 0253P (6th Cir. 2007).
101. *Ibid*.
102. *Ibid*. Footnote 2. According to the Sixth Circuit Court of Appeals, "The State Secrets Doctrine has two applications: a rule of evidentiary privilege, see *United States v. Reynolds*, 345 U.S. 1, 10, 73 S. Ct. 528, 97 L. Ed. 727 (1953), and a rule of non-justiciability, see *Tenet v. Doe*, 544 U.S. 1, 9, 125 S. Ct. 1230, 161 L. Ed. 2d 82 (2005). The present case implicates only the rule of state secrets evidentiary privilege. The rule of non-justiciability applies when the subject matter of the lawsuit is itself a state secret, so the claim cannot survive."
103. *ACLU v. NSA*, 2007 U.S. App. LEXIS 16149, 2007 FED App. 0253P (6th Cir. 2007).
104. 50 U.S.C. *§ 1804(a)(7)(B*).
105. *United States v. Said Mohamad Rahim*, 2019 U.S. Dist. LEXIS 64011 (N.D. Tex. 2019).
106. Protect America Act of 2007, Sec. 6(c).
107. www.nytimes.com/2007/08/06/washington/06nsa.html?ei=5065&en=4e05f95a4b60ac78&ex-=1187064000&partner=MYWAY&pagewanted=print 9 (Aug. 6, 2007).

Confession and the Privilege Against Self-Incrimination 11

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Learning Objectives

1. Analyze and be able to explain the original intent possessed by the Framers of the Fifth Amendment concerning the privilege against self-incrimination.
2. Give examples of evidence that would be admissible under the Fifth Amendment and evidence that may be excluded from admission under the Fifth Amendment.
3. Detail the changes brought to the Fifth Amendment by its incorporation into the Fourteenth Amendment's due process clause.
4. Evaluate and be able to explain why non-testimonial evidence is not excluded by the Fifth Amendment's privilege against self-incrimination.
5. Be able to discriminate between situations where the privilege against self-incrimination may be asserted and where the privilege has no application.
6. Describe a hypothetical situation where an individual should successfully contend that the privilege against self-incrimination has application and should exclude evidence.
7. Describe the reasons a prosecutor may neither call a defendant to the witness stand nor make adverse comments to the jury if a defendant chooses not to testify.
8. Analyze why use immunity granted by the prosecution is coextensive with the protections of the Fifth Amendment against self-incrimination, and be able to describe the limitations of use immunity.
9. Articulate the rationale for why an immunized witness may not properly assert the privilege against self-incrimination at a trial or grand jury proceeding.
10. Be able to discuss the manner in which the Fifth Amendment privilege may be waived, and be able to explain the substance of the rights that are being given up by a waiver of this privilege.
11. Be able to explain the theory that personal motivations directed toward giving a confession do not prevent the admissibility of a confession so long as police have not overreached the individual.
12. Explain why an involuntary confession cannot be used for impeachment or other purposes at a criminal trial, but a confession received only in violation of the *Miranda* warnings may be used for impeachment.

Chapter Outline

KEY TERMS

1. Adverse prosecutorial comment
2. Blood alcohol tests
3. Due Process Clause of Fourteenth Amendment
4. Fifth Amendment privilege
5. Impeachment use of confession
6. Involuntary confession
7. Nontestimonial evidence
8. Physical compulsion
9. Right assertable against government
10. Testimonial evidence
11. Totality of the circumstances test
12. Transactional immunity
13. Use immunity
14. Voluntary confession
15. Waiver of privilege against self-incrimination

1. Introduction to the Fifth Amendment Privilege

Amendment Five

No person shall be . . . compelled in any criminal case to be a witness against himself.

The Fifth Amendment provides a guarantee that a person shall not have to offer assistance in making a conviction by becoming a witness against him- or herself, but case law has determined that an individual may have to offer nontestimonial evidence that may have the effect of assisting the government in the case against that individual. Although originally not intended to limit the states, the Fifth Amendment has been held to apply to state criminal practice through the Due Process Clause of the Fourteenth Amendment. The Fifth Amendment helps ensure reliability and truthfulness of evidence, since compelled evidence may be based on coercion and lack of free will and be motivated to remove or end coercion or torture. Since the Amendment guarantees that a person shall not have to self-incriminate, the prohibition against the use of coerced evidence helps to enforce that right not to be overreached into giving damaging evidence. As a general rule, the privilege must be asserted at the time a person wants to claim its protection. Where testimonial evidence has been obtained in violation of the Fifth Amendment, it will be excluded from use at trial, a fact that removes any police incentive to obtain such evidence in violation of the Constitution. In addition to removing physical or psychological motivations to coerce a defendant, the Fifth Amendment forces the prosecution to obtain damaging evidence from sources external to the defendant in order to obtain a conviction.

2. Original Intent and the Fifth Amendment

The Constitution provided for a national government that cured some of the shortcomings of the Articles of Confederation, but a lingering fear existed in many quarters that the national government might become too powerful. As a result, limitations and clarifications on that power resulted in the passage of the Bill of Rights that became effective in 1791. As originally contemplated by the Framers of the Bill of Rights, the Fifth Amendment privilege against self-incrimination[1] allowed a person to refuse to divulge any evidence that could assist the federal government in prosecuting that individual. It was not clear whether the privilege merely prevented words from being extracted from the individual or whether other means of obtaining information of an incriminating nature might be included within the protection. Justice Thomas suggested that the Fifth Amendment may have originally possessed a broader meaning than that currently in vogue with the Supreme Court. In his concurring opinion in *United States v. Hubbell*, he noted:

> The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The key word at issue in this case is "witness." The Court's opinion, relying on prior cases, essentially defines "witness" as a person who provides testimony, and thus restricts the Fifth Amendment's ban to only those communications "that are 'testimonial' in character." Ante at 34. None of this Court's cases, however, has undertaken an analysis of the meaning of the term at the time of the founding. A review of that period reveals substantial support for the view that the term "witness" meant a person who gives or furnishes evidence, a broader meaning than that which our case law currently ascribes to the term.
>
> 530 U.S. 27, 49–50 (2000)

Although, according to Justice Thomas, the Framers of the Fifth Amendment may have intended to include a prohibition against general production of incriminating evidence, case law and recent precedent have restricted the privilege to cover only testimonial evidence as a general rule. Since the Fifth Amendment originally applied only against the federal government, the protection against self-incrimination had application only when the federal government attempted to require an individual to give testimony involving incriminating information. As originally conceived, the Fifth Amendment failed to offer any protection to a person when a state official requested documentary or physical evidence of an incriminating nature. Prior to a 1964 case,[2] protection from self-incrimination in state courts depended upon state constitutional law, state statutory law, and state judicial interpretations of that law and was completely independent of federal law.

3. Privilege Against Self-Incrimination: Excludable Evidence

Evidence obtained in violation of the Fifth Amendment is generally excluded from affirmative use in criminal trials. Since a person need not serve as a "witness against himself," judicial construction illuminating and explaining the phrase proves crucial.

The privilege provides protection for an accused from being required to actually testify against him- or herself as a witness or otherwise give evidence that is testimonial or communicative in nature. According to the Court in *Doe v. United States:*

> [I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a "witness" against himself.
>
> *Doe v. United States*, 487 U.S. 201, 210 (1988)

A state violates the privilege against self-incrimination when it obtains evidence against a defendant through efforts that force the defendant to divulge adverse information. The privilege is violated where a state gains evidence by

> the cruel, simple expedient of compelling it from his own mouth. . . . In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will."
>
> *Miranda v. Arizona*, 384 U.S. 436, 460 (1966)

And in *Culombe v. Connecticut*, the Court suggested the proper inquiry for determining the voluntariness of a confession:

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.
>
> 367 U.S. 568, 602 (1961)

The essence of the privilege is that if a person wishes to testify, it should be due to the personal decision of the defendant, freely made and not motivated by mental or physical coercion on behalf of the government. There is a requirement that a government "which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers"[3] rather than devise a method of extracting the appropriate evidence personally from a defendant by overreaching his or her mind and will.

4. The Fourteenth Amendment Alterations

Following the Civil War, the United States adopted the Fourteenth Amendment (1868), which, among other things, required that the states grant procedural due process to all persons.[4] In a nutshell, procedural due process requires that state governments treat all individuals with fundamental fairness. The Framers of this Amendment did not envision that it might encompass most of the guarantees of the first eight amendments. Similarly, the precise extent of fundamental fairness included in due process was not delineated in the amendment, but the concept has been amplified and described more fully by court decisions subsequent to its adoption. Supreme Court decisions since the adoption of the Fourteenth Amendment have gradually incorporated most of the Bill of Rights guarantees into the due process clause of the Fourteenth Amendment. The privilege against self-incrimination was incorporated in the case of *Malloy v. Hogan* in

1964, when the Court stated, "We hold today that the Fifth Amendment's exemption from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."[5] From this point forward, the same protections against self-incrimination that court litigants had enjoyed in federal courts now existed in all state courts.

5. Required Production of Nontestimonial Evidence and the Fifth Amendment

While involuntary confessions should not be admitted in court,[6] the government may compel the production of other types of evidence that, though not testimonial, helps the prosecution gain convictions. The privilege against self-incrimination protects a defendant from being compelled to testify against him- or herself or otherwise provide the prosecution with evidence of a testimonial or communicative nature but not from being compelled by the state to produce real or physical evidence. To be testimonial, the communication must, explicitly or implicitly, relate a factual assertion or disclose similar information.

The Fifth Amendment does not insulate an individual from being forced to divulge business records when the person is a mere custodian. In *Bellis v. United States*,[7] the Court noted:

> It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. In *Boyd v. United States*, 116 U.S. 616 (1886), we held that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" would violate the Fifth Amendment privilege. *Id*. at 630; see also *id*. at 633–635; *Wilson v. United States*, 221 U.S. 361, 377 (1911).

However, in *Bellis*, the custodian of the records for a law firm could not successfully invoke a personal Fifth Amendment privilege against incrimination in common law firm records, since they were not his personal papers but collective papers of the firm and had to be divulged when requested by a federal grand jury.

In *Schmerber v. California* (Case 11.1),[8] the Court upheld the introduction of evidence of intoxication taken from a suspected alcohol-impaired driver by a doctor at the request of a police officer (see Case 8.1). The motorist contended that the use of his blood violated his Fifth Amendment privilege against self-incrimination because it effectively made him a witness against himself, but the Court rejected that argument. According to the Court, the Fifth Amendment provides protection to an accused "only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." According to *Schmerber:*

> [B]oth federal and state courts have usually held that it [Fifth Amendment privilege against self-incrimination] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular

> gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.
>
> *Schmerber v. California*, 384 U.S. at 764 (1966)

Justice Stevens noted in *United States v. Hubbell* that Justice Holmes had concluded that there existed a significant difference between using duress to compel testimony from a witness and requiring that person to engage in activity that could lead to incrimination.[9] In essence, the *Schmerber* Court held that mere physical evidence, though it may communicate information, is not considered testimonial and is not prohibited under the Fifth Amendment. As recently as 2019, the Court appeared to note with approval that forcing accused drunk drivers to undergo a blood tests does not violate their constitutional right against self-incrimination.[10]

The *Schmerber* Court was on solid ground with an earlier case, *Holt v. United States*,[11] where Justice Holmes dismissed an argument that the Fifth Amendment privilege against self-incrimination would be violated by requiring a defendant to put on an article of clothing for identification purposes. Justice Holmes noted that

> the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.
>
> 218 U.S. at 252

The wearing of clothing, while it could harm a defendant's case when used to identify the defendant, was not considered "testimonial" and thus did not constitute a violation of the Fifth Amendment. In a slightly different situation, a defendant's tattoo on his arm was considered testimonial in nature, but because had been visible to a police officer, the contents were not considered to have been compelled.[12] The name of the defendant's girlfriend was part of the tattoo that connected him to using the car, titled in her name, that matched the tattoo, in which his prohibited firearm parts were found.

In a case in which the legal theory was consistent with *Schmerber*, the Supreme Court held that the Fifth Amendment did not offer protection to a grand jury witness who had been ordered to give a voice sample for comparison purposes. In *United States v. Dionisio*,[13] a trial court mandated that Dionisio make a voice recording for use by the prosecutor in a grand jury proceeding. Dionisio refused on the ground, among others, that to offer a sample of his voice would violate his Fifth Amendment privilege against self-incrimination because the sample might be used against him in a criminal prosecution. The *Dionisio* Court rejected his Fifth Amendment argument with the conclusion that prior cases have uniformly rejected the contention that the compelled display of identifiable physical characteristics infringes on the privilege against compelled testimonial self-incrimination.

Under *Schmerber, Dionisio*, and numerous other cases, it has become clear that physical attributes such as fingerprints, weight, height, tone of speech, manner of handwriting, walking characteristics, general body stance, content of blood or other bodily fluids, and general appearance are not testimonially communicative and, as such, are

not subject to Fifth Amendment privilege self-incrimination claims. While performing a particular act may provide nontestimonial incriminating evidence, a criminal suspect may be compelled to put on a shirt, *Holt v. United States*, 218 U.S. 245 (1910); to provide a blood sample, *Schmerber*, or a handwriting example, *Gilbert v. California*, 388 U.S. 263 (1967); or to make a recording of his voice, *United States v. Wade*, 388 U.S. 218 (1967). The act of exhibiting such physical characteristics is not the same as a sworn communication by a witness that relates either express or implied assertions of fact or belief.

Consistent with case law, the prosecution may force a person to exhibit his or her body and the extent of his or her motor skills while under suspicion for driving under the influence of alcohol. In *Pennsylvania v. Muniz*,[14] police videotaped a motorist attempting to perform various diagnostic tests for intoxication and later used the video in court in an attempt to demonstrate impairment. The Court approved the introduction of portions of the recording that revealed only the physical manner in which his speech was constructed and demonstrated the defendant's lack of muscular coordination without revealing any testimonial components of those responses.

In a similar fashion, a defendant has no right to prevent a prosecutor from commenting to a jury that the defendant, while under suspicion of driving while under the influence of alcohol, refused to take a Breathalyzer test following his arrest. In *South Dakota v. Neville*, 459 U.S. 553 (1983), the trial court granted Neville's motion to suppress, and the prosecution eventually appealed to the Supreme Court of the United States. According to the Court, the admission into evidence of a defendant's refusal to submit to a blood alcohol test would not have violated Neville's Fifth Amendment privilege against self-incrimination. According to the Court, a refusal to take such a test after a police officer has lawfully requested it is not an act coerced by the officer and thus is not protected by the Fifth Amendment privilege against self-incrimination as applied to the states through the Due Process Clause of the Fourteenth Amendment.

Case 11.1 LEADING CASE BRIEF: SELF-INCRIMINATION AND PHYSICAL EVIDENCE FROM THE DEFENDANT

Schmerber v. California
Supreme Court of the United States
384 U.S. 757 (1966).

CASE FACTS:

A police officer arrested Schmerber at a hospital while he was receiving treatment for injuries suffered in an accident involving the automobile that he had been driving. At the direction of a police officer, a hospital doctor took a blood sample from petitioner's body at the hospital. The chemical analysis of his blood revealed a blood alcohol level that was indicative of intoxication. The report of his blood alcohol level was admitted in evidence at his trial. The Los Angeles Municipal Court convicted petitioner Schmerber of driving an automobile while under the influence of alcohol.

At the trial, Schmerber's attorney objected to trial court use of the analysis of the blood evidence on the ground that the blood had been withdrawn despite his refusal to consent to the test. Through counsel, Schmerber contended that the withdrawal of the blood and the acceptance of the analysis as evidence denied him the exercise of his constitutional rights against self-incrimination under the Fifth Amendment and his rights under several different provisions of the United States Constitution. The Appellate Department of the California Superior Court rejected these contentions and affirmed the conviction. The Supreme Court of the United States granted certiorari to consider the constitutional arguments offered by Mr. Schmerber.

LEGAL ISSUE:

Does the medically appropriate extraction of bodily fluids from a person against the will of the individual and the subsequent use of the evidence against that person violate the Fifth Amendment privilege against self-incrimination?

THE COURT'S RULING:

The Court determined that allowing the introduction of a defendant's blood alcohol reading in a driving under the influence case did not violate the Fifth Amendment privilege against self-incrimination because the evidence was not testimonial in nature but was proof of a physical fact.

ESSENCE OF THE COURT'S RATIONALE:

We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends. It could not be denied that in requiring petitioner to submit to the withdrawal and chemical analysis of his blood, the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. He submitted only after the police officer rejected his objection and directed the physician to proceed. The officer's direction to the physician to administer the test over petitioner's objection constituted compulsion for the purpose of the privilege. The critical question, then, is whether petitioner was thus compelled "to be a witness against himself."

* * *

It is clear that the protection of the [Fifth Amendment] privilege [against self-incrimination] reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd v. United States*, 116 U.S. 616. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak

for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.

CASE IMPORTANCE:

The *Schmerber* decision reaffirmed the concept that unless a defendant has been forced to offer testimony or evidence that is close to testimony, for proof of physical facts, even if they come from a defendant, the Fifth Amendment privilege has not been violated.

6. Assertion of the Privilege Against Self-Incrimination

A person does not expressly invoke the privilege against self-incrimination by remaining mute and saying nothing. As a general rule, the person who wants to assert the privilege must affirmatively state that he or she is relying on the privilege not to speak.[15]

The privilege against self-incrimination has been determined to benefit only real human beings and does not apply to corporations or other artificial businesses, charities, or labor entities. Where a witness offers testimony that would tend to incriminate, he or she may not retroactively assert the privilege so as to render the previously offered testimony useless; the privilege has been deemed to have been waived by conduct. The privilege is personal to the person who asserts it, and it generally cannot be asserted by one person on behalf of another. An individual who is asked or has been subpoenaed to give evidence against a different individual may not invoke the different individual's Fifth Amendment privilege to prevent giving evidence against the other person. A defendant who is awaiting sentencing may assert the privilege if called to testify against a second individual, since that evidence might adversely affect the sentence ultimately imposed.[16] Because the Fifth Amendment does not apply outside of the United States, as a general rule, an individual may not successfully invoke the privilege not to testify when that evidence might tend to incriminate the individual solely in a foreign nation.[17]

7. Privilege Against Self-Incrimination Assertable in a Variety of Contexts

While the privilege against self-incrimination is often viewed as being available only at a criminal trial, the application of the privilege is not so limited, and its assertion may properly occur in a variety of contexts. The privilege may be asserted any time a police officer asks questions of an individual, whether or not that person is in custody. A person may refuse to testify on Fifth Amendment grounds when called as a witness in a grand jury proceeding where the answers might tend to incriminate the witness. Since

legislative bodies have power to compel witness attendance, if an individual is asked a question for which the answer might be incriminating, refusal under the Fifth Amendment has been held to be appropriate. In essence, any time a government or its agents demand or request that an individual offer evidence of a testimonial nature that might either directly incriminate or indirectly lead to other evidence that would incriminate, any person may refuse to testify on Fifth Amendment grounds.[18]

8. Prosecution Comment on Defendant's Use of Fifth Amendment

When a defendant does not offer evidence but probably has such knowledge, he or she may be relying on the Fifth Amendment privilege. A failure to explain evidence or to personally present a defense cannot be rendered especially costly by allowing a prosecutor to adversely comment on the failure of the defendant to take the witness stand. To allow a prosecutor to comment on a defendant's use of the Fifth Amendment would render the privilege against self-incrimination somewhat illusory. In *Griffin v. California*,[19] the defendant chose not to testify in his capital murder trial, and the judge instructed the jury not to draw any inference of guilt or innocence from this failure. The prosecutor reminded the jury that the defendant knew things that he was not telling the jury and invited the jury to consider the failure to testify against the defendant. The Supreme Court reversed the conviction with the observation that the Fifth Amendment forbids adverse comment by the prosecution on the accused's silence and instructions from the judge concerning the silence of the accused that indicate that silence may be evidence of guilt. A prosecutor's closing argument would violate a defendant's privilege under the Fifth Amendment if the statement "was manifestly intended to be a comment on the defendant's failure to testify," or "was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."[20]

9. An Equivalent Substitute for the Fifth Amendment Privilege: Immunity

When a prosecutor determines that the importance of obtaining evidence or testimony to assist in one prosecution outweighs the loss that accrues to society when a different guilty party goes free, a grant of immunity to that potential defendant may be appropriate. In such a case, the prosecution may grant immunity and then require that person to give evidence that otherwise might tend to convict or to be a link in a chain of evidence that might have otherwise resulted in a successful prosecution of the person given immunity. In order to successfully require an individual to offer evidence that might provide a link toward a potential future conviction for that individual, the prosecution must offer some type of immunity. The level or scope of the immunity must be coextensive with the protections offered by the privilege against self-incrimination. As a general rule, use immunity is the minimal level of immunity that replaces the same

level of protection originally offered by the Fifth Amendment's privilege against self-incrimination. Black's Law Dictionary defines use immunity as "Immunity from the use of the compelled testimony (or any information derived from that testimony) in a future prosecution against the witness."[21] As Chief Justice Rehnquist noted in *Braswell v. United States*, "Testimony obtained pursuant to a grant of statutory use immunity may be used neither directly nor derivatively."[22] Use immunity means that the prosecution will not take evidence offered by a witness or potential future defendant witness and use it affirmatively against the individual in any pending or future prosecution and will not use the evidence as a link in a chain to discover additional evidence related to or derived from the original evidence. Since this level of immunity merely replaces the guarantee under the Fifth Amendment with an equal level of protection, once it is given, the prosecution may require the witness to answer questions that could otherwise be barred by the assertion of the privilege against self-incrimination.[23] A more extensive immunity, transactional immunity, may be offered by a prosecutor in most jurisdictions as an added inducement to have a reluctant witness testify. The essence of transactional immunity is that the prosecution gives up any legal right to prosecute the immunized witness for any crime that is covered by the grant of immunity so long as the witness cooperates to the full extent of any agreement with the prosecutor. A grant of use immunity may require the witness to testify at a grand jury proceeding or at a trial or several different or subsequent trials. Additionally, a failure to testify or otherwise fully cooperate according to the immunity agreement can result in it being rescinded,[24] with a prosecution to follow. Naturally, a potential defendant-witness would prefer a grant of transactional immunity as opposed to mere use immunity, but the grant of use immunity fully grants the same legal protection as is covered by the Fifth Amendment privilege against self-incrimination.

10. Waiver of the Fifth Amendment Privilege

The Fifth Amendment privilege against self-incrimination, like most constitutional rights, is a waivable right, and a waiver will be effective provided waiver has been properly accomplished. The most obvious waiver of the Fifth Amendment privilege occurs in the context of the *Miranda* warning where the individual, either orally or in writing, agrees to talk with police and understands that what he or she says may be used in a court of law. A defendant or an ordinary witness may waive the privilege by voluntarily taking the witness stand at the trial, where the witness testifies fully and is subject to cross-examination.[25] A waiver of the Fifth Amendment privilege may occur where a defendant seeks out a police officer and freely offers a confession to criminal activity, provided the defendant's waiver has been made voluntarily, knowingly, and intelligently.[26]

The concept that a waiver of the Fifth Amendment privilege must have been made "voluntarily, knowingly, and intelligently" does not mean that a defendant must understand every legal nuance and effect of the decision to waive the privilege. For example, in an older Supreme Court case, *Connecticut v. Barrett*, the arrestee indicated a willingness to talk about his crimes with police but refused to make any written statement that memorialized his words.[27] According to the Supreme Court, the *Barrett* trial court

properly held that the arrestee's decision to talk operated as a voluntary waiver of constitutional protections and that there was no evidence of threats, trickery, or other overreaching on the part of police. In another Supreme Court case, *Berghuis v. Thompkins*,[28] the homicide defendant did not waive his Fifth Amendment privilege after receiving a proper *Miranda* warning, but never said that he did not want to talk with police or that he wanted an attorney. When officers questioned him, he was mostly silent and did not offer responses to most questions, but did respond to some questions with one-word answers that were not particularly informative. When asked some three hours into the questioning, "Do you pray to God to forgive you for shooting that boy down?" and Tompkins answered, "Yes," and then became silent.[29] His answer was used against him at his murder trial despite his argument that being silent for periods of time indicated that he had invoked his right to be silent and his privilege against self-incrimination. Whether a subject has waived the Fifth Amendment privilege will generally be a question of fact to be resolved during pretrial legal proceedings and can be subject to appellate action if a conviction occurs.

In determining whether a defendant has properly waived the Fifth Amendment privilege against self-incrimination and has voluntarily given a confession, courts often evaluate the voluntariness of the statement by the use of a test that considers the totality of the circumstances.[30] When deciding the admissibility of a confession, courts often consider the subject's age, education, and level of sobriety; the circumstances of the *Miranda* warning; the subject's prior experience with police and the criminal justice system; the length and circumstances of any interrogation; threats made by officials, if any; promises made; and any other factors that could produce an involuntary confession.[31]

In one case involving an allegation of the use of an involuntary confession, the defendant had been convicted of aggravated arson and one count of engaging in a pattern of corrupt activity based on his confession and other evidence in the case.[32] Following the defendant's arrest and being advised of his rights under *Miranda*, the defendant agreed to talk with police and made inculpatory statements that were admitted against him at his trial. The Court of Appeals noted that the state's top court had declared that in making an evaluation of an alleged involuntary confession, courts should consider the totality of the circumstances, including the age; any past criminal experience of the defendant; the length, intensity, and frequency of the interrogations; and the existence of any mistreatment or deprivation of necessities, and should consider the existence of any threats or inducements made by police. In this case, the first interview occurred at the police station with the defendant in handcuffs, but he made no complaint of any discomfort until near the end of the interview. When he asked to use the restroom, it was made available within one minute of the request. The court did not find that this interview was coercive, and so any evidence produced was properly admissible. A second interview occurred at the request of the defendant, and he made no allegation of any physical deprivation or discomfort during the questioning. The interrogator did tell the defendant that the prosecutor would offer more favorable treatment if he made a confession and that the judge in the case was generally a light sentencer because the judge didn't believe that prison sentences helped rehabilitation. It was during this encounter that one of the officers threatened repeatedly to arrest the defendant's girlfriend for obstruction of justice because he felt she was lying about the defendant's presence at some of the

crimes involving arson. It was also indicated that if the girlfriend were arrested, their child would be taken in by a children's protective services organization. Ohio case law indicates that the threats to arrest members of the suspect's family may result in a confession being ruled as involuntary, but in this case, that threat did not cause the defendant to change his story at all or to otherwise additionally incriminate himself. At one point, the interrogator indicated that the arsons might be considered misdemeanors because of the value of the property burned, but this was erroneous legal information. State court interpretations have also indicated that an interrogator's misstatement of law could render a confession involuntary. In this case, the defendant was aware that arson was a felony, and even cited the state statute to the officer, so this was not a factor that would have made his confession involuntary or contributed to its involuntary nature. In ruling that the confessions were properly taken, the reviewing court indicated that the defendant was well acquainted with the legal system and the law and was not uncomfortable during the interrogations. In addition, he had received no actual threat or any physical deprivations and did not appear to be intimidated by the length of the frequency of the interrogation/interviews, one of which he requested. The reviewing court held that the confessions were not involuntarily extracted and that the evidence was properly admitted against the defendant.[33]

Waiver of the Fifth Amendment privilege against self-incrimination in one context may not constitute a waiver of the privilege for all jurisdictions and for all potential causes of action. In a Minnesota case, a witness pled guilty to murder and testified against another defendant, waiving her Fifth Amendment privilege at the trial. When the state wanted her to testify against a different defendant in the same criminal case, she refused, and the trial court held her in contempt of court. The judge took the position that the earlier testimony indicated a waiver of her privilege concerning the case and her involvement in it. The refusing witness feared a possibility of a federal prosecution and based her refusal to testify on the ground that she had remaining concerns about criminal liability. The court of appeal agreed that where the courts of one jurisdiction attempt to compel testimony from a witness that could be used by a different jurisdiction in a subsequent proceeding, the witness possesses a Fifth Amendment privilege that can be asserted, even if it has been waived in an earlier proceeding.[34]

11. Confession Practice Prior to the Warren Court Revolution

In an old case in 1936 involving state racial discrimination and brutality, *Brown v. Mississippi*,[35] the Court determined that brutal beatings directed and conducted by a state cannot be used to coerce a confession from a defendant without violating the defendant's right to due process of law under the Fourteenth Amendment. In *Brown*, the suspects were subjected to extensive physical torture, including hanging and repeated whipping, to the point that they made involuntary confessions to law enforcement officials. Since the free will of the defendants had been broken by pain and torture by local police, there were two reasons not to admit their confessions. First of all, no one could be sure that the confessions were true and accurate, since the defendants had been coerced into

offering them; second, fundamental fairness under the due process clause of the Fourteenth Amendment prohibited the use of the confessions due to the methods used to extract them. The lesson of *Brown* suggested that where the defendant's free exercise of discretion in giving a confession has been eliminated, the resulting confession, whether truthful or not, cannot be used against the defendant. Following *Brown*, in any state court, confessions extracted from a defendant, even if truthful, should not be introduced in evidence, since the process of extraction failed to comport with the fundamental fairness required under due process of law. While *Brown* was not decided on Fifth Amendment self-incrimination grounds because the Amendment had not then been deemed to apply to state government actions, the basis for excluding the use of coerced confessions can be traced to the rationale behind the privilege against self-incrimination. Fundamental fairness cannot allow such forced and involuntary confessions into court.

Demonstrative of the *Brown* due process principle prohibiting the use of involuntary confessions is the case of *Payne v. Arkansas*, 356 U.S. 560 (1958), where a retarded man had been convicted in an Arkansas state court of first-degree murder. Over his objection at his trial, the prosecution introduced a confession, which the defendant alleged had been improperly taken. He had been arrested and placed in a cell for two days without access to friends, family, or legal counsel; he had been given very little food during a forty-hour period; and a mob had gathered outside the jail. The defendant confessed after being told that the chief of police would try to keep the mob from coming and getting him if he would tell the police the whole story. Several police officers entered the room with a court reporter, and several local businessmen were present when the defendant gave his "confession."

According to the *Payne* Court, the use in a state criminal trial of a defendant's confession obtained by coercion, whether physical or mental, has been forbidden under decisions interpreting the Fourteenth Amendment. The confession was motivated by the defendant's fear that a mob might violently end his life and that law enforcement might do little or nothing to prevent it unless he cooperated by offering an acceptable confession. The Court found that torture of either the mind or body can affect free will, since the will is influenced as much by fear as by force. Upon a finding of involuntariness of the confession, the Supreme Court reversed the conviction on due process grounds.

In determining whether a confession has been given freely and voluntarily, judges make the decision; the decision cannot be left to a jury to determine,[36] as this involves a question of law. In evaluating whether a confession has been voluntarily offered, courts typically look to see if the defendant's will was overborne by the totality of the circumstances. Factors to consider include both the characteristics of the accused and the details of the interrogation under a totality of the circumstances test. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Some of the factors the Court has taken into account in the past have included the youth of the accused, *Haley v. Ohio*, 332 U.S. 596 (1948); lack of education, *Payne v. Arkansas*, 356 U.S. 560 (1958); low intelligence, *Fikes v. Alabama*, 352 U.S. 191 (1957); the lack of any advice to the accused regarding his constitutional rights, *Davis v. North Carolina*, 384 U.S. 737 (1966); the length of detention, *Chambers v. Florida*, 309 U.S. 227 (1940); the repeated and prolonged nature of the questioning, *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); and the use of physical punishment such as deprivation of food or sleep, *Reck v. Pate*, 367 U.S. 433 (1961). The

Court in *Culombe v. Connecticut*, 367 U.S. 568 (1961), phrased a test for voluntariness of a confession as follows:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.[37]

During the years in which the Court adjudicated coerced confession cases prior to determining that the self-incrimination clause of the Fifth Amendment applied to the states, due process proved the constitutional vehicle of choice. As court membership changed over the years and as novel constitutional changes became accepted, the court moved toward incorporating various parts of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. In various cases, arguments were made that suggested that due process must include an exclusion of evidence if illegally seized, a prohibition against double jeopardy, a right to a grand jury indictment in a serious state case, the right to counsel, freedom from excessive fines, and a prohibition against cruel and unusual punishments, among others. Some rights arguably might be crucial to criminal justice, while others might be desirable but not absolutely essential. Over the years, the Court evaluated those rights and incorporated most, though not all, of the rights from the first eight amendments into the Fourteenth Amendment and made them applicable to the states.

12. Evolution of Interrogation and Confession under the Warren Court

Following *Brown* and *Payne*, the Court decided *Malloy v. Hogan*,[38] where it held that the privilege against self-incrimination contained within the Fifth Amendment should provide protection against a state that was seeking to force an individual to give criminal evidence against himself. *Malloy* incorporated the guarantees against self-incrimination mentioned in the Fifth Amendment into the Due Process Clause of the Fourteenth Amendment, which clearly applied to the states. In *Malloy*, the previously convicted defendant had been called to testify before a referee concerning his gambling and other activities, which he refused to do on grounds that the answers might tend to incriminate him. Since the Fifth Amendment offered him no protection because it only applied to limit the federal government at that time, he was committed to jail until he would agree to testify. Following the denial of his state court application for a writ of habeas corpus, the case eventually reached the Supreme Court. According to the holding of the *Malloy* Court, "[T]he Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination."[39] The Due Process Clause operated as if the federal Fifth Amendment privilege against self-incrimination had been written within the words "due process."

The *Malloy* Court determined that in enforcing the concept of due process in state cases, the Fifth Amendment privilege against self-incrimination must be read as part and

parcel of the Fourteenth Amendment's guarantee of due process. Therefore, in meeting the constitutional requirement of voluntariness under a "totality of the circumstances" test, an admissible confession must be the result of the defendant's free and voluntary decision, unfettered by coercion, whether physical or mental. Factors that courts consider in making a determination concerning whether a particular confession has been properly offered involve the treatment of the individual by law enforcement officials. The length of the time of interrogation and manner of questioning, including rest periods for food, personal essentials, and sleep, are considered in deciding a question of the voluntariness of a confession. The number of interrogators who have repeatedly "worked" on the defendant in an effort to "whipsaw" him or her into an untenable position must also be weighed. Age, level of education, intelligence, and emotional health are additional elements that must be considered in specific cases to determine whether a particular individual has made a proper confession.

13. Modern Evolution of Interrogation and Confession

The process of defining the scope of the privilege against self-incrimination involved numerous court cases and did not proceed in a completely orderly manner. Clearly, any concept of due process must include a prohibition of physical and mental torture designed to break a person's will to produce a coerced confession. In a case in which the plaintiff claimed a violation of civil rights based on an alleged Fifth Amendment violation, the Court determined that where an officer, in the absence of *Miranda* warnings, was merely asking questions of a severely injured suspect while he was receiving hospital treatment, such conduct did not constitute a violation of the Fifth Amendment. The suspect was never prosecuted, and his incriminating statements were never used against him. There was no evidence that the officer was trying to coerce the suspect. According to the Court, the suspect "was no more compelled to be a witness against himself than an immunized witness is forced to testify on pain of contempt."[40] In addition, jurisprudence has determined that the privilege against self-incrimination is not violated by the use of many traditional identification procedures, such as being forced to stand in a lineup; to wear a particular piece of clothing; to utter the words allegedly spoken by the criminal; to make a voice recording; and to give blood, hair, or fingernail samples.[41] Although such identification procedures may communicate potentially incriminating evidence, courts have determined that the processes are not communicative in a testimonial nature and therefore are not regulated or prohibited by the Fifth Amendment privilege.

14. Personal Motivations for Confession Irrelevant

There are many reasons a person might want to waive rights offered by the privilege against self-incrimination. Some persons figure that the police have sufficient damaging information that telling the whole story probably makes little difference. Other persons might simply feel the need to "come clean" and get the facts out. Family or religious

pressures and concerns may induce others to confess. Some individuals might confess to implicate a second different person for whom the confessor wants to create legal problems or to otherwise "get even" by implicating the second person. Protecting other persons who might appear to be part of a criminal scheme but who are not may induce a suspect to confess. A plea bargain with a prosecutor may induce an arrestee to confess, and it may be part of the agreement with the prosecutor. For whatever reason a person desires to confess, under current interpretation, if a suspect or an arrestee decides to make a confession, internal personal motivations are generally not factors to take into consideration where the law enforcement personnel have not improperly created the stimulus to confess. In *Colorado v. Connelly* (11.2),[42] the defendant approached a police officer and confessed to a homicide. While the confession appeared to be the result of a personal decision, an existing mental illness created the motivation to confess.[43] According to the defendant's doctor, the mental disease produced "voices" that told the defendant either to make a confession or to commit suicide. Connelly may not have possessed an entirely free will regarding whether to make a confession and may have confessed due to personal internal motivations. Since the police dealt with him properly, warned him under *Miranda*, and did not otherwise motivate him to offer a confession, whatever personal motivation Connelly may have possessed had no effect on police conduct. *Connelly* stands for the proposition that so long as police do not illegally coerce physically or otherwise mentally motivate an individual to confess, the confession will not be excludable under grounds of a Fifth Amendment violation. As the *Connelly* Court noted, "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."[44]

Case 11.2 LEADING CASE BRIEF: PERSONAL MOTIVATIONS DO NOT PRODUCE INVOLUNTARY CONFESSIONS

Colorado v. Connelly
Supreme Court of the United States
479 U.S. 157 (1986).

CASE FACTS:

Connelly approached a uniformed off-duty Denver police officer, Patrick Anderson, and stated that he had committed a murder and indicated a desire to discuss the situation. The officer advised Connelly of his right under *Miranda* to remain silent and informed him that anything he said could be used against him in court. Connelly indicated that he had come all the way from Boston to confess to the murder and that he understood his rights and wanted to talk. When Officer Anderson asked if Connelly had been drinking or taking drugs, Mr. Connelly replied in the negative but added that he had previously been admitted as a mental patient in several hospitals.

Subsequent to a second warning of the right to remain silent and the arrival of a homicide detective, the officer warned Connelly for the third time. Connelly indicated that he was the person responsible for the murder of Mary Ann Junta, a young girl who had been

killed in Denver. Connelly was taken to headquarters, told his story to another officer, and led the police to the location of the homicide. During the entire encounter with officers and during the confessions, Connelly appeared clear headed and normal in all respects.

Connelly began giving confused answers during an interview with a public defender. He noted that "voices" had told him to return to Denver and the "voices" had directed his confession. Convinced that the confessions were involuntary due to the defendant's mental state, the public defender filed a motion to suppress the confessions as not being freely and voluntarily given.

At a motion to suppress hearing, a psychiatrist testified that Connelly suffered from schizophrenia and was in a psychotic state the day prior to the confession. Such a diagnosis indicated that the disease interfered with respondent's volitional abilities and impaired his capacity to make free and rational choices.

The trial court ordered that the statements to police be suppressed because they had been given involuntarily. The state Supreme Court agreed and held that the correct test for admissibility was "whether the statements are 'the product of a rational intellect and a free will.'" According to the court, the capacity for proper judgment and free choice may be overcome by mental illness as well as other factors. The Supreme Court of the United States granted certiorari.

LEGAL ISSUE:

Where a person with a history of mental illness confesses to a police officer following an appropriate warning of his Fifth Amendment privilege against self-incrimination, must the confession be suppressed as involuntarily, given the police have not coerced the individual in any way?

THE COURT'S RULING:

The Court reversed the top state court and ruled that a confession that has not been motivated by official police conduct, regardless of the defendant's internal motivations, does not violate the Fifth Amendment privilege against self-incrimination even if the confession was not the product of a rational intellect and free will.

ESSENCE OF THE COURT'S RATIONALE:

* * *

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." Just last Term, in *Miller v. Fenton*, 474 U.S. 104 (1985), we held that by virtue of the Due Process Clause

> certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.

Indeed, coercive government misconduct was the catalyst for this Court's seminal confession case, *Brown v. Mississippi*, 297 U.S. 278 (1936). In that case, police officers extracted

confessions from the accused through brutal torture. The Court had little difficulty concluding that even though the Fifth Amendment did not at that time apply to the States, the actions of the police were "revolting to the sense of justice." *Id*., at 286. The Court has retained this due process focus, even after holding, in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the Fifth Amendment privilege against compulsory self-incrimination applies to the States.

Thus the cases considered by this Court over the 50 years since *Brown v. Mississippi* have focused upon the crucial element of police overreaching. While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct. Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.

* * *

We have previously cautioned against expanding "currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries . . ." *Lego v. Twomey*, 404 U.S. 477, 488–489 (1972). We abide by that counsel now. "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence," *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986), and while we have previously held that exclusion of evidence may be necessary to protect constitutional guarantees, both the necessity for the collateral inquiry and the exclusion of evidence deflect a criminal trial from its basic purpose. Respondent would now have us require sweeping inquiries into the state of mind of a criminal defendant who has confessed, inquiries quite divorced from any coercion brought to bear on the defendant by the State. We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area.

CASE IMPORTANCE:

The Supreme Court of the United States reaffirmed the principle under the Fifth and Fourteenth Amendments that for a confession to have been involuntarily taken, government action must have improperly coerced or otherwise wrongfully influenced a defendant to confess. Private motivations to confess do not create official coerciveness that would suppress a subject's confession.

Consistent with personal reasons for confessing being irrelevant, in recent Pennsylvania case[45] involving conviction for several robberies, one of the individuals phoned the FBI in Delaware and asked to speak with an agent concerning his criminal activity. An appointment was made to interview the subject with a Philadelphia police officer and an FBI agent. Subsequent to receiving *Miranda* warnings, the future defendant discussed his criminal participation in three Philadelphia armed robberies. Police officers indicated that the defendant appeared to have no mental health issues, did not appear to be under

the influence of drugs, and could understand the questions that they asked. A neurologist who testified on behalf of the defendant indicated that she did not know why the defendant initiated the contact and did not know his motivations for incriminating himself. The reviewing court did not determine the defendant's motivations but accepted the trial court's determination that the videotape recording of the confession indicated that it was clear that the defendant knowingly, intelligently, and voluntarily made his confession to the police. In affirming the conviction, the reviewing court followed the *Connelly* rationale and was not concerned about what motivated the defendant to confess so long as the motivation was not based on any illegal conduct by police.

15. Involuntary Confession Not Available for Proof of Guilt

An involuntary confession is not admissible against a defendant in a state court by virtue of the Due Process Clause of the Fourteenth Amendment.[46] Similarly, an involuntary confession should be excluded from a federal criminal trial based on the Fifth Amendment's Due Process Clause. To determine whether a confession has been voluntarily offered or involuntarily extracted, courts must examine the totality of the circumstances. A trial court might consider the physical condition under which an arrestee has been held; the age of the defendant; whether the defendant has seen friends or family; and whether the arrestee consulted with an attorney and received sufficient sleep, food, water, and access to toilet facilities. It would be essential to determine whether threats of harm have been made and whether physical harm has occurred to the arrestee. Upon the evaluation of the factors under the totality of the circumstances test, a trial judge should render a ruling concerning the admissibility of the confession.

If the evidence shows that a confession has been made freely; voluntarily; and without duress, compulsion, or coercion, it should be admitted against the defendant. Where a court makes a determination that a confession has been involuntarily taken, the court should refuse to allow the introduction of that confession in evidence. From an appellate perspective, once an involuntary confession has been admitted for consideration as evidence in a trial court, analysis under the harmless error rule determines the resolution of the appeal. Under this standard, if an appellate court determines that the use of the involuntary confession had no effect on the outcome of the case, the resulting conviction will not be disturbed. On the other hand, if an appellate court cannot say that, beyond a reasonable doubt, the admission of the involuntary confession had no effect on the outcome, then the criminal case should be reversed.[47]

In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the prosecution used the defendant's confession against him in a murder prosecution (see Case 11.3). The defendant was serving time in a federal prison but was having a rough time of it because it was rumored among the other prisoners that he was a child murderer. Another federal prisoner, working with police, offered to protect Fulminante if he could hear the whole story about the killing of the child. In exchange for security within prison, Fulminante confessed to the government's agent and subsequently to the government agent's wife. The state prosecutor used the prison confession against Fulminante in a successful state murder

prosecution. On appeal, the Supreme Court reversed the conviction since the coerced confession should not have been introduced in court because the manner in which it was obtained violated the Due Process Clause of the Fourteenth Amendment, and the Court held that the harmless error standard had not been met.

Case 11.3 LEADING CASE BRIEF: POLICED COERCED CONFESSIONS ARE INADMISSIBLE FOR ANY PURPOSE

Arizona v. Fulminante
Supreme Court of the United States
499 U.S. 279 (1991).

CASE FACTS:

After Fulminante's eleven-year-old stepdaughter was murdered in Arizona, he emerged as a prime suspect in her murder due to a series of inconsistent statements he made to police and to the effect of other evidence. Even when the victim's body was discovered, police remained unable to develop sufficient evidence to successfully prosecute Mr. Fulminante for the homicide of his stepdaughter. Later, a federal court convicted Fulminante on an unrelated crime, and he served time in a federal correctional facility. During this incarceration, some inmates began to give him a rough time because of the rumor that he was a child murderer and rapist/molester. Sarivola, an inmate and a former police officer working undercover for the Federal Bureau of Investigation, pretended to befriend Fulminante and offered "protection" from other inmates on the condition that Fulminante tell Sarivola the complete story of the child killing. After Fulminante admitted his sexual assault of the victim, he confessed to murder and then related to Sarivola significant details concerning the girl's death. Following Fulminante's release from prison, for unknown reasons, he repeated the substance of his original confession to Sarivola's future wife, Donna. Both this confession to the girl's murder and the earlier prison confession were introduced at Fulminante's subsequent trial for the murder of his stepdaughter. The prosecution obtained a capital conviction and the death penalty for Fulminante. On appeal, Fulminante contended that the prison confession was involuntarily obtained by a government agent and should not have been introduced against him at trial.

LEGAL ISSUE:

Where a confession has been illegally coerced from a suspect by a police operative in violation of the Fifth Amendment and admitted in evidence against the accused, on appellate review, should courts apply the harmless error analysis concerning the admissibility of the confession?

THE COURT'S RULING:

The Court determined that the prison confession had been extracted in violation of the Fifth Amendment's self-incrimination provision and should not have been admitted at the murder trial, and since the Court could not determine whether the admission of the first confession had no effect on the verdict, a new trial resulted.

ESSENCE OF THE COURT'S RATIONALE:

Although the question is a close one, we agree with the Arizona Supreme Court's conclusion that Fulminante's confession was coerced. The Arizona Supreme Court found a credible threat of physical violence unless Fulminante confessed. Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient.

* * *

The Court has repeatedly stressed that the view that the admission of a coerced confession can be harmless error because of the other evidence to support the verdict is "an impermissible doctrine," *Lynumn v. Illinois*, 372 U.S. 528, 537 (1963); for "the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."

* * *

[S]ome coerced confessions may be untrustworthy. *Jackson v. Denno*, 378 U.S., at 385–386; *Spano v. New York*, 360 U.S., at 320. Consequently, admission of coerced confession may distort the truth-seeking function of the trial upon which the majority focuses. More importantly, however, the use of coerced confessions, "whether true or false," is forbidden because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth, *Rogers v. Richmond*, 365 U.S., at 540–541.

* * *

[On the merits, the Supreme Court determined that the burden of demonstrating that the admission of the prison confession rested with the prosecution and that it had not proved beyond a reasonable doubt that the admission of the first confession had no influence on the jury's verdict. The Court upheld the ordering of a new trial to Fulminante.]

CASE IMPORTANCE:

Fulminante determined that the issue of whether a new trial must be granted when a coerced confession has been improperly admitted against a defendant turns on whether the erroneous admission of the confession had any effect on the outcome of the trial. The case reinforced the concept that coerced confessions taken in violation of the Fifth Amendment as applied to the states through the due process clause of the Fourteenth Amendment cannot be admitted against a defendant for any purpose.

In *Fulminante*, the coercion involved realistic threats of future physical harm, while some cases involve actual physical harm that occurred during police custody. In a recent Illinois case,[48] a defendant based his appeal partly upon physical abuse perpetrated by some Chicago police officers that resulted in his confession. At the point of his arrest, he

had been punched in the face and thrown against the wall, with a police firearm placed at his head. Police also kicked him in the groin and, while he was thus incapacitated, kicked him twice in the ribs and placed a plastic bag over his head until he could not breathe. An apartment neighbor, who had been awakened by the noise and sounds of thuds and voices, corroborated many of the facts by his trial testimony. Upon the defendant's arrival at the station, he was threatened with death if he did not tell the officers what they wanted to know. Apparently no one informed him of his constitutional rights under *Miranda*, and he eventually gave an inculpatory statement and signed a typed version of it, even though he had only been educated to the eighth grade. Police officers denied such conduct, but other witnesses refuted police claims. In addition, a reviewing body, the Chicago Torture Inquiry and Relief Commission (TIRC), an official group tasked with investigating police brutality, interviewed some family members involved in this case. Several police officers took the Fifth Amendment and refused to testify under oath to the TIRC concerning their involvement with the defendant in this case. The reviewing court noted that the use of a defendant's physically coerced confession as substantive evidence is never harmless error, and the reviewing court reversed the defendant's murder conviction.[49]

16. Involuntary Confession Not Available for Impeachment

An involuntary confession, while illegally obtained, cannot be used for impeachment purposes. "The fifth amendment is typically violated when a coerced confession is introduced at trial, whether substantively or for purposes of impeachment."[50] Assume that a defendant has given a confession that has been determined to have been obtained by virtue of physical or mental coercion. There is no way to discern whether the coerced confession possessed any reliability or truth. In addition, there is also a desire that the police must obey the law while enforcing the law and that our society and culture might well be undermined as much from illegal police investigatory tools as from criminals themselves.[51] We might exclude an illegally obtained confession from the case-in-chief of the prosecution on federal constitutional grounds, but we also would have to exclude it from use as impeachment evidence because we have no way of determining its truthfulness. A fundamental principle of the Constitution and of criminal procedure is that a confession must have been taken voluntarily or it is inadmissible for any purpose.[52] A confession obtained in violation of the Constitution stands on different grounds than one taken after a defective *Miranda* warning, since the confession following *Miranda* may well be truthful but inadmissible only on *Miranda* grounds, and a coerced confession may not be true.

17. Violation of *Miranda*: Use of Confession for Impeachment Purposes

The Fifth Amendment privilege against self-incrimination cannot be fully understood without reference to the landmark case *Miranda v. Arizona*.[53] In substance, the Court in *Miranda* held that when a person is in law enforcement custody and an officer

intends to conduct any interrogation, the arrestee must be told of the right to speak with counsel prior to questioning, that there exists no requirement that the individual speak with the officer, and that anything the person does say may be used against him or her in a court of law. If the dictates of *Miranda* are not met, the evidence thereby obtained will not be admissible in court for purposes of proving guilt. The exclusion is virtually absolute despite the strong chance that any statement offered was given without violation of the Fifth Amendment privilege against self-incrimination. As the *Miranda* Court noted, the warnings are required and a waiver of rights necessary as a prerequisite to the admission of any statement made by a person in custody. The *Miranda* prohibition does not depend on proof of a Fifth Amendment violation; the evidence is excluded because of the chance that the statement was not voluntarily offered by the arrestee. It is quite possible that an arrestee who has not properly received the *Miranda* warnings may offer an inculpatory statement that is voluntarily given in the English language sense but that still violates the principles of *Miranda*.

Where a confession has been taken in violation of *Miranda* but not under duress or coercion, the confession cannot be admitted for substantive proof of guilt but may be used for impeachment purposes,[54] so long as there is no allegation of involuntariness. Impeachment use of a "bad" *Miranda* confession may be admissible in a case where a defendant has taken the witness stand and offered a story that is materially inconsistent from the original. The confession presumably will offer accurate evidence, since it has been given by the subject's free decision and is excludable from the prosecution's case only due to the *Miranda* violation. If impeachment use of voluntary confessions taken in violation of *Miranda* were not permitted, the shield provided by *Miranda* would be turned into an ability to lie without any sanction on the defendant.[55] In such a case, the defendant would possess little worry that earlier contrary evidence from his or her own mouth might be used to impeach.

In *Harris v. New York*, the defendant had been caught selling heroin and made statements to the police that were taken in violation of the principles of *Miranda*. During the prosecution's part of the case, it did not attempt to use the defendant's initial statements as substantive proof of guilt, but the defendant took the witness stand in his defense and denied selling heroin to an undercover agent on the day in question, and the police knew he was being untruthful. The trial judge allowed statements that had been taken in violation of *Miranda* to be used for impeachment purposes. The judge instructed the jury that they could consider the defendant's earlier *Miranda*-violation statements in which the defendant admitted possession of the drugs only for the purposes of impeachment and not for substantive proof of guilt. The Supreme Court noted that, "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements."[56]

In a recent application of the principles of *Harris*, the Supreme Court of Utah considered a case[57] where the arrested driver of the getaway car in a drug deal spoke to police and admitted his involvement. During the trial, the defendant admitted that he knew what was going to happen during the drug deal when he and several of his

friends tried to steal drugs from a dealer. Once in custody, and before the police finished reading the *Miranda* warnings to the defendant, he indicated that he did not want to talk to the police about answering any questions, but police continued to question him for several hours. He made many incriminating statements that indicated his substantive involvement in the drug deal, robbery, kidnapping, and other crimes. The trial court rejected any contention that his answers were coerced, even though the *Miranda* violation was one factor in his favor involving alleged coercion. In pretrial proceedings, the prosecution agreed not to use the statements taken in violation of *Miranda* during its case-in-chief but indicated that it would use them if he took the witness stand and denied the truth by telling a different story. The trial judge indicated that impeachment use could be made of the statements taken in violation of the *Miranda* warnings, so the defendant never testified in his own defense. He appealed on the ground that the judge's ruling kept him from testifying. The Supreme Court of Utah, in affirming the convictions, ruled that impeachment use would have been appropriate if the defendant had taken the witness stand and testified differently from the story he told police.[58]

18. Summary

The Fifth Amendment provides that a person shall not have to offer evidence that would help a prosecutor gain a conviction against the same person or to otherwise give testimonial evidence that could tend to incriminate that individual. The same guarantee extends to state and local criminal prosecutions. Courts exclude evidence obtained through coercion or torture from introduction against the person from whom it was extracted. The essence of the privilege is that if a person wishes to testify, it should be due to the personal decision of the defendant or of a witness whose testimony might tend to incriminate the witness and that the decision has been made freely and not motivated by mental or physical coercion on behalf of the prosecutor.

The assertion of a Fifth Amendment privilege is generally available at any time in any sort of proceeding and carries protection beyond criminal tribunals. As a general rule, the prosecutor may not emphasize a defendant's assertion of the privilege during a criminal trial. Use immunity gives a witness the same protection as the Fifth Amendment, so a prosecutor may give immunity to a witness that the prosecutor wants to testify against a defendant. Any witness or defendant may waive the protections of the Fifth Amendment and agree to testify in a criminal or other proceeding.

Police are required to offer warnings containing information about the Fifth Amendment whenever they have a person in custody and desire to interrogate that individual, but the Fifth Amendment privilege does not extend to preventing a person from using it to refuse to participate in an in-person lineup or other identification procedure. A confession taken in violation of the Miranda warnings may be used for impeachment purposes in some situations. However, when an interrogation violates the Fifth Amendment producing an involuntary confession, such a confession cannot be used to prove guilt or for impeachment purposes.

REVIEW EXERCISES AND QUESTIONS

1. In what type of context is the Fifth Amendment privilege against self-incrimination assertable? Only in criminal trials? In other contexts?
2. In a criminal case, the defendant determined that it would be in his best interests that he not give testimony during the defense portion of the trial. Obviously, a defendant knows some information that is not possessed by the prosecutor. May the prosecutor argue to the jury that the defendant has information that he has refused to share with the trial jury? Why or why not?
3 The prosecutor may give immunity to a witness whose testimony would otherwise subject the witness to potential criminal prosecution. Why is the granting of immunity of sufficient importance and effect that the prosecutor may force the witness to offer incriminating information at a criminal trial or at a grand jury proceeding?
4. If the prosecution alleges that a defendant has waived her privilege against self-incrimination, what are some of the factors that a judge might properly consider to make a determination concerning a waiver?
5. Consider a situation where a mentally unstable individual sought out police to confess to a homicide. The officer did not question the individual but merely listened to the story. The decision to confess to police appeared to have been motivated by some mental problems coupled with a recent religious experience. Once the individual consulted with a court-appointed attorney, the defense lawyer wanted the confession suppressed from trial use. Should such a confession be suppressed? Why or why not?

1. How Would You Decide?

In the Court of Appeals of New Mexico.

A New Mexico trial court convicted defendant Costillo of twenty-one counts of criminal sexual penetration of a minor (CPSM), among other crimes. The defendant lived in the same household as the child/victim and was married to the victim's grandmother. The complaining child and her mother alleged that defendant Costillo repeatedly raped R.S. from August one year to April of the next and threatened to harm the child R.S. or her brother if she complained to anyone. The child, R.S., first told her mother of the sexual abuse in 2015, and six months later, both reported it to police. A sheriff's deputy conducted a voluntary and noncustodial interview of the defendant before any charges were filed. At the start of the investigation, a detective interviewed Costillo at the local sheriff's office, and the clear implication was that the detective Costillo had sexually abused the minor, R.S. Despite the setting, and consistent with the non-custodial nature of the interview, Costillo remained silent about anything substantive, clearly declined to answer questions, and asked several times to end the interview. On appeal, defendant Costillo contended that at his later trial, the prosecutor impermissibly commented on his invocation of his Fifth Amendment privilege against self-incrimination and the right to remain silent during his voluntary prearrest interview with police. Twice during

his opening statement, the prosecutor emphasized the defendant's failure to deny his involvement in R.S.'s sexual abuse during his interview with the detective, informing the jury that defendant Costillo did not deny the allegations even one time to the detective. Later in the opening statement, the prosecutor told the jury that the defendant does not deny the allegations. The general rule is that a person's right to silence that has been invoked may not be used against that individual, except in rare circumstances recognized by case law, usually where it has not clearly been invoked. See *Salinas v. Texas*, 570 U.S. 178 (2013).

How would you rule on the defendant's argument that the prosecutor failed to respect the defendant's Fifth Amendment privilege against self-incrimination by the prosecutor's highlighting the fact that the defendant never once denied the allegations as he met with the detective?

The Court's Holding:

* * *

C. The Prosecutor Impermissibly Commented on Defendant's Silence

We next consider whether—under existing precedent and the prohibition we announce today—the prosecutor's questions to Detective Tallman and Defendant [Costillo] and statements during the State's opening and closing remarks constituted improper commentary on Defendant's silence. In so doing, we consider "whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the accused's exercise of his or her right to remain silent." [*State v.*] *DeGraff*, 2006-NMSC-011, ¶ 8 (internal quotation marks and citation omitted).

As stated already, the prosecutor directly exploited Defendant's refusal to answer Detective Tallman's questions throughout the proceedings. Twice during his opening statement, the prosecutor noted Defendant's failure to deny his involvement in R.S.'s sexual abuse during the interview with Detective Tallman, informing the jury that Defendant "d[idn]'t deny it once, not once," and a short time later, reminding them again that Defendant "[d]oesn't deny [the allegations] just once." During direct examination of Detective Tallman, the prosecutor introduced and played the forty-minute taped interview of Defendant in which he invoked his right to remain silent. Then when asked, "Did [Defendant] give any reasons why he would be falsely accused of such a heinous crime?" Detective Tallman responded, "Not one." And when cross-examining Defendant regarding his conversation with Detective Tallman, the prosecutor directly asked: "[W]hy didn't you profess your innocence just like you did to the jury?" Perhaps most illustrative of the prosecutor's mindset was his suggestion during closing argument that Defendant, if innocent, should have professed his innocence during the interview. The prosecutor suggested to the jury that they put themselves in the position of Defendant, arguing:

> When confronted . . . you're gonna wonder why these accusations are coming if you're really innocent. You're gonna be like, 'wow, that's really crazy that this little girl would even come up with these schemes.' But the first thing you'd want to do is profess your innocence. And you didn't get any of that.

The natural and necessary impact upon the jury of each of the prosecutor's statements, especially taken together, was to prompt the jury to wonder what Defendant was hiding by invoking his right to remain silent. See *State v. Hennessy*, 1992-NMCA-069, ¶ 16, 114 N.M. 283, 837 P. 2d 1366 (determining "whether the language of the prosecutor's questions on cross-examination and his comments in closing were such that the jury would naturally and necessarily have taken them to be comments on the exercise of the right to remain silent"), overruled on other grounds by *State v. Lucero*.

Indeed, the prosecutor's theory of the case suggestively and unabashedly rested on the premise that Defendant's failure to proclaim his innocence in the face of R.S.'s accusations insinuates—if not commands—a conclusion of guilt. But as we hold today, a prosecutor's trial arsenal rightly excludes the fact of a defendant's invocation of silence for the straightforward reason that under the Fifth Amendment, no criminal defendant is compelled to say anything at all, much less profess his innocence, after he has invoked his right to remain silent. Cf. In re Gault, 387 U.S. 1, 47–48, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

* * *

We conclude that the prosecutor's comments during his opening statement and closing argument, as well as the testimony he elicited from Detective Tallman and Defendant, proactively utilized Defendant's invocation of his right to remain silent as indicium of his guilt, and pursuant to our ruling today violated the Fifth Amendment.

D. The Prosecutor's Comments on Defendant's Silence Constituted Fundamental Error.

Having concluded that the prosecutor's comments on Defendant's silence were constitutionally improper, we next consider whether they rendered Defendant's trial fundamentally unfair such that a new trial is warranted despite Defendant's failure to object. [I]t is fundamentally unfair and a violation of due process to allow an individual's invocation of the right to remain silent to be used against him or her at trial." (internal quotation marks and citation omitted).

* * *

Considered in sum, the prosecutor's comments on Defendant's silence during opening statement, direct examination of Detective Tallman, cross-examination of Defendant, and closing argument were cumulatively powerful. Indeed, the commentary was trial-spanning and suggestive of guilt. To reiterate, the State repeatedly invited the jury to infer Defendant's guilt from his invocation of his right to remain silent and his attendant failure to proclaim his innocence. It would be impossible to conclude in this instance that the prosecutor's comments on Defendant's silence were insignificant to the jury in its deliberation, particularly given the fact that the evidence of Defendant's guilt otherwise hinged largely on the testimony and credibility of R.S. ("[I]mproper prosecutorial . . . commentary on a defendant's exercise of the constitutional right to remain silent is frequently regarded as a significant factor, sufficiently prejudicial in nature to constitute fundamental error."). We conclude instead that the prosecutor's reliance upon Defendant's invoked silence, and the implication the prosecutor urged the jury to draw

therefrom, were distinctly prejudicial and warrant a determination of fundamental error and require reversal of Defendant's convictions.

See *State v. Costillo*, 2020-NMCA-051, 475 P. 3d 803, 2020 N.M. App. LEXIS 39 (2020).

2. How Would You Decide?

In the 9th District Ohio Court of Appeals.

An 18-year-old high school student told her counselor that her uncle had engaged in sexual activity with her, and authorities were notified. Police spoke with both the counselor and the alleged victim, the defendant's niece. Although the female victim was chronologically an adult, she had been placed in special education classes and was intellectually disabled. Accompanied by his parents, suspect Wilson voluntarily came to the police station and talked with the investigating officer and, initially, denied that any sexual activity had occurred with his niece. He was not under arrest and was informed that he was free to go at any time. The officer repeatedly urged Wilson to admit to any consensual sexual activity because she noted that, since the female was an adult, she could close the case and avoid a drawn-out investigation. The officer did not mention the niece's intellectual disability and how that might limit her ability to consent to sexual activity. Suspect Wilson admitted to sexual contact with his niece. The trial court found that the tactics used by the police officer created a coerced confession. The officer's tactics included some of the following: telling the subject that the situation was not even a criminal matter yet; telling him that the niece had alleged only consensual sexual activity; repeatedly asking him to corroborate his niece's story, which the officer said that would end the matter; repeatedly telling him the investigation would go on for months unless the two stories became consistent; repeatedly assuring Wilson that the officer was not concerned with any consensual sexual activity that had occurred between them; and stressing that his niece was an adult and could make her own decisions concerning sexual activity. All of the interrogation took place in the police station, and the defendant was not at that time under arrest.

The trial court determined that Wilson had been coerced into confessing his sexual activity with the mentally compromised niece, and it suppressed the confession and inculpatory statements that involved his discussion with police at the station. The prosecutor brought this action to the Court of Appeals to contest the suppression of the confession.

How would you rule on the prosecution's allegation that the trial court committed error when it suppressed what the prosecution believed was a completely voluntary confession to sexual activity with a person who was not able to give lawful consent?

The Court's Holding:

* * *

In its sole assignment of error, the State argues that the trial court erred by granting Wilson's motion to suppress. The State argues that there was no evidence the

investigating officer used an inherently coercive tactic when interviewing Wilson. Further, it argues that Wilson's admissions were voluntary under the totality of the circumstances. Upon review, we reject the State's argument.

* * *

Inherently coercive tactics can be either physical or psychological in nature. *Blackburn v. Alabama*, 361 U.S. 199, 206, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960). Examples include (1) physical abuse; (2) "deprivation of food, medical treatment, or sleep," (3) threats of physical violence, *Beecher v. Alabama*, 389 U.S. 35, 38, 88 S. Ct. 189, 19 L. Ed. 2d 35 (1967); (4) illusory promises of leniency, *United States v. Johnson*, 351 F.3d 254, 262 (6th Cir.2003); and (5) threats to prosecute third parties when no legal basis for those threats exist, " '[A] mere threat to take action which would be lawful and necessary absent cooperation is not objectionable.'" Likewise, "[o]fficers may discuss the advantages of telling the truth, advise suspects that cooperation will be considered, or even suggest that a court may be lenient with a truthful defendant."

"[T]he totality of the circumstances regarding the voluntariness of a [confession] includes 'the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.'" *State v. Rafferty*, 9th Dist. Summit No. 26724, 2015-Ohio-1629, ¶ 37, quoting *State v. Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), paragraph two of the syllabus. "The use of deceit by the authorities is not conclusive in the voluntariness determination." It is "merely one of the relevant factors bearing on the issue [of voluntariness]." Even so, in certain instances, an officer's "misstatement of the law may cause a confession to be involuntary." *State v. Robinson*, 9th Dist. Summit No. 16766, 1995 Ohio App. LEXIS 145, 1995 WL 9424, *4 (Jan. 11, 1995). "[E]ach case turns on its own set of special circumstances."

[The reviewing court found that the police officer used tactics that misrepresented the law on multiple occasions when she indicated that consensual activity was not a criminal act, even though the officer knew the alleged victim was mentally impaired. The investigator told Wilson that the investigation could drag on for months, and she indicated that she was not interested in consensual sexual activity. In repeatedly emphasizing that the alleged victim was an adult and could give her consent, that fact was not necessarily true, given the officer's own knowledge. The court indicated that the investigating officer engaged in a pattern of deception and, in effect, told Wilson that if his statement agreed with the alleged victim's, there would be no charges against him.]

* * *

The State argues that the trial court erred by granting Wilson's motion to suppress for two reasons. First, it argues that the court erred when it found that the investigating officer had subjected Wilson to inherently coercive tactics. According to the State, the only outright threat the officer made was that her investigation would continue for months if Wilson could not corroborate the niece's statement.

* * *

Second, the State argues that, even if the investigating officer employed one or more inherently coercive tactics, Wilson's statements were voluntary under the totality of the circumstances. The State argues that Wilson was a competent adult who admitted he had prior criminal experience. It notes that his interview lasted less than an hour, he was never subjected to any form of deprivation, he was told more than once that he was free to leave, and he came to and left the station with his parents. According to the State, any deception on the part of the investigating officer was not enough to outweigh the remaining circumstances in support of a finding of voluntariness.

[The reviewing court indicated that the investigating officer used coercive tactics on upon the subject and admitted that she had used a deceitful interview technique. She repeatedly informed him that she could close the case if the two stories matched, and she intimated to Wilson that he would not be criminally liable for any sexual activity that occurred if it was consensual, which was not necessarily true due to the mental challenges faced by the alleged victim.]

* * *

Upon review, we cannot conclude that the trial court erred when it determined that Wilson's statements were involuntary under the totality of the circumstances. We recognize that deceit is only one factor in a voluntariness determination, and that several other factors present in this case weigh in favor of a finding of voluntariness. Those factors include the relatively short length of Wilson's interview, the fact that he was told twice that he was free to leave, and the fact that he was not subjected to any form of physical deprivation or mistreatment. Even so, if egregious enough under the circumstances, an officer's "misstatement of the law may cause a confession to be involuntary." Robinson 1995 Ohio App. LEXIS 145, [WL] at *4. Further, "evidence induced by a promise of immunity [is] coerced evidence and cannot be used against the accused." The record reflects that the investigating officer engaged in a pattern of misconduct and repeated her misrepresentations "over and over in an attempt to convince [Wilson] to admit to consensual sex." Wilson only admitted to some degree of sexual activity after the investigating officer repeatedly indicated that consensual sexual activity with the victim was legal and that she could close the case if the sexual activity that occurred was consensual. "[S]ince [the officer's] statements and representations were the motivating cause of [Wilson's] decision to speak, his incriminating statements, not being freely self-determined, were improperly induced, were involuntary and were inadmissible as a matter of law." Accordingly, the trial court did not err by granting Wilson's motion to suppress. The State's sole assignment of error is overruled. [The suppression of the involuntary confession was upheld.] [Some references and citations omitted.]

See *State v. Wilson*, 2019-Ohio-5099, 2019 Ohio App. LEXIS 5161 (2019).

Notes

1. Amendment Five: "*No person . . . shall be compelled in any criminal case to be a witness against himself,* nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation" (emphasis added).

2. See *Malloy v. Hogan,* 378 U.S. 1 (1964), where the Court held that the Fifth Amendment privilege against self-incrimination should be applied to state criminal prosecutions through the Due Process Clause of the Fourteenth Amendment.
3. *Culombe v. Connecticut,* 367 U.S. 568, 581–582, 81 S.Ct. 1860, 6 L.Ed.2d 1037, 1961 U.S. LEXIS 811 (1961).
4. Amendment Fourteen: "nor shall any State *deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws" (emphasis added).
5. *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653, 1964 U.S. LEXIS 993 (1964).
6. In *Arizona v. Fulminante,* 499 U.S. 279 (1991), where an involuntary confession had been introduced against Fulminante, the Court held that a coerced confession admitted in court would not automatically result in a reversal and new trial. The resolution of a case involving a coerced confession should turn on an evaluation of the "harmless error" standard that would reverse a conviction unless it could be said beyond a reasonable doubt that the outcome would not be different without the admission of the coerced confession. The Court reversed Fulminante's conviction. See also *Chapman v. California,* 386 U.S. 18 (1967), where the Court rejected the position "that all federal constitutional errors in the course of a criminal trial require reversal. We held that the Fifth Amendment violation of prosecutorial comment upon the defendant's failure to testify would not require reversal of the conviction if the State could show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" 386 U.S. at 24.
7. 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678, 1974 U.S. LEXIS 58 (1974).
8. 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, 1966 U.S. LEXIS 1129 (1966).
9. 530 U.S. 27, 35–36, 120 S.Ct. 2037, 147 L.Ed.2d 24, 2000 U.S. LEXIS 3768 (2000).
10. *Mitchell v. Wisconsin*, 588 U.S.___, 139 S.Ct. 2525, 2533, 204 L.Ed.2d 1040, 2019 U.S. LEXIS 4400 (2019).
11. 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021, 1910 U.S. LEXIS 2018 (1910).
12. *United States v. Greer*, 631 F.3d 608, 613, 2011 U.S. App. LEXIS 2187 (2d Cir. 2011).
13. 410 U.S. 1, 2, 93 S.Ct. 764, 35 L.Ed.2d 67, 1973 U.S. LEXIS 110 (1973).
14. 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528, 1990 U.S. LEXIS 3211 (1990).
15. *Salinas v. Texas*, 570 U.S. 178, 186, 133 S.Ct. 2174, 186 L.Ed.2d 376, 20123 U.S. LEXIS 4697 (2013). In this case, the subject had voluntarily answered questions until the answer to one might have been incriminating, then fell silent. The silence was effectively used against him in a homicide case.
16. *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359, 1981 U.S. LEXIS 95 (1981).
17. *United States v. Balsys*, 524 U.S. 666, 118 S.Ct. 2218, 141 L.Ed.2d 575, 1998 U.S. LEXIS 4210 (1998).
18. If either use immunity or transactional immunity has been accorded to the witness at a grand jury session, legislative hearing, or similar proceeding, no Fifth Amendment privilege remains, and the witness must testify in response to questions.
19. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, 1965 U.S. LEXIS 1346 (1965).
20. *United States v. Thompson*, 422 F.3d 1285, 1299 (11th Cir. 2005).
21. Use immunity, *Black's Law Dictionary* (11th ed. 2019).
22. 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98, 1988 U.S. LEXIS 2864 (1988).
23. See *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212, 1972 U.S. LEXIS 57 (1972).
24. *United States v. Staton*, 2021 U.S. App. LEXIS 8154, at *13–14 (6th Cir. 2021).
25. *Powell v. Texas*, 492 U.S. 680, 684, 109 S.Ct. 3146, 106 L.Ed.2d 551, 1989 U.S. LEXIS 3383 (1989).
26. See *Colorado v. Spring,* 479 U.S. 564, 572, 107 S.Ct. 851, 93 L.Ed.2d 954, 1987 U.S. LEXIS 418 (1987).
27. *Id*. at 523, 527.
28. 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098, 2010 U.S. LEXIS 4379 (2010).
29. *Id*. at 376.
30. *Montana v. Loh*, 275 Mont. 460, 475; 914 P. 2d 592, 601 (1996).
31. *Montana v. Campbell,* 278 Mont. 236; 924 P. 2d 1304, 1307, 1308 (1996).
32. *State v. Mogle*, 2021-Ohio-1741, 2021 Ohio App. LEXIS 1694 (2021).
33. *Id*. at *P26.

34. See *In re Contempt of Ecklund,* 636 N.W.2d 585, 589, 590 (2001). For a case with the same outcome based on a similar legal rationale, see also *Martin v. Flanagan,* 259 Conn. 487; 789 A.2d 979 (2001).
35. 297 U.S. 278, 81 S. Ct. 1860, 6 L. Ed. 2d 1037, 1961 U.S. LEXIS 811 (1936).
36. *Jackson v. Denno*, 378 U.S. 368, 370–371, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1964 U.S. LEXIS 826 (1964).
37. *Id*. at 602.
38. 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, 1964 U.S. LEXIS 993 (1964).
39. *Id*. at 3.
40. *Chavez v. Martinez,* 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984, 2003 U.S. LEXIS 4274 (2003).
41. See, generally, *Schmerber v. California,* 384 U.S. 757 (1966).
42. 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473, 1986 U.S. LEXIS 23 (1986).
43. *Ibid*. When Connelly spoke with police, he denied any drug use or that he had been drinking. Connelly did mention that in the past he had been a mental patient in several mental hospitals. Connelly told police that his conscience had been bothering him following the homicide.
44. *Id*. at 167.
45. *Commonwealth v. Barrow*, 2021 Pa. Super. Unpub. LEXIS 57 (2021).
46. See *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302, 1991 U.S. LEXIS 1854 (1991).
47. See *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302, 1991 U.S. LEXIS 1854 (1991).
48. *People v. Mahaffey*, 2020 Il App (1st) 170229-U, 2020 Ill. App. Unpub. LEXIS 770 (2020).
49. *Id*. at [*P52].
50. *People v. Sanders*, 2021 ILApp(5th) 180339, ¶ 49, 2021 Ill. App. Lexis 187 (2021) (citing *Kansas v. Ventris*, 556 U.S. 586, 590, 129 S.Ct. 1841, 173 L.Ed.2d 801, 2009 U.S LEXIS 3299 (2009)).
51. See *Blackburn v. Alabama*, 361 U.S. 199, 206, 80 S.Ct. 274, 4 L.Ed.2d 242, 1960 U.S. LEXIS 1766 (1960).
52. *People v. Sanders, supra* at ¶ 41.
53. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 1966 U.S, LEXIS 2817 (1966).
54. See *Harris v. New York,* 401 U.S. 222, 225, 91 S.Ct. 643, 28 L.Ed.2d 1, 1971 U.S. LEXIS 75 (1971).
55. *Id*. at 226.
56. *Ibid*.
57. *State v. Apodaca*, 2019 UT 54, 448 P. 3d 1255, 2019 Utah LEXIS 135 (2019).
58. *Id*. at ¶ 34.

Pretrial Criminal Process: Pretrial Motions, Identification Process, Preliminary Hearing, Bail, Right to Counsel, Speedy Trial, and Double Jeopardy

12

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Learning Objectives

1. Be able to understand why the right to the presence of legal counsel exists at some identification procedures.
2. Distinguish between the identification procedures that permit the presence of counsel and those for which the right to counsel does not exist.
3. Understand the legal rationale that gives rise to the right to have legal counsel at an identification procedure.
4. List and be able to apply the five-factor test from the case of *Neil v. Biggers* that courts use to determine the accuracy of eyewitness identification.
5. Be able to explain why a defendant has the right to counsel at a preliminary hearing.
6. Explain the purpose of pretrial bail and the justification for allowing bail to many defendants.
7. Be able to list several factors that a judge typically considers when setting bail in a felony case.
8. Comprehend and be able to apply the *Barker v. Wingo* four-factor test used to determine whether the constitutional right to a speedy trial has been violated.
9. Know how the rights to a speedy trial benefit a defendant awaiting a trial.
10. Develop an understanding of the concept of double jeopardy and be able to offer an example of a prosecution that would violate the constitutional provision protecting against being tried twice for the same crime.

Chapter Outline

KEY TERMS

1. Arraignment
2. Attachment of jeopardy
3. Bail provision of Eighth Amendment
4. Bailable offense
5. *Blockburger* test for double jeopardy
6. Collateral estoppel
7. Determination of bail amount
8. Dual sovereignty
9. Excessive bail
10. Factors used in determining bail
11. First hearing
12. Misdemeanor bail
13. *Neil* five-factor test
14. Preliminary hearing
15. Pretrial detention
16. Pretrial motions
17. Probable cause only hearing
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19. Rationale for bail
20. Rationale for double jeopardy
21. Remedy for violation of speedy trial
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23. Right to counsel at a lineup
24. Right to counsel at preliminary hearing
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26. Speedy trial: *Barker* factors to consider
27. Statutory right to a speedy trial

1. Pretrial Motions

In order to facilitate a smooth and orderly trial, when the adversaries have conflicts involving legal or constitutional questions, a judge must resolve the issues and conflicts prior to the actual trial. These issues may involve search and seizure conflicts, and questions of privileged communications may arise. Some challenges may question whether the trial should go forward at all, such as double jeopardy or jurisdiction of the court to hear the cause. If these legal challenges were to wait until trial to be raised and the trial had to be halted, even briefly, while the conflicts were resolved, court personnel, juries, witnesses, and other legal functionaries would be waiting around the courtroom for hours on end.

From the initiation of a criminal case until the time the matter actually goes to trial, many of these issues are considered mandatory questions that must be resolved prior to trial. Other legal conflicts may be considered as discretionary pretrial motions that could be determined during the trial itself. These issues range from constitutional objections by the defense to controversial items of evidence that the prosecution desires to introduce at the trial. Motions to reduce the amount of bail may result in the defendant being granted an affordable level of bail. Claims that involve questions concerning the jurisdiction of the court[1] or venue concerns should be resolved prior to trial, but allegations that

the court lacks jurisdiction may be raised at any time in the criminal justice process. A pretrial motion to change the venue, the place where the trial will be held, may prove crucial to a fair trial of a defendant where local pretrial publicity may have polluted the jury pool or have made prospective jurors draw some conclusions when the case has a high publicity value. In fact, speedy trial and double jeopardy issues generally must be raised during the pretrial phase or they will be considered waived by the defendant, since the very issues they seek to address might make a trial unnecessary. Defendants may argue that the case should be dismissed due to defects in an indictment or the way the charges have been brought. In the case of mandatory pretrial objections, the general rule is that they must be made prior to the start of a trial.

Motions to suppress evidence under the Fourth Amendment, allegations that the right to a speedy trial has been denied, and allegations that holding a trial will violate double jeopardy guarantees should be raised and resolved prior to trial in order to foster an orderly and smooth presentation of the evidence. Where there is some concern about the competency of a defendant to stand trial or an issue related to an insanity defense, pretrial motions for mental exams related to these issues are of such paramount importance so that decisions should be made prior to the start of a trial. In cases where a variety of pretrial motions have not been resolved, either party to the lawsuit may file a motion for a continuance that will delay the start of the criminal trial. Where there is an allegation that a confession has not been freely given under standards of voluntariness, a motion to exclude the confession may result in a dismissal of the case where the prosecution's case has been anchored on the use of the questioned confession. Evidentiary questions that turn on the resolution of an evidentiary privilege such as the husband-wife marital testimonial privilege or doctor-patient privilege may be best resolved prior to trial in a way that promotes the orderly presentation of the evidence.

During the pretrial stage, the prosecution must share much of its information with the defense. Under *Brady v. Maryland*, 373 U.S. 83 (1963), when the defense requests evidence from the prosecution of an exculpatory nature, the prosecution must reveal whatever evidence it possesses that meets the request. When a prosecutor fails to deliver what has been called *Brady* material, the defense may file a pretrial motion to compel the prosecution to comply with the *Brady* request. To prevent unfair prejudice to multiple defendants who face multiple counts, some of which may be related and some of which may not be related, individual defendants may petition the court in a pretrial motion, to sever the charges into separate trials or to separate codefendants' cases into individual trials. Motions to sever defendants or charges generally must be made prior to the beginning of a trial or they will be deemed waived.

In most situations, the pretrial motions that are made by either the defense or the prosecution are those that are designed to promote the orderly progress and resolution of the criminal trial. There will be occasions in which one or more issues that could have and perhaps should have been resolved at the pretrial stage unexpectedly will arise during the trial and a court will be forced to deal with them. Usually these are issues that were not apparent to either the prosecution or the defense prior to the beginning of trial, but in some situations, changed or unanticipated circumstances arise that bring the issues into the forefront and require resolution during trial.

2. Identification Procedures: Introduction

Attempts to screen the potentially guilty from the rest of society have been a problem of long standing without absolutely clear solutions that guarantee accuracy with reasonable certainty. Although a variety of methods of identification are available, a witness identification of the human body with a focus on the face has been a traditional avenue to discriminate the guilty from the innocent. We make discriminations on identity based on gender, race, skin color, eye and hair color, height, and weight, tattoos, and scars, as well as the tone of voice and linguistic characteristics. The use of fingerprinting, blood typing, and DNA matching has been added to the traditional ways of discerning identity. Newer types of biometric measures are just now making their way to the forefront of identity screening. Measuring and identifying the blood vessel patterns on the human retina and using mathematical ratios embedded in computer programs and mathematical ratios, algorithms, and formulas to measure the face and head are among the most modern methods of what is claimed to be foolproof identification. Some of the newest methods will eventually become widely used in the law enforcement community, but even though the technology may be quite accurate, the expense of such advanced scientific measures may limit their application in the near term due to expense and availability. The admissibility of scientific identity testing, assuming that the data has been obtained with due concern for appropriate criminal procedure, generally rests more with the law of evidence than with substantive criminal procedure.[2]

3. Due Process and the Right to Counsel at Identification Procedures

In most instances, traditional witness identification, with procedures based on fairly settled law, will be the path followed by most police departments and prosecutors. Most of the larger issues concerning identification procedures have been litigated years ago to the point that prosecutors, the defense bar, and the law enforcement community have fairly clear directives concerning the appropriateness of specific procedures. Issues surrounding the right to counsel during lineup procedures under the Sixth Amendment remain clear and are not subject to much dispute. The appropriateness and practice of conducting pre-indictment and pre-information identification in the absence of legal counsel are well known and lawfully allowable. Due process concerns involving suggestiveness or steering have been detailed in a variety of court cases so that there is a fairly clear certainty, if proper procedures are followed, that a criminal case will not be reversed for errors in this area. However, an appellate court should reverse a conviction based partially or wholly on eyewitness identification where the pretrial identification procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[3]

The right to counsel at an in-person lineup exists only "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, or arraignment."[4] The legal standards involving post-charging

identification procedures appear to be largely matters of settled law, and there exists little indication any major future changes are likely to be forthcoming. Commentators have criticized the identification process as creating potential for error in too many cases,[5] but judges and courts have not proven particularly amenable to change even when faced with scientific studies challenging the correctness or reliability of eyewitness identification. In a case[6] where a woman identified a nighttime car burglar from her apartment window that was some distance from the man whom police caught with car electronics in his hands, the Supreme Court of the United States approved the use of the identification in court even though her view was at night, the view was from some distance, and the only man standing with police was the suspect. Even though the witness could not pick the suspect out of a photo lineup at a later time, the top court noted that there were avenues for the defense to call her identification into question, and it refused to conclude that the identification violated due process.

Proper identification of criminal suspects involves an inquiry concerning whether the suspect possesses a right to counsel and whether the identification procedure meets the standards of due process. Although the identification of a suspect may be one step toward a conviction, the Fifth Amendment privilege against compelled testimonial self-incrimination has been held not to be implicated when a witness views a suspect. Some suspects may refuse to participate in a lineup because identification may provide a link toward an eventual guilty verdict, but there is no constitutional basis for a suspect to refuse to participate in a lineup. In *United States v. Wade*, the defendant contended that by forcing him to take part in an in-person lineup, the government violated his Fifth Amendment privilege against self-incrimination.[7] The *Wade* Court rejected the suggestion by noting that the Fifth Amendment privilege protects a defendant from being required to testify against him- or herself and not from exhibiting him- or herself to potential eyewitnesses.[8] Appearing in an in-person lineup does not involve any testimonial evidence extracted from a lineup participant.

Consistent with due process considerations, identification procedures include showing a single suspect to a witness, conducting a traditional lineup, having a witness look through the "mug book" display, viewing a PowerPoint array of photographs, or conducting a hard-copy photographic array of suspects. In all the identification processes, there must be no "steering" of the witness with a view to assisting the witness in identifying a particular person as the criminal.

4. Sixth Amendment Right to Counsel at Lineups

Court decisions have held that suspects may be entitled to the Sixth Amendment right to the assistance of legal counsel when a lineup is being conducted by law enforcement agents. Past decisions indicate that legal counsel is required at all "critical stages" of the criminal justice process where substantial rights of an accused may be compromised. Some identifications occur in the absence of counsel but under circumstances that have court approval. A failure to follow the rules and regulations developed through case law may culminate in a conviction ultimately being overturned or the refusal of a court to allow a witness to offer an identification. The most clear-cut situation where the right

to counsel exists occurs when there is a post-indictment or post-information in-person lineup. According to the Court in *United States v. Wade*,[9] when an arrestee has been formally charged with a crime, an in-person lineup constitutes a critical stage of the criminal justice process during which the suspect has a constitutional right to the assistance of counsel. In *Wade*, the Court quoted one commentator who observed:

> [t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.
>
> Wall, Eyewitness Identification in Criminal Cases 26

Justice Brennan indicated concern with eyewitness identification procedures when he cautioned in *Wade* at 229:

> Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

Brennan continued to emphasize his concern for requiring reliable eyewitness identification procedures when he quoted from a legal encyclopedia:

> [i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that, in practice, the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial. Williams Hammelmann, Identification Parades, Part I, [1963] Crim.L.Rev. 479, 482.
>
> *Wade* at 229

The *Wade* Court indicated that in many cases, the witness identification of a suspect as the guilty party may effectively conclude a criminal case and seal the fate of the accused, whether guilty or not. Once an eyewitness has selected a particular person as the guilty party and the government has taken clear steps to prosecute, the eyewitness is unlikely to recant the identification at a later time due to personal and institutional pressures.

According to the *Wade* Court, a major factor in the miscarriage of justice has traditionally been the degree of suggestion inherent in the manner in which the government presents the arrestee to the witness for the purpose of identification. Writing for the majority, Justice Brennan cited cases of questionable identification procedures in which one suspect had been identified by a witness where the suspect was the only person of Asian heritage in the lineup, a case where a tall suspect had been placed with short participants, and where a young suspect had been placed in a lineup array with older men.[10] Suggestive identification procedures create the potential for impermissibly "steering" eyewitnesses toward identifying a particular suspect, producing a due process violation.

The *Wade* case determined that the Sixth Amendment right to counsel extends to a person under an indictment or otherwise formally charged[11] with a criminal offense who is placed in an in-person lineup. An attorney may offer corrective suggestions concerning lineup procedures that will assist the police in conducting a proper identification. Naturally, law enforcement personnel have no interest in identifying the wrong person and should cooperate with an arrestee's counsel. In the absence of counsel, a variety

of wrongs could occur, and the suspect would be powerless to contest their occurrence even if the arrestee became aware of them. The assistance of counsel becomes important because lineup witnesses may be unaware of subtle steering in the making of an identification, and the suspect might be completely ignorant of undue suggestiveness in whatever form it might take. Other lineup participants possess no particular interest in protesting an improper lineup, since they are not targets of the identification procedure. Thus, where a suspect is represented by counsel and errors in procedure appear about to develop, the attorney may request that corrective measures be taken prior to the occurrence of irreparable misidentification.[12]

The practical effect of having an attorney present at an in-person, post-information, or post-indictment lineup is that the attorney has the ability to observe and to object to any irregularities in the process that might involve violations of due process rights. If problems are not corrected, the attorney may bring these issues to a pretrial proceeding or to the trial itself. Certainly, police officers are not able to profit from a lineup that suggests the wrong person and should be quite cooperative in correcting irregularities that are obvious to the defense counsel. Impermissible steering, whether by audible or other suggestion by police officers, can be observed if it occurs. Suggestions by law enforcement may point to one lineup member more than another. The lineup might have too many short people when the defendant's client was quite tall, or it might be composed of thin individuals when the defendant was more robust. Alternatively, if the defendant is the only person in three successive lineups, that can indicate a suggestive lineup that would be unfair to a defendant. Tattoos or other distinctive human characteristics that may cause the defendant to have a more pronounced presence in a lineup are generally considered non-objectionable. It might be impossible to expect that a lineup consist of people with similar tattoos or a body deformity that might be distinctive to a suspect. The basic concept of having the attorney present is to help ensure that a lineup is not unduly suggestive and is otherwise respectful to the rights of a target individual subjected to an in-person lineup. Similar issues of suggestiveness may occur at photographic lineups, but counsel has not been deemed an essential component of the photographic array or of a single photograph.

In a companion case to *Wade, Gilbert v. California*, the defendant had been required to participate in a post-indictment in-person lineup without the presence of his attorney. Because there were so many witnesses to the alleged crimes of Gilbert, the lineup proceedings occurred in an auditorium with bright lights shining on the participants so that they could not observe the witnesses. Nearly 100 witnesses gathered in the auditorium, where presumably they were able to talk with each other and observe identifications made by fellow witnesses. During the guilt phase of his capital murder trial, Gilbert sought to elicit confirmation from some of these eyewitnesses that they had made earlier identifications of him at the auditorium lineup, thus indicating that the identification procedure occurred without his attorney being present. The *Gilbert* Court vacated the sentence of death, since it held:

> The admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error. *United States v. Wade, supra*. We there held that a post-indictment pretrial

> lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to, and in the absence of, his counsel denies the accused his Sixth Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup.
>
> *Gilbert* at 273

From the *Wade* and *Gilbert* cases, a clear rule has emerged that post-indictment or post-information in-person lineups require the presence of counsel, absent waiver, or the evidence concerning the lineup will, at a minimum, be excluded from trial. Under *Gilbert*, if the lineup was conducted in the absence of an attorney, a witness's lineup identification may still be admissible if the court makes a determination that the in-court identification was not tainted by the illegal lineup.[13] The State of New York has a stronger requirement for the presence of a suspect's attorney even prior to any formal charge.[14] New York requires the presence of the suspect's attorney at any time a person is suspected of a crime that is under investigation and the police know that the defendant is currently represented by counsel. An attorney is also required where a defendant who is already in custody and is represented by an attorney in an unrelated case requests that his or her attorney be present. In a robbery case from Queens County, New York, the suspect was identified at the courthouse by an alleged victim and the police conducted a lineup without the presence of the suspect's attorney. The resulting identification contributed to his robbery conviction. The reviewing court reversed the guilty verdict on the basis that the defendant's right to counsel under New York law had been violated because police knew he was currently represented by counsel.[15] New York practice goes beyond what is minimally required by the federal constitution.

5. Right to Counsel During Identification: Limitations

A fair reading of the *Wade* and *Gilbert* line of cases would seem to indicate that the Supreme Court of the United States was moving in the direction of mandating the presence of counsel at all identification procedures. It could be argued that counsel would have to be supplied for every individual arrested by police if any witness identification process was contemplated. However, the Court backed away from the *Wade* holding a bit when it determined that the Sixth Amendment right to counsel during the identification process does not apply in every conceivable context. In *Kirby v. Illinois*,[16] the Court required that formal adversarial proceedings beyond a bare arrest have to be initiated before the right to counsel matured at witness identification procedure. The defendants in *Kirby* had been arrested for a robbery but had not been formally charged. While Kirby was in custody, police allowed the victim to enter a holding room and make an identification by merely observing Kirby and another defendant, who were the room's sole occupants. According to the Court, Kirby and his companion had no right to counsel during the particular identification procedure, since they had not been indicted, had not had an information filed against them, were not

being arraigned or subjected to a preliminary hearing, and were not facing a clear decision by the state to prosecute. The rule that emerged requires the presence of counsel when an information has been filed or an indictment returned, but no right to counsel exists for a person who has been merely arrested and whom police want to subject to an identification process.

In support of the requirement of the right to counsel at an identification procedure, the Supreme Court reversed a rape conviction under circumstances where the prosecution introduced the victim's testimonial identification originally given at a preliminary hearing at the defendant's actual trial.[17] The defendant had not been represented by counsel at the preliminary hearing and had not been offered appointed counsel. The Court found that the preliminary hearing constituted the initiation of formal adversarial proceedings, at which point the defendant should have been represented by counsel. Therefore, the prosecution should not have been allowed to support its trial evidence by introducing evidence of the pretrial identification made at the preliminary hearing in violation of the defendant's Sixth Amendment right to counsel.

6. Photographic Arrays: No Sixth Amendment Right to Counsel

The use of a still photographic array for identification purposes, even where the subject has been indicted or a prosecution has otherwise been initiated, does not require the presence of counsel, according to *United States v. Ash*.[18] According to the Court, an arrestee or defendant has no Sixth Amendment right to counsel at a photographic array, no matter when it occurs, because the procedure is not one at which the accused requires "aid in coping with legal problems or assistance in meeting his adversary."[19] Were legal counsel required at each and every photo array, as a practical matter, an attorney would have to participate every time a witness looked at a mug book or computer display of photographs, even if the target was on the run and had never been captured. In the pretrial context, the attorney's role is to assist the defendant in dealing with legal questions and to suggest solutions where unfair practices or conditions appear. Where a defendant is not present, as in a police presentation of a photographic array of several pictures to eyewitnesses, "no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary."[20] Since a photographic array does not involve an actual defendant-witness confrontation similar to a trial, the assistance of an attorney is not constitutionally mandated. However, a due process violation involving impermissible "steering," suggestive photograph selection, or the repeated presence of only the suspect's picture in a series of photographic arrays collectively remain as potential problems for an accused for which a remedy may prove illusory. Best practice involves preserving a visual record of the array, should questions later arise.

In dealing with photographic arrays, the Supreme Court was not willing to further extend the right to counsel under the Sixth Amendment, even though potential prejudice to a particular defendant might arise due to improper conduct of law enforcement officials. The Court noted that photographic identifications were not the only part of a

criminal prosecution where an unfair prosecutor might fail to follow due process requirements. According to Justice Blackmun, writing for the Court in *Ash:*

> Evidence favorable to the accused may be withheld; testimony of witnesses may be manipulated; the results of laboratory tests may be contrived. In many ways, the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may "strike hard blows," but not "foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935); *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963). If that safeguard fails, review remains available under due process standards. See *Giglio v. United States*, 405 U.S. 150 (1972). *Ash* at 320.

The Court trusted that most prosecutors would properly follow the law, and in cases where the prosecution failed to accord due process to a defendant at a non-adversarial photographic array, a defendant's legal counsel should be able to ferret out the wrongdoing and ultimately achieve justice. However, a practical problem, never addressed by the Court, exists where the wrongdoing never becomes apparent through pretrial discovery or from cross-examination during trial, instead remaining hidden to wreak its unconstitutional wrong on an unknowing defendant's case.

Some states, including New York[21] and Michigan,[22] give a defendant who has been formally charged the right under state procedure to have counsel at a photographic lineup. Following a robbery, but before the suspect was charged, the state carefully constructed a photo array of similar-appearing individuals based on photographs on file with a state agency. There was some argument that the suspect had been charged when the victim viewed the photographs and should have had counsel present at the viewing, but ultimately, the viewing was determined to have occurred three days prior to the actual charging. Even after being cautioned that he robber might not be in the photographic array, the witness was immediately and virtually certain that she saw the defendant's picture because she observed the defendant's "lazy eye," which helped solidify the identification. The trial court admitted her identification, and the reviewing court found no errors in the identification process.[23] In this Michigan case, there was no right to counsel at the photographic lineup since the array was presented prior to charges formally being offered.

7. Due Process Concerns: Suggestiveness of Identification

Consistent with due process considerations, all identification procedures should be constructed in a neutral manner with a view to producing a reliable and accurate identification. Where impermissible steering, directing, or suggesting transpires, the accuracy of the result comes into question. While a witness ideally may be offered several choices of photographs or of several persons in a lineup, on occasions when a formal lineup or photographic array is impractical, other techniques must be substituted. Sometimes a suspect quickly enters police custody, virtually at the crime scene, and/or is subjected to a return to the scene for an immediate identification or exclusion from further police interest. If a victim cannot travel to the location of the suspect, the suspect may be brought to the

victim without violating the suspect's due process rights or the right to counsel. However, such a procedure becomes improper where adversarial proceedings have been initiated and the defendant has appeared at a preliminary hearing without counsel. An identification by a witness who observed the defendant alone at the preliminary hearing should have been excluded from making an identification at the subsequent trial due to the violation not of due process but of the Sixth Amendment right to counsel.[24]

In one case that involved more that bare suggestiveness,[25] the police officer caught a fleeting two- or three-second glimpse of the suspect's face that occurred more than four months prior to trial. Om the eve of the trial, the prosecutor showed the officer a mug shot of the defendant to study for identification, and the officer was permitted to identify the defendant based on the original glimpse, viewing the photo prior to trial, and observing him at court. The Court of Appeals for the District of Columbia reversed the conviction based on a violation of due process since the viewing of the photo prior to trial was beyond being suggestive; it told the officer that this was the culprit that the prosecutor thought was the guilty one.

Exigent or emergency circumstances permit identification by witnesses where practical necessities dictate the rapid use of creative identification procedures despite the risks of suggestiveness. In *Stovall v. Denno*,[26] police brought an arrested homicide suspect to the hospital bedside of a victim whose health was in a precarious state. The victim was permitted to identify the unrepresented suspect as the killer of her husband, despite the suggestiveness inherent in the one-on-one encounter. According to the *Stovall* Court, the practice was appropriate under the circumstances of the case: a sole suspect, a critically injured victim, and a need for identification. The teaching of *Stovall* illustrates that there are identifications in which counsel need not be present and the use of a formal lineup is not required so long as there is no significant chance of irreparable misidentification of the suspect.

Improper suggestiveness may violate the Due Process Clause of the Fourteenth Amendment in a situation where successive lineups were conducted and where the only common individual to all of them happened to be the defendant. In *Foster v. California*,[27] the defendant was initially placed in a lineup that contained three men. The defendant was nearly six feet tall, and the other two men in the lineup were significantly shorter, a fact that gave rise to an impermissible steering argument. One of the eyewitnesses to the case said that he "thought" Foster was one of the guilty men but was not positive. After speaking to Foster and hearing his voice, the eyewitness was not any more secure in his identification, even after meeting with him one on one in a room. A week or so later, the police arranged for the eyewitness to view another lineup involving five men. Foster was the only person in the second lineup who had appeared in the first lineup. The witness made a certain identification of Foster following the second lineup. The *Foster* Court reversed and remanded the case. According to *Foster*, successive positioning in repeated lineups clearly violated due process and could not be lawfully conducted as a general rule. In many respects, the result in *Foster* was required if the Court followed its prior *Wade* decision because *Wade* had held that post-information or post-indictment lineups constitute a critical stage of the criminal justice process and that, judged by the totality of the circumstances, an identification procedure cannot be allowed to stand where the procedures were unnecessarily suggestive and conducive to irreparable mistaken identification.

8. Accurate Eyewitness Identification: The *Neil v. Biggers* Five-Factor Test

Whether or not counsel is required, the identification process must produce reliable and reasonably accurate identification. In an effort to determine the appropriate standard for proper eyewitness identification procedures, the Court clarified *Stovall v. Denno* by adopting a more specific test in *Neil v. Biggers* (Case 12.1).[28] In developing the "totality of the circumstances" test, the Court listed five factors as a guideline to measure whether a particular identification process comported with due process and eliminated any significant chance of irreparable misidentification. When considering a claim involving an alleged improper identification, courts must consider the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's original description of the criminal, the level of certainty demonstrated by the witness at the time of the confrontation, and the length of time that had passed between the crime scene identification and the confrontation. A proper analysis by a trial court of these factors, called the "totality of the circumstances test," should result in only proper eyewitness identifications being admitted to evidence by trial court judges.

In *Neil v. Biggers*, officers paraded a suspect past the complaining victim in a rape case. Previously, the victim-witness had looked at mug books and photographs and had attended in-person lineups for about six months and had identified no one. When she walked past the suspect in a hallway, she indicated that she was very sure he was the perpetrator. At the crime scene, she had a good opportunity to see his face and body and paid close attention during the crime, and her original description proved quite accurate. The six-month delay was viewed as the weakest part of her identification but did not make her identification inadmissible because of her level of certainty. The *Neil* Court approved the courtroom use of eyewitness identification of the suspect even though he was not represented by counsel at the time of his identification. Consistent with *Kirby*, since the suspect had not been formally charged with a crime, he did not possess the right to counsel at the time of his identification by the victim.

Case 12.1 LEADING CASE: THE FIVE-FACTOR TEST TO MEET DUE PROCESS STANDARDS IN IDENTIFICATION

Neil v. Biggers
Supreme Court of the United States
409 U.S. 188 (1972).

CASE FACTS:

A Tennessee trial court convicted Biggers of rape based on the victim's visual and voice identification of him. According to the victim, the rape began at her home where the victim initially managed to observe the attacker's face as it was illuminated from the light of her kitchen and again when the perpetrator took her across a field under a full moon. On at least two occasions, she was face to face with her attacker with an excellent opportunity to observe his identity. The victim initially described

her assailant as being between sixteen and eighteen years old and between five feet ten inches and six feet tall, as weighing between 180 and 200 pounds, and as having a dark brown complexion. The victim's initial description offered to police clearly matched the defendant in every detail.

Police permitted the victim to observe the defendant as she walked past the suspect in a hallway. Only after the police had Biggers speak did the victim identify him as the man who had raped her. In order to obtain a voice identification and at the victim's request, the police required Biggers to say "shut up or I'll kill you." Upon seeing Biggers and after hearing his voice, her identification of him as the perpetrator proved instantaneous and positive. She testified that it was petitioner's voice that "was the first thing that made me think it was the boy."[29]

During the seven months between the rape and her identification of the defendant, the victim had looked at countless mug shots, viewed suspects in her own home, and observed many in-person lineups and photographic arrays, but had never identified any suspect.

The trial court jury convicted Biggers of rape, and he had no success with direct appellate review. A petition for a writ of habeas corpus was granted by a federal district court and affirmed by the Court of Appeals for the Sixth Circuit. The Supreme Court of the United States granted certiorari.

LEGAL ISSUE:

Where a rape victim has been permitted to walk past an arrested suspect, where the victim made a positive identification based on visual inspection and after hearing a voice sample, does such a suggestive identification process, in the absence of a standard lineup or photographic array, violate a defendant's right to due process under the Fourteenth Amendment?

THE COURT'S RULING:

The justices held that although an identification process might be somewhat suggestive, the procedure used here could meet due process standards where there was little likelihood of an erroneous misidentification as tested by the five-factor test.

ESSENCE OF THE COURT'S RATIONALE:

* * *

III

We have considered on four occasions the scope of due process protection against the admission of evidence deriving from suggestive identification procedures. In *Stovall v. Denno*, 388 U.S. 293 (1967), the Court held that the defendant could claim that "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." *Id*., at 301–302. . . .

Subsequently, in a case where the witnesses made in-court identifications arguably stemming from previous exposure to a suggestive photographic array, the Court restated the governing test:

> [W]e hold that each case must be considered on its own facts, and

> that convictions based on eye-witness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
>
> *Simmons v. United States*, 390 U.S. 377, 384 (1968)

* * *

Some general guidelines emerge from [our] cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S., at 384. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself.

* * *

We turn, then, to the central question, whether under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, *the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation*. [Emphasis added.] Applying these factors, we disagree with the District Court's conclusion.

* * *

We find that the District Court's conclusions on the critical facts are unsupported by the record and clearly erroneous. The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately. She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes. Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, might not have satisfied Proust but was more than ordinarily thorough. She had "no doubt" that respondent was the person who raped her. In the nature of the crime, there are rarely witnesses to a rape other than the victim, who often has a limited opportunity of observation. The victim here, a practical nurse by profession, had an unusual opportunity to observe and identify her assailant. She testified at the habeas corpus hearing that there was something about his face "I don't think I could ever forget."

There was, to be sure, a lapse of several months between the rape and the confrontation. This would be a

seriously negative factor in most cases. Here, however, the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup. Weighing all the factors, we find no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury.

Affirmed in part, reversed in part, and remanded.

CASE IMPORTANCE:

Neil v. Biggers stands for the principle that identifications constitute a crucial part of the criminal justice process during which due process standards must be properly honored. Where the five-factor test is applied consistently and properly, the chances of an irreparable misidentification becomes remote.

The *Neil* five-factor eyewitness identification test may be applied to virtually any type of identification process, from an in-person lineup to the use of a photographic array. An interesting and somewhat suggestive procedure occurred in *Manson v. Brathwaite*,[30] where a trained police officer observed a drug dealer during an undercover narcotics purchase. Subsequently, the officer described the suspected drug dealer to a fellow officer in such detail that the fellow officer believed he knew the identity of the suspect. The second officer obtained a photograph of the suspected drug dealer and placed it on the original officer's desk. When the undercover officer looked at the photograph, he instantly recognized the drug suspect. At the time of the viewing of the photograph, the suspect did not have counsel and was not under arrest.

The Supreme Court upheld the identification of Brathwaite by the undercover officer by using the five-factor test of *Neil v. Biggers* and concluded that, under the circumstances, such a procedure did not violate due process. The officer had been trained in observation of suspects, especially concerning details relating to identification. He had a fairly clear view of the suspect, and little time had transpired between the original view and the identification. The officer was sure of his identification, and the suspect description matched the description originally offered by the officer.

Many states have adopted the *Neil v. Biggers* five-factor test or some slight variation for evaluating eyewitness identification issues. Kansas follows its own test, which incorporates some of the *Neil* case and adds some slightly different considerations. According to a Kansas case, the factors used to determine eyewitness identification are as follows:

> (1) The opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer's.
>
> *Kansas v. Long*, 721 P. 2d 483 at 493 (1986)

In a recent Tennessee case,[31] involving a photographic identification, the victim received a Facebook message to come to a hotel where his girlfriend was staying. Upon arrival at the room, in addition to his girlfriend, a different female was present whom defendant knew. Suddenly, a man with dreadlocks burst from a closet with a weapon and robbed the victim of valuables, including his wallet and Galaxy 8 smartphone. Although the room was somewhat darkened, the victim did observe the unmasked defendant for a few seconds before a pillow case was placed upon the victim's head. The victim described the defendant as "six feet, one inch tall and 160 pounds. He said that Defendant wore 'dreads' in his hair."[32] Upon the victim's freeing himself, police were summoned. A police officer obtained an e-mail address from the room's rental agreement that allowed him to download the defendant's criminal record, which contained the defendant's picture. The police officer's laptop computer displayed the picture of the defendant that was observed by the victim while the victim sat in the backseat of the patrol car. Later, police put together two photographic arrays, one for the armed defendant and another for his female accomplice, that were shown to the victim. The defendant was included in the array because the picture of the defendant was related to the e-mail address for the hotel room where the crime occurred. The trial court rejected the defendant's objection that showing the original photograph on the computer was unduly suggestive and admitted the victim's identification of the defendant at the trial. Following a conviction, the defendant appealed based on the argument that identification process had been unduly suggestive. The reviewing court upheld the victim's identification of defendant after considering the five-factor test of *Neil v. Biggers*. Although the showing of the initial photograph was suggestive, the victim testified that he had a good opportunity to observe the defendant at the crime scene. The reviewing court held that he made a good identification at the photographic lineup that occurred fairly shortly after the crime had been reported. In addition, there was other corroborating evidence in this case because, at the time of his arrest, the defendant possessed the victim's identification and bank card, and so the court affirmed the conviction.[33]

This type of trial and appellate court analysis serves to prevent misidentification of defendants by meeting due process standards under both state and federal constitutions.

9. Current Application of Identification Procedures

Since for several years the Supreme Court of the United States has not heard a major case that altered the due process requirements of eyewitness identification, the general framework involving the right to counsel and to due process remains relatively settled law. Demonstrative of generally accepted identification process is a case from the Court of Appeals for the Seventh Circuit, *United States v. Traeger*,[34] where the defendant alleged that his identification in a bank robbery case contained constitutional errors.

In *Traeger*, the defendant contended that a bank teller's identification of him as the robber should have been suppressed. At the crime scene, the teller had an excellent view of the robber and made a certain identification three weeks following the crime. According to Traeger, his constitutional right to due process had been violated because the lineup, as composed, was unduly suggestive. The defendant was much taller and much more robust than the other men in the lineup, a fact, he alleged, that made him stand out from

the others. The identification process occurred three weeks after the robbery, with all the participants dressed in traditional jail orange jumpsuits. In the beginning stages of the lineup, all the men were seated, which disguised height differentials, but subsequently, the men were asked to stand one by one. Since the defendant was by far the largest of the participants, he contended that the lineup procedure was unduly suggestive. The Court of Appeals noted that it normally engaged in a two-step process in evaluating such a claim:

> First, we ask whether the defendant established that the identification procedure was unnecessarily suggestive. If it was, we ask whether, under the totality of the circumstances, the identification was reliable despite the suggestive procedures. In determining the reliability of an identification, we consider five factors: (1) the witness' opportunity to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty that the witness demonstrated at the time of the confrontation, and (5) the time elapsed between the crime and the confrontation. *See Cossel v. Miller*, 229 F.3d 649, 655 (7th Cir. 2000) (citing *Neil v. Biggers*, 409 U.S. 188, 199–200, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972)).
>
> *Traeger* at 474

In reviewing the material facts, the *Traeger* Court determined, from viewing photographs of the lineup, that even though the defendant was much larger in stature and more robust than the other participants, the differences were not so great as to create an unduly suggestive lineup. The court also found that the bank teller had ample opportunity to view the robber while she was getting money from her drawer and that her level of attention appeared to have been elevated by the fact that she was the victim of a robbery. She accurately described Traeger as an individual who was in his midthirties, "who was 6'3" tall, weighed 300 to 350 pounds, was unshaven, and wore a blond ponytail."[35] The Court rejected the defense argument concerning unfair suggestiveness because Traeger wore an ankle strap restraint during the lineup. The barely visible plastic ankle restraint would not be recognizable as a restraint unless one were intimately acquainted with the criminal justice system, and there was no evidence that the bank teller focused on Traeger's feet at the lineup.[36]

Ultimately, the Court of Appeals rejected defendant Traeger's complaints based on the alleged improper identification procedures because the Court followed the suggestions offered by the Supreme Court in *Neil v. Biggers*, mentioned previously. While most state courts have followed the principles suggested in *Neil* and reconfirmed by the Court in *Manson v. Brathwaite*[37] when deciding identification issues, some states have determined to pursue a more in-depth evaluation and may reject identifications based on state case law. States are free to offer greater procedural safeguards and follow more stringent concepts of due process concerning identification and to reject procedures that would pass muster under the minimal federal constitutional standards.[38]

10. The Initial Appearance and the Preliminary Hearing

Although a preliminary hearing is not a required step under the Constitution of the United States, many states use it as an additional screening device for criminal cases, especially where a grand jury has not returned an indictment or a grand jury is not

expected be used. Generally, the purpose of a preliminary hearing is to establish whether probable cause exists to believe that the defendant has committed a crime, usually a felony. Some states dispense with a preliminary hearing completely where a grand jury has returned an indictment[39] because the grand jury has already made the determination of probable cause. As is the case in many legal proceedings, the statutory right to a preliminary hearing is a waivable right, and an informed defendant may dispense with this legal procedure.[40] Unlike a probable cause only hearing, the preliminary hearing is adversarial and permits the confrontation and cross-examination of prosecution witnesses by the defendant. As a general rule, states follow the rules of evidence at preliminary hearings.[41] Where a state chooses to use the preliminary hearing, it must grant a defendant the Sixth Amendment right to counsel; where a defendant is indigent, there is a right to free counsel.[42]

The Supreme Court first recognized the right to counsel at a preliminary hearing in *Coleman v. Alabama*, 399 U.S. 1 (1970) (see Case 12.2). In *Coleman*, the defendants had been granted a preliminary hearing in an assault with intent to commit murder prosecution, but the indigent defendants were not represented by counsel. In deciding the case, the Court noted that an accused requires the guidance of counsel in every step of a criminal prosecution and that the Sixth Amendment right to counsel extends beyond the actual trial. The *Coleman* Court determined that a preliminary hearing constituted a critical stage of the criminal justice process, at which time the assistance of counsel was required by the federal constitution.

Case 12.2 LEADING CASE: THE SIXTH AMENDMENT RIGHT TO COUNSEL AT A PRELIMINARY HEARING

Coleman v. Alabama
Supreme Court of the United States
399 U.S. 1 (1970).

CASE FACTS:

An Alabama court convicted Coleman and some associates of assault with intent to murder a Mr. Reynolds. At the trial, Mr. Reynolds testified that he had been engaged in changing an automobile tire when three men approached him. One of the men shot Reynolds, and there was evidence that Coleman put his hands on Mrs. Reynolds. As a car approached, the men ran away after one of them shot Reynolds a second time. The victims positively identified Coleman and the others as the perpetrators.

During the pretrial stage of the prosecution and at the preliminary hearing, the state of Alabama failed to furnish Coleman with legal representation to advise him of legal issues presented. Although Alabama law does not require a preliminary hearing, when one is held, a variety of defendant's rights become involved. Among the issues to be determined at an Alabama preliminary hearing are whether there is probable cause to present the case to the grand jury and whether to allow bail and in what amount for bailable crimes. Upon appeal, Coleman argued that Alabama's failure to provide him with appointed counsel at the preliminary hearing unconstitutionally violated the Sixth

Amendment right to counsel, a "critical stage" of the prosecution.

LEGAL ISSUE:

Where a preliminary hearing is an optional step in the criminal process, where a defendant is not required to advance any defenses, is a preliminary hearing considered a "critical stage" of the criminal justice process for which the right to counsel under the Sixth Amendment exists?

THE COURT'S RULING:

The Court determined the Sixth Amendment right to counsel was required at a preliminary hearing because the justices determined that the preliminary hearing constituted a "critical" stage of the criminal process. The justices noted that the assistance of an attorney might expose flaws in the prosecution's case, can "freeze" adverse testimony that may be used at trial, and should assist in discovering the prosecution's theory of the case.

ESSENCE OF THE COURT'S RATIONALE:

II

This Court has held that a person accused of a crime "requires the guiding hand of counsel at every step in the proceedings against him," *Powell v. Alabama*, 287 U.S. 45, 69 (1932), and that that constitutional principle is not limited to the presence of counsel at trial.

It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. *United States v. Wade, supra*, at 226.

Accordingly, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice. *Id*. at 227.

Applying this test, the Court has held that "critical stages" include the pretrial type of arraignment where certain rights may be sacrificed or lost, *Hamilton v. Alabama*, 368 U.S. 52 (1961). [Other citations omitted.] The preliminary hearing is not a required step in an Alabama prosecution. The prosecutor may seek an indictment directly from the grand jury without a preliminary hearing. *Ex parte Campbell*, 278 Ala. 114, 176 So.2d 242 (1965). The opinion of the Alabama Court of Appeals in this case instructs us that under Alabama law the sole purposes of a preliminary hearing are to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury, and if so to fix bail if the offense is bailable. The [Alabama] court continued:

> At the preliminary hearing . . . the accused is not required to advance any defenses, and failure to do so does not preclude him from availing himself of every defense he may have upon the trial of the case. Also *Pointer v. State of Texas* [380 U.S. 400 (1965)] bars the admission of testimony given at a pretrial proceeding where the accused did not have the benefit of cross-examination by and through counsel. Thus, nothing occurring at the preliminary hearing in the absence of counsel can substantially prejudice the rights of the accused on trial.
>
> 44 Ala.App., at 433; 211 So.2d. at 921
>
> * * *
>
> The determination whether the hearing is a "critical stage" requiring the provision of counsel depends, as noted, upon an analysis "whether potential substantial prejudice to the defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice." *United States v. Wade, supra*, at 227. Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case, that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.
>
> The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a "critical stage" of the State's criminal process at which the accused is "as much entitled to such aid [of counsel] . . . as at the trial itself." *Powell v. Alabama, supra*, at 57.

CASE IMPORTANCE:

This case demonstrated that the justices on the Supreme Court were committed to due process by extending the right to counsel to any part of the criminal process where the guiding hand of a lawyer could assist a defendant whether indigent or not.

Consistent with the Sixth Amendment right recognized in *Coleman*, the California Penal Code provides that the defendant be allowed to have counsel during a preliminary hearing:

> The magistrate shall immediately deliver to the defendant a copy of the complaint, inform the defendant that he or she has the right to have the assistance of counsel,

> ask the defendant if he or she desires the assistance of counsel, and allow the defendant reasonable time to send for counsel.
>
> Cal. Penal Code § 859 (2021)

Most states allow a defendant a reasonable time in which to obtain legal counsel and will proceed with a preliminary hearing only when the attorney for the defendant can be present. When a defendant is indigent or is otherwise unable to employ counsel, the court will appoint one to represent a defendant prior to the preliminary hearing.

Among the purposes of a preliminary hearing is to show that probable cause exists to believe that the accused committed the crime or crimes. As a general rule, at the beginning of a preliminary hearing, the government calls the witnesses who will be able to offer sufficient evidence to demonstrate probable cause to believe that the defendant has committed the crime or crimes for which the allegation has been made. The witnesses are subject to cross-examination by the defense, which may enable the attorney for the accused to cast sufficient doubt to destroy probable cause. In most cases, the defendant's attorney will not be successful in having the case dismissed but will be able to gather evidence about the government's theory of the case and how the prosecution will probably proceed if the case goes to trial. An additional benefit to the defendant is that the witnesses who do testify at a preliminary hearing have the effect of "freezing" their testimony, and the subsequent trial testimony must match what was given at the preliminary hearing or the witness will face impeachment at trial.

Demonstrative of the general theory that the preliminary hearing shall not become a mini-trial on the merits, many jurisdictions do not allow defendants to call witnesses to rebut the general testimony placed on the record by the prosecutor or to summon witnesses in order to impeach the prosecutor's witnesses. In the interests of justice, California allows a slightly different process from the traditional preliminary hearing procedure. When the examinations of prosecution witnesses in preliminary hearings in California are complete, any witness the defendant may produce shall be sworn and examined. The limitations on defense witnesses are that

> the magistrate shall require an offer of proof from the defense as to the testimony expected from the witness. The magistrate shall not permit the testimony of any defense witness unless the offer of proof discloses to the satisfaction of the magistrate, in his or her sound discretion, that the testimony of that witness, if believed, would be reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness. See Cal. Penal Code § 866 (2021).

Essentially, the defense witnesses would be allowed to testify if such evidence would clearly be devastating to the finding of probable cause to believe that the defendant had committed the crime or crimes and might result in the discharge of the defendant.

When the preliminary hearing results in a finding by the judge or magistrate that probable cause exists, the court will order that the defendant continue to be held in custody and that the prosecutor's office take steps to continue the prosecution. In jurisdictions that are permitted to initiate serious criminal prosecutions by the use of information

rather than a grand jury, the prosecutor can file an information followed by a preliminary hearing to make a judicial determination of probable cause. If an information has not yet been filed, following a successful preliminary hearing, the prosecutor continues the steps that result in the filing of an information in the court of general jurisdiction where the case is triable.

11. Bail Issues Presented at a Preliminary Hearing

In many jurisdictions, once the judge or magistrate has determined that probable cause exists to hold the felony defendant further, the court moves to address the issue of whether to grant bail or to order pretrial detention. If an offense is subject to bail under state law, the judge must consider the relevant factors in determining what type of bail and amount would be appropriate. Some states allow a variety of assets to be pledged to meet the required monetary amount of bail. A cash bail is sometimes required, but approved property such as stocks and bonds or real estate holdings within the court's jurisdiction are generally considered permissible types of assets. The most important factor for a judge is to set the amount of bail. In making an evaluation of the defendant and the charged crime for bail purposes, the judge may be limited by an excessive bail provision of the state's law or constitution. However, many states hold by legislation, constitution, or case law that some offenses are not bailable, so any concern of excessive bail under these circumstances does not become an issue.[43]

When a defendant is or may be entitled to bail, the defense attorney has a variety of arguments to offer concerning bail in that particular case, the amount of bail, and the conditions under which bail may be offered. A fairly extensive number of decided cases offer both the defense attorney and the counsel for the government a wide range of issues to litigate concerning bail. The question of bail often arises at an arraignment or at the preliminary hearing.

12. General Bail Jurisprudence

Among other rights, the Eighth Amendment to the Constitution of the United States guarantees that "excessive bail shall not be required." A bail that has been set at an amount higher than the minimum reasonably calculated to fulfill the aims and purposes of bail may be deemed "excessive" under the Eighth Amendment. Bail allows a criminal defendant to be released from formal government custody in exchange for the payment money or the pledge of property of a value sufficient to ensure the defendant's return to court at all proper times. The rationale for conditionally releasing a person who has been accused of a crime rests on the primary consideration of the pretrial presumption of innocence.[44] Pretrial release permits the accused to freely consult with counsel, to interview and search for favorable witnesses, to

assist in the preparation of an appropriate defense, and to continue gainful employment, among other things.

The assets pledged or paid as bail usually must meet state or local statutory requirements concerning type and location of the collateral as well as the value of the property. Even where sufficient property has been pledged as bail, the conditional freedom always involves the risk that a defendant might flee and fail to return when required. For this reason, if new factors become obvious or if new conditions arise in the time prior to trial, an adjustment of the amount or a reconsideration of the conditions of bail may be held at any time upon the request of either party. Offering bail is, at best, a calculated risk-weighing decision where a judge gambles that a defendant will perform consistently with the pledges and promises made in court.

Bail limitations have existed from the time of the common law, when bail was not available for all types of alleged crimes, especially the more serious offenses. Where the crime charged carries a potential life sentence or the death penalty or involves serious drug trafficking, a judge or magistrate might refuse to set bail at any amount. Under local law or pursuant to practice, judges may deny bail where the danger to the community appears to be great, particularly in instances involving sexual crimes or drug-related offenses. The resulting situation ensures, as much as is possible, that the defendant will not flee and does not give rise to a claim of "excessive bail," since a judge denied bail completely.

While states frequently grant pretrial bail, the bail portion of the Eighth Amendment has not yet explicitly been incorporated into the Due Process Clause of the Fourteenth Amendment. Therefore, it cannot be stated with certainty whether this part of the Eighth Amendment applies to state bail practice. In any event, the states generally permit bail to be granted on terms and conditions that mirror or are substantially similar to the federal bail jurisprudence under the Eighth Amendment.[45]

In a leading case that remains good law, *Stack v. Boyle*, 342 U.S. 1 (1951), the Supreme Court determined that the factors used to set bail are subject to individual determination by taking due consideration for the personal circumstances of each person charged in federal prosecutions (see Case 12.3). Felony bail cannot be automatically set based on the charge or the past history of other persons charged with the same offense. Courts should consider the nature and circumstances of the defendant and of the crime, the strength of the evidence, the general character of the accused, and the ability of a defendant to pay for release. Demonstrative of bail factors in a state case,[46] Texas bail considerations also look to ensure the future safety of a victim of the alleged offense as well as the accused's work record, ties to the community, length of residency, prior criminal record, compliance with previous bond conditions, and aggravating circumstances related to the charged crime. A judge weighs all of these factors to come to a determination concerning the amount and conditions of bail. According to *Stack v. Boyle*, bail that has been set at a greater amount than necessary to ensure that the accused individual will not flee will be considered "excessive." A federal judicial official must make a determination that is unique for each defendant.

Case 12.3 LEADING CASE: FEDERAL BAIL DETERMINATIONS REQUIRE INDIVIDUAL CONSIDERATION

Stack v. Boyle
Supreme Court of the United States
342 U.S. 1 (1951).

CASE FACTS:

A federal grand jury returned an indictment against twelve defendants for violating the Smith Act, 18 U.S.C. sections 371 and 2385, that involved advocating the overthrow of the government of the United States and conspiracy with other conspirators to do the same. Subsequent to their arrest in New York, a federal district judge set bail at amounts ranging from $2500 to $10,000 by taking into consideration the various factors affecting each defendant. When the defendants arrived in California, and pursuant to the prosecution's request that the amounts of bail be increased, the district court elevated bail to $50,000 for each defendant.

Defendant Stack filed a motion for a reduction in bail on the basis that the amount as determined violated the excessive bail prohibition of the Eighth Amendment. In support of the motion for bail reduction, the petitioners cited their varying financial situations, family relationships, health, prior criminal records, and other information. The prosecution did not focus on individual characteristics of each defendant during the bail reconsideration hearing. In opposition to the bail amount change, the prosecution argued that since other persons previously convicted of violating the Smith Act had jumped bail, a high bail was absolutely necessary for these defendants.

The federal district court denied the motion to reduce bail and refused to grant a motion for a writ of habeas corpus. The two decisions were affirmed by the Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States granted certiorari.

LEGAL ISSUE:

In a federal prosecution, is the amount of bail considered excessive where it is set without reference to individual circumstances in an amount greater than the minimum level necessary to ensure the appearance of each defendant for all appropriate times?

THE COURT'S RULING:

Recognizing that bail considerations involve both the Eighth Amendment and federal statutes, the Court vacated the trial court's determination of bail to require that the judge look at the individual circumstances and situations of each defendant and set bail at the minimum amount necessary to ensure attendance at all trial proceedings.

ESSENCE OF THE COURT'S RATIONALE:

* * *

From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, the present Federal Rules of Criminal Procedure, Rule 46(a)(1), 18 U.S.C.A., federal law has unequivocally provided that a

person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. *Ex parte Milburn*, (1835) 9 Pet. 704, 710, 9 L.Ed. 280. . . . Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment.

Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards as expressed in Federal Rules of Criminal Procedure are to be applied in each case to each defendant. . . . It is not denied that bail for each petitioner has been fixed in a sum much higher than usually imposed for offenses with like penalties and yet there has been no factual showing to justify such action in this case. The Government asks the courts to depart from the norm by assuming, without the introduction of evidence, that each petitioner is a pawn in a conspiracy and will, in obedience to a superior, flee the jurisdiction. . . .

If bail in an amount greater than that usually fixed for serious charges of crimes is required in the case of any of the petitioners, that is a matter to which evidence should be directed in a hearing so that the constitutional rights of each petitioner may be preserved. In the absence of such a showing, we are of the opinion that the fixing of bail before trial in these cases cannot be squared with the statutory and constitutional standards for admission to bail.

* * *

The Court concludes that bail has not been fixed by proper methods in this case and that petitioners' remedy is by motion to reduce bail, with right of appeal to the Court of Appeals. Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to vacate its order denying petitioners' applications for writs of habeas corpus and to dismiss the applications without prejudice. Petitioners may move for reduction of bail in the criminal proceeding so that a hearing may be held for the purpose of fixing reasonable bail for each petitioner.

It is so ordered.

CASE IMPORTANCE:

Felony bail considerations must be made with reference to individualized factors, including the strength of the government's case, defendant's prior record while on bail, and danger to the community, among other considerations. Where bail is to be offered, each defendant must be evaluated based on individual circumstances.

For state felony cases,[47] a judicial official generally must consider numerous factors in determining the appropriate bail amount while giving due consideration to the individual circumstances of a particular defendant. Considerations underpinning the bail decision involve an individual analysis of the defendant's past history, if any, while under pretrial release, the defendant's ties to the local community involving family and length of residence, the defendant's work history and financial resources, the seriousness of the crime, the strength of the evidence, and the potential penalty if convicted. Additional considerations may involve whether the defendant was on bail or probation for a different offense when recently arrested and the likelihood that the defendant will continue criminal conduct or otherwise endanger individual members of the community. If the defendant has been granted bail in the past, a judge will evaluate whether the defendant properly appeared at all required times or escaped while on bail. Although the primary bail consideration centers focuses upon the issue of whether the defendant will return for all required court appearances, the federal Bail Reform Act of 1984 interjected additional requirements for some federal prosecutions.[48]

13. Federal Bail Practice: Relevant Considerations

Bail involving criminal prosecutions in federal courts is regulated by the United States Code and provides that upon the appearance in front of a judicial official, the judicial officer is required to issue an order that the person be released on his or her personal recognizance (agreement to appear) or upon the execution of an unsecured bond or released on conditions that will protect the public and will ensure the appearance when required of the defendant at all proceedings. Alternatively, the judicial official may order that the person be temporarily detained to permit revocation of an earlier conditional release order or to permit the deportation or exclusion of the person, where appropriate. The judicial official may order that the person be detained without bail when there are no conditions or combination of conditions that can be mandated by the judge that would reasonably secure the appearance of the person at all required times or that no conditions would ensure the safety of any other person or the safety of the community.[49]

Congress moved to correct some perceived abuses in federal bail practice, most notably the tendency of drug-trafficking defendants to post large bail amounts and flee the jurisdiction of the United States. In passing the Bail Reform Act of 1984,[50] Congress continued most of the typical requirements for bail but changed the basic philosophy of federal bail in a few situations. The act directed federal courts specifically to look at the type of crime charged, the weight of the evidence, the defendant's physical and mental condition, any history of drug or alcohol abuse by the defendant, and the potential danger presented by the defendant toward any person and toward the community. The act changed federal bail practice in cases where the defendant was charged with specific drug offenses, a crime of violence, a life imprisonment crime, or a crime for which the penalty could be greater than ten years or where the accused had been convicted

of two similar crimes within the past ten years. In these situations, the attorney for the federal government may ask for a pretrial detention order. In addition, where the federal prosecutor presents evidence that the person might flee, could present a danger to any community member, or might obstruct justice by threatening potential witnesses or jurors, bail may be denied altogether.[51]

In *United States v. Salerno*,[52] the Supreme Court upheld the constitutionality of portions of the Bail Reform Act of 1984 affecting federal pretrial detention. The *Salerno* Court rejected arguments that the practice of holding some defendants in custody pending trial constituted pretrial punishment and noted that pretrial detention orders served to prevent dangers to the community, a legitimate regulatory goal. In *Salerno*, writing for the Court, Chief Justice Rehnquist noted, "The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel."[53] The Court stated that although the Eighth Amendment prohibited excessive bail, the language of the Amendment did not address the issue of whether bail should be available in a particular case and under what circumstances bail could be denied completely. If bail has been properly denied, there is little chance that an excessive bail argument under the Eighth Amendment will be successful.

Although the federal Bail Reform Act of 1984 contemplated that federal courts would grant bail to many persons, only two situations were recognized by the statute.[54] When a court is faced with a bail request, it may either grant release on any reasonable condition or conditions or order detention without bail. If a court grants bail, the accused is deemed released, no matter what conditions are ordered by the judge or how severe or limited the conditions of release might be. In *Reno v. Koray*,[55] the district court granted the defendant presentence release to a community treatment center, where the order required that he would be confined to the physical premises of the center without permission to leave for any reason unless accompanied by a federal agent. The plain English meaning of these conditions would seem to indicate that the defendant remained in government custody while he awaited sentencing rather than being free to roam abroad at his own discretion. When the defendant desired credit toward time served at the center, the *Koray* Court held that he had been released to a halfway house and had not been denied bail. For the reason that he was not in jail but had been released to the halfway house, he could not apply that time toward his sentence. The lesson of the case is that a person may be "released" under conditions of bail that seem almost like being in full custody; thus a person facing a sentence might want to reconsider whether pretrial or presentence release serves an appropriate individual purpose where the federal prosecutor's case appears strong or the defendant has already been convicted. While *Koray* was a federal case, the logic would apply to state practice under similar circumstances.

The federal Bail Reform Act of 1984 mandated that a federal arrestee be granted a detention hearing at his or her first appearance before a judicial official. Such a hearing could be delayed up to five days at an arrestee's request or up to three days on motion by the government. Figure 12.1 shows the federal court form used to permit detention until the mandated bail hearing mandated pursuant to the present federal Bail Reform Act of 1984.

AO 470 (Rev. 01/09) Order Scheduling a Detention Hearing

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America v. _____ *Defendant*	)))))	Case No.

ORDER SCHEDULING A DETENTION HEARING

A detention hearing in this case is scheduled as follows:

Place:	Courtroom No.:
	Date and Time:

IT IS ORDERED: Pending the hearing, the defendant is to be detained in the custody of the United States marshal or any other authorized officer. The custodian must bring the defendant to the hearing at the time, date, and place set forth above.

Date: _____

_____
Judge's signature

_____
Printed name and title

FIGURE 12.1 Example of an Order Scheduling a Detention Hearing in Federal Court.[56]

At issue in *United States v. Montalvo-Murillo*[57] was the question of what remedy should be available for the arrestee if a detention hearing had been delayed longer than the federal statute permitted and delayed significantly through no fault of the arrestee. To resolve a dispute among federal courts of appeal, the Supreme Court granted certiorari to determine the remedy for failure to grant a detention hearing at the first appearance of an arrestee. The Court held that a federal court does not lose jurisdiction to make a detention determination under the Bail Reform Act even where the act has not been followed to the letter. The Court held that a court may issue a detention order even if the government has not followed the time requirements of the law. According to the *Montalvo-Murillo* Court, "Magistrates and district judges can be presumed to insist upon compliance with the law without the threat that we must embarrass the system by releasing a suspect certain to flee from justice."[58]

In contrast to the practice of felony bail and the litigation that accompanies it, criminal cases involving misdemeanor offenses generally do not require such detailed analysis of individual factors. Typically, alleged misdemeanors and violations of local municipal ordinances are bailable with little reference to any factor other than a local predetermined bail schedule that has taken the seriousness of the alleged offense.[59] For example, the Ohio rules covering misdemeanor bail note that

> In order to expedite the prompt release of a defendant prior to initial appearance, each court shall establish a bail bond schedule covering all misdemeanors including traffic offenses, either specifically, by type, by potential penalty, or by some other reasonable method of classification.[60]

Regardless of whether the charged offense constitutes a felony or misdemeanor, once the amount of bail has been judicially determined, the defendant, or a person acting on behalf of the defendant, may personally pay or pledge the full amount to the court. Not infrequently, the accused does not possess the complete bail amount or own approved types and values of real or personal property and must resort to using a commercial bail bondsman. Typical bond practice requires the defendant to pay 10% to 15% of the full bail to the bondsman in exchange for the bondsman's executing a pledge for the complete amount to the government. Bail posted through a bondsman is money that will not be returned to the defendant even if he or she fully complies with all conditions of bail.

The availability of bail may be of extreme importance to a defendant to be able to assist in the orderly preparation of a defense. In addition, the defendant may desire to assert other constitutional rights prior to trial that may take time to prepare and would be facilitated by being released on bail. In some cases, the trial might occur too rapidly following notification of charges to allow adequate preparation; conversely, delay in getting to trial may create other problems and challenges for a defendant. Release on bail does have the effect of preventing pretrial punishment and detention while the defendant retains the constitutional presumption of innocence. Bail after a conviction rests on some different considerations, and the presumption of innocence no longer exists. Many jurisdictions look at the chances of a defendant's success upon appeal, consider whether the appeal has been taken for the purposes of delay on starting the sentence, and look at the length of sentence and how long an appeal will take. If the conviction has been for a misdemeanor and the matter might not be resolved until the defendant has served longer than the sentence would have been, post-conviction bail may be in order. Other factors that are considered for pre-trial bail generally still apply in post-conviction bail requests.

14. Right to a Speedy Trial: Reasonable Time Requirements

If a person could be charged with a crime and if the government took no additional steps to resolve the charge, a defendant would be in limbo and face an uncertain future in moving on with life, family, and career. Federal constitutional protections granted to all accused defendants include the Sixth Amendment right to a speedy trial; defendants also possess similar additional protections under state laws and state constitutions. The

Sixth Amendment right to a speedy trial was incorporated through the due process clause of the Fourteenth Amendment and made applicable to the states in *Klopfer v. North Carolina* in 1967.[61] Regardless of the source of the right, the guarantee of a speedy trial is a right that must be asserted prior to trial or it may be deemed to have been waived.

The Sixth Amendment to the United States Constitution reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a *speedy and public trial*, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.
>
> (Emphasis added)

The literal language of the Sixth Amendment states that in all prosecutions of a criminal nature, the accused has the right to a speedy trial. As a practical matter, a criminal trial may be delayed for a variety of reasons. The defendant's request for additional time to formulate a defense, the prosecution's need to prepare its case, and the resolution of pretrial motions constitute appropriate reasons that the start of a trial may be delayed. Prior to 1967, the Sixth Amendment speedy trial right clearly applied only in federal criminal trials, but following the Court's decision in *Klopfer v. North Carolina*,[62] the right to a speedy trial became a constitutional requirement enforceable against the states in criminal prosecutions. In addition to the constitutional provision, Congress passed the Speedy Trial Act of 1974,[63] which helps move federal criminal cases to the top of trial dockets. States also have statutory speedy trial statutes designed to ensure that criminal matters generally receive expeditious resolution. For example, the California speedy trial statute requires that a felony case must be brought to trial within sixty days after an arraignment, indictment, or filing of an information or the action will be dismissed.[64] In any case, a defendant has an improved chance of having a case dismissed based on a speedy trial statutory violation than on federal or state constitutional grounds; statutes are more specific concerning their provisions, making it easier to demonstrate a prosecution deficiency with legal requirements.

From a policy perspective, prompt resolution of criminal matters allows a defendant to plan for the future and allows society to make a proper disposition of the case and to move forward. Having criminal cases resolved fairly rapidly prevents a nonbailed defendant from extensive preresolution punishment and disruption or termination of employment. Additionally, a fairly quick trial allows the accused's defense to remain fairly fresh, before the memory of witnesses has had much chance to fade. A trial held within a reasonable time limits the period of public scrutiny of the defendant's affairs, which is an additional justification for a quick resolution of the defendant's legal difficulties. If there were no imperative to resolve criminal cases, a prosecutor could allow an accused to wallow in uncertainty for months or years, always wary that a prosecution could be initiated at any time.[65] Such an extended delay is not normally practiced by the prosecution, however; the government generally has the burden of proof concerning most trial issues, and delay in proceeding to trial usually works in a defendant's favor as the memory of prosecution witnesses becomes less clear with the passage of time.[66]

15. Speedy Trial Statutes

Criminal defendants may file pretrial motions concerning speedy trial rights based on federal law and state statutory and constitutional provisions, depending on which jurisdiction has initiated criminal charges. Typically, state and federal speedy trial statutes attempt to provide a timetable with which the prosecution must comply, subject to carefully delineated exceptions. Most state statutes include savings provisions to prevent the release of a defendant due to a mere nonconformity with the time requirements.

Demonstrative of a state speedy trial statute is the law of Ohio.[67] The speedy trial statute of this state applies to both felonies and misdemeanors, but most of the litigation has occurred in the felony arena. Ohio law requires that a person against whom a charge of a felony is pending must be brought to trial within 270 days after the person's arrest if the person has not been held in custody. In a situation where the accused has remained in custody, each day of custody counts for three days, and the individual must be brought to trial within ninety days. The running of the time is stalled for any period when the defendant is unavailable for trial, deemed mentally incompetent, does not have counsel, or for pretrial motions made by the defendant. Any reasonable continuance necessitated by the prosecution does not count against the running of the statutory time period.[68]

Because both society and the accused possess an interest in a fairly rapid resolution of criminal cases, the state function of administering justice arguably is best served by freeing the innocent and incarcerating wrongdoers as soon as possible. Without the statutory right to a swift resolution of a criminal case, a defendant would face an uncertain future and would be forced to contend with difficulties in planning for the future, with maintaining employment, in meeting expenses of litigation, and with diminished availability of witnesses and testimony. Problems concerning availability of defense witnesses become especially acute where crispness and detail of testimony prove crucial. Further prejudice to the defendant's reputation and community standing occurs while criminal charges are pending, a factor that leads to much personal anxiety and stress. Of special concern is the prejudice suffered by a defendant who is unable to make bail and must remain incarcerated pending trial. In such a case, a speedy resolution becomes imperative.

16. Speedy Trial: When the Time Begins to Run Under the Sixth Amendment

The time aspect of the constitutional speedy trial right begins to run when a person has been arrested for a particular crime and has been either retained in custody or released on bail. The period also begins to run when a person has been indicted or has had an information filed against him or her. Only by taking one of these steps has the prosecution indicated that a criminal case has been selected for which a speedy resolution becomes meaningful. The constitutional right to a speedy trial also applies to individuals incarcerated in a foreign jurisdiction (another state) who have been indicted or had an information filed in the current state. In order not to violate the Sixth Amendment, the

jurisdiction lacking custody must attempt to procure the presence of the defendant or risk a violation of the right to speedy trial. The noncustodial state may not use the excuse that unavailability is the defendant's problem where the convict is the "guest" of a foreign jurisdiction.[69]

17. To Determine Whether a Violation Exists: The Four-Factor Test

To determine whether the federal constitutional right to a speedy trial has been violated, courts should look to four factors as described by the Court in *Barker v. Wingo* (see Case 12.4).[70] According to the *Barker* Court, attention should be directed to consideration of the length of the delay, the reason for the delay, the defendant's assertion or nonassertion of the right, and prejudice to the defendant. The length of the delay may prove determinative that the right has been violated. Case law seems to indicate that the passage of time *alone* will rarely prove sufficient to constitute an infraction,[71] but time, in concert with other factors, may tip the scales in the direction of a violation.

Case 12.4 LEADING CASE: THE FOUR-FACTOR TEST USED TO DETERMINE SPEEDY TRIAL VIOLATIONS

Barker v. Wingo
Supreme Court of the United States
407 U.S. 514 (1972).

CASE FACTS:

Following two brutal homicides, Silas Manning and Willie Barker, the petitioner, were indicted for the murders. The trial court appointed attorneys for the pair on September 17 and set a tentative trial date of October 21, 1958. Since the Commonwealth of Kentucky had a stronger case against Manning and the prosecutor felt that Barker could only be convicted if Manning testified against Barker, the trial court granted the first of what eventually became sixteen continuances. Barker's trial finally began on October 9, 1963, some five years following his murder indictment. Barker spent ten months in custody prior to being released on pretrial bail.

The primary reason for the lengthy delay prior to Barker's trial was the difficulty of obtaining a valid conviction of Manning so that Manning could be forced to testify against Barker. Subsequent delays involved the prosecutor and the health of his witnesses. Following Manning's conviction, the prosecutor requested a continuance of Barker's case for the twelfth time, and Barker objected. The court granted the twelfth continuance in February 1962 and two subsequent continuances in June and September of 1962. Barker did not object to the latter two continuances. In February 1963, Barker's trial was set for March 19. On the March trial date, the prosecutor requested another continuance to which Barker objected and requested a dismissal of the case. The judge set the case for a June trial in 1963. The June trial date came and went

due to the continued illness of the former sheriff. The trial court announced that if the case were not tried in the October term of court for 1963, that the case would be dismissed with prejudice.

At the October trial, Manning testified against Barker, with the result that Barker was convicted of murdering the elderly couple and sentenced to life in prison. Barker argued that his trial should never have occurred because his rights under the speedy trial provision of the Sixth Amendment had been violated and the case should have been dismissed. The Supreme Court of the United States granted certiorari to consider whether the Sixth Amendment right to a speedy trial had been violated.

LEGAL ISSUE:

Where valid reasons existed for the prosecution to seek trial delays for longer than five years, does the length of the delay, without more, violate the Sixth Amendment right to a speedy trial?

THE COURT'S RULING:

The Justices decided that the length of time was only one factor to consider in making a evaluation of whether the Sixth Amendment right to speedy trial has been violated. The court noted that the reasons for the delay, the defendant's assertion or non-assertion of the right, and prejudice to the defendant's case were three other factors that must be considered in making the determination.

ESSENCE OF THE COURT'S RATIONALE:

[The Court noted that the right to speedy trial is somewhat different from other constitutional rights that protect an accused. Society has an interest in a rapid resolution of a criminal case, but a defendant may wish to delay because a prosecutor's case generally gets weaker with time. The right to speedy trial is a somewhat vague concept that does not allow an easy determination of when the right has been violated. The Court reaffirmed that the remedy for the violation of the right to speedy trial is a dismissal of the case without the chance to bring in a second time.]

III

[The defendant suggested that the court follow one of two approaches.] . . . The first suggestion is that we hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period. The result of such a ruling would have the virtue of clarifying when the right is infringed and of simplifying courts' application of it.

* * *

We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.

The second suggested alternative would restrict consideration of the right to those cases in which the accused has demanded a speedy trial. Most States have recognized what is loosely referred to as the "demand rule," although eight States reject it. . . . Under this rigid approach, a prior demand is a necessary

condition to the consideration of the speedy trial right. . . .

Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

* * *

[The Court rejected either a set elapsed time test and rejected a requirement that the defendant has to demand a speedy trial.]

IV

A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis.

* * *

The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. . . . To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Closely related to length of delay is the reason the government assigns to justify the delay. [A deliberate delay for no good reason would run against the prosecutor. Negligence and overcrowded courts would not be as severe considerations. Delay that is the government's fault is a factor in the defendant's favor]. . . . Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice

is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

* * *

CASE IMPORTANCE:

The four-factor test provides a benchmark against which alleged violations of the right to speedy trial can be measured. The length of the delay and prejudice to the defendant's case are related and carry the most weight in making this evaluation.

The Court applied *Barker v. Wingo* and the four-factor test in *Doggett v. United States*. In that case, the defendant had been indicted in 1980 for drug-related offenses but not arrested until late 1988. In intervening time, he had been residing openly in the United States for almost six years.[72] Doggett's location could have been easily discerned except for governmental negligence. On speedy trial grounds, the *Doggett* Court overturned Doggett's conviction for drug offenses based on the length of the delay and the presence of presumed, but unproven, prejudice. Even though Doggett proved unable to present specific instances of prejudice to his case, the Court accepted the presence of prejudice by citing the extremely long wait between indictment and arrest. The *Doggett* decision reaffirmed principle that the remedy for a violation of the Sixth Amendment right to speedy trial is an absolute dismissal of the charges with prejudice or, where there has been a conviction, a reversal of the decision with no chance to retry the defendant.

The second factor mentioned in *Barker* involved the reason for the delay. Acceptable reasons include time used for psychiatric examination, defense requests for continuances, and absence or illness of necessary prosecution witnesses. Crowded court dockets and postponements purposely used or created to hinder the defense have not proven acceptable as reasons for delay. Where a defendant has requested a continuance, the right to a speedy trial has been effectively waived to the extent of the request.

The *Barker* Court noted that the assertion or failure to assert the right to a speedy trial constitutes the third factor courts must consider. While some continuances may enhance the prosecution's case, normally the defense benefits from a delay because the burden of proof rests with the government. Where the defendant remains silent and does not *assert* the right, a waiver will not conclusively be presumed, but the silence of the defendant in failing to assert the constitutional right will not materially enhance a speedy trial contention.

The final factor cited by the *Barker* Court as important to a determination of a speedy trial violation was prejudice to the defendant. Prejudice should be viewed in the light of the interests of defendants, which the speedy trial right was designed to protect. The *Barker* Court identified three such prejudicial interests: the prevention of oppressive pretrial incarceration, the diminution of anxiety and concern of the accused, and a limitation of the possibility that the defense case might be impaired.[73] Of the three, the most crucial is the third, because the inability of a defendant adequately to prepare his

or her case tilts the fairness of the criminal justice system. If witnesses die or disappear during a delay, the prejudice becomes apparent. Prejudice may originate where defense witnesses are unable to recall accurately events of the distant past.

Applying the *Barker* factors to an allegation of a Sixth Amendment speedy trial violation, the Ohio Supreme Court ordered a criminal case dismissed.[74] Defendant Long's original plea-bargained case was reversed on appeal and remanded due to a failure by the trial court to properly advise the defendant of his constitutional rights upon acceptance of the plea. The prosecution initially offered the same plea terms, but Long's counsel asked that the case be set for trial. The defendant consistently demanded that his right to a speedy trial be respected, but other pretrial hearings came and went with no trial on the horizon. The prosecutor's office was not diligent, and on one occasion no one from the prosecutor's office appeared in court for a hearing. Nine months elapsed, and the defendant again asserted his right to a speedy trial and noted that 518 days had passed since the reversal of his original conviction. The defendant eventually accepted another plea agreement but reserved his right to appeal, on constitutional speedy trial grounds. In taking the case, the Supreme Court of Ohio noted that it would judge the constitutional violation based on the four-factor test of *Barker v. Wingo*.[75] (see Case 12.4). The top court found that the length of the delay for over a year from the time the case was remanded from the Court of Appeals was troubling and was presumptively prejudicial to the defendant's detriment. The inattention of the trial court and the prosecution toward moving the case for retrial, the second *Barker* factor, the reason for the delay, was clearly in the defendant's favor. In this case, the top Ohio court determined that the defendant had clearly and repeatedly made motions that his case be tried, and he certainly had not been dilatory in demanding a speedy trial. This factor also pointed toward a violation of the Sixth Amendment right to speedy trial. The court also concluded that the fourth factor, prejudice to the defendant, weighed heavily in the defendant's favor because the factor of prejudice to the defendant's person and his case was designed to prevent oppressive pretrial incarceration, minimize anxiety of the accused, and reduce the possibility that the defense would be impaired. In finding that all four factors of the *Barker* test were met, the defendant's convictions were reversed, but since he had already been released from custody and had served a six-month period of post-release control, there was no reason to remand the matter.[76] However, due to the finding that the defendant's Sixth Amendment right to a speedy trial had been violated, the defendant's convictions were erased and no longer existed.

To prevail on a federal constitutional claim of a Sixth Amendment right to a speedy trial, prejudice to the merits of a defendant's case appears to be the primary factor in winning a motion to dismiss a criminal prosecution. Sheer length of time, even in the absence of clear prejudice, may permit a trial court to find a violation, although length of time accompanied by prejudice to the merits of the case may stand the best chance of winning the motion for a defendant. Prejudice may include extensive pretrial incarceration, loss of job, stress to the defendant, or loss of witness testimony due to death or fading memory. Where a strong indication of prejudice appears and coexists in the presence of a sufficient level of the three other factors, a court may conclude that the government has violated a defendant's Sixth Amendment right to a speedy trial. The speedy trial right does not apply once a person has been convicted or has pled guilty, so that any delay in imposing a sentence cannot be a violation of the constitutional right but

could be a violation of due process. In one federal case,[77] the Supreme Court rejected the convicted defendant's argument based on constitutional speedy trial grounds that a fourteen-month delay between his conviction and sentencing constituted a violation. The Court noted that the remedy for a constitutional speedy trial right was dismissal with prejudice and that to allow that remedy for a delayed sentencing would produce a windfall to the defendant by vacating validly obtained convictions.

18. Remedy for Violation of Sixth Amendment Right to Speedy Trial

Where the criminal defendant has prevailed on a Sixth Amendment speedy trial claim, courts struggled to formulate an appropriate remedy until the Supreme Court of the United States made a determination. Some jurisdictions devised a method whereby a sentence would be reduced by the duration of the speedy trial violation, a remedy that ignored any prejudice to the defendant. However, the Court in *Strunk v. United States*[78] determined that the remedy must include a prejudicial dismissal of the criminal case. Where prejudice to the defendant, such as the death of a witness, has occurred, a reduction in length of sentence would do nothing to cure that prejudice and would not ensure fairness in a trial involving facts from the distant past. Therefore, outright prejudicial dismissal remains the sole remedy for a violation of the Sixth Amendment right to a speedy trial. This drastic remedy creates pressure on trial courts to reject pretrial motions to dismiss and has the effect of sending speedy trial issues to appellate courts for resolution. However, it is crucial that the issue be raised at the pretrial stage or the defendant runs a strong chance that an appellate court will rule that a waiver has occurred by virtue of the failure to raise the issue in a timely manner.

19. Double Jeopardy: A Required Pretrial Motion

Initial legal jeopardy attaches in a jury trial when the jury is empaneled and sworn, while jeopardy attaches in a bench trial when the first witness begins giving testimony. After jeopardy has attached, to bring a second trial on the same issues would, subject to some exceptions, constitute placing the defendant in jeopardy of losing life or freedom for a second time involving the same crime. The burden is on the defendant to make the double jeopardy complaint by a pretrial motion.

Along with other mandatory pretrial motions that an accused must make prior to trial or be deemed to have waived is the requirement to alert court and the prosecution concerning a double jeopardy claim. This necessity to object to a second trial occurs when a prior trial may have already adjudicated the case, when the case had been dismissed after jeopardy had attached when the state is attempting to bring the prosecution for a second time, or where the defendant faces a second punishment for a crime for which punishment jeopardy had already attached. The constitutional prohibition against double jeopardy has been interpreted as a prohibition against a second trial for the same crime arising from one set of operative facts by the same sovereign jurisdiction. According to

the Supreme Court, the Fifth Amendment double jeopardy provision offers three separate protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.
>
> *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)

Where the prosecution is unaware that it is about to transgress the constitutional prohibition, the defendant has the legal duty to make the prosecution aware of the constitutional issue prior to trial. According to the Fifth Amendment of the Constitution of the United States, "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." The Fifth Amendment prohibition against trying a criminal defendant twice for the same crime is based on the theory that the state, with all its resources, should try a defendant once and not exhaust the defendant's assets and will to resist with a series of consecutive trials. A judicial interpretation of the Fifth Amendment double jeopardy provision generally prevents imposing successive punishments for the same crime. For example, in one case, a defendant had been convicted of capital murder, but the jury could not unanimously agree on a penalty, so pursuant to state law, the judge sentenced the defendant to life in prison. When an appeals court overturned the conviction, the state planned to retry the case with death penalty specifications; the defendant contended that the judge's imposition of the life sentence effectively acquitted him of the death penalty, and to place him in jeopardy of losing life would constitute double jeopardy. The Supreme Court of the United States disagreed, saying the double jeopardy clause would not be offended, since the original jury had never acquitted him of the death penalty; it just failed to reach an agreement, constituting a hung jury that never reached a decision on the merits of the penalty. Hung juries do not prevent a retrial of either the case or the penalty.[79]

As previously noted, the contention that the government's prosecution may violate the defendant's rights under the double jeopardy provision of the state or federal constitution must be made prior to a second trial on the merits, because if the motion is well taken, there will not be a second trial. A defendant with adequate representation who pleads guilty to gain other favorable outcomes generally waives the right to complain on the appellate level or mount a collateral attack about an alleged double jeopardy violation.[80] However, under some circumstances, and in the interests of justice, several states will allow a double jeopardy claim to be raised on appeal for the first time under the plain error doctrine where the undisputed facts demonstrate a clear violation of double jeopardy on the face of the case record.[81]

20. Requirements to Claim a Violation of Double Jeopardy

In order to successfully prevail on a double jeopardy violation, a defendant must have first been placed in jeopardy prior to the claim that a subsequent prosecution runs afoul of the United States Constitution. Jeopardy has been determined to attach when

the judge begins to hear evidence from the first witness in a bench trial[82] and when the jury is empaneled and sworn in a jury trial.[83] As the Court of Appeal for the Second Circuit noted:

> it is firmly established that the "attachment of jeopardy" occurs not only with a verdict but more generally at the "point in criminal proceedings at which the constitutional purposes and policies [of the clause] are implicated." *Serfass* [*v. United States*], 420 U.S. at 388. As a result, the Supreme Court has long recognized that jeopardy attaches in a jury trial after the jury has been empaneled and sworn, see *Kepner v. United States*, 195 U.S. 100, 128, 24 S. Ct. 797, 49 L. Ed. 114 (1904), and in a bench trial when the judge begins to hear evidence. *Wade v. Hunter*, 336 U.S. 684, 688, 69 S. Ct. 834, 93 L. Ed. 974 (1949); *McCarthy v. Zerbst*, 85 F.2d 640, 642 (10th Cir.), cert. denied, 299 U.S. 610, 57 S. Ct. 313, 81 L. Ed. 450 (1936).[84]

Pretrial motions and dismissals have not generally been considered proceedings during which jeopardy attaches.[85] For example, if a defendant successfully obtains dismissal of an indictment on technical grounds, a subsequent indictment and trial are not barred, since the defendant was never placed in jeopardy. Similarly, a prosecutor could take a case to successive grand juries if the first grand jury failed to return an indictment or return to a grand jury for an enhanced superseding indictment without encountering any problem concerning initial jeopardy. Where jeopardy has attached and the trial does not reach a conclusion, such as a hung jury being unable to reach a verdict, and a mistrial has been declared, a second trial is permitted on the grounds of manifest necessity. However, if, after a hung jury, the prosecution dismisses the case without reserving the right to retry, double jeopardy may prevent a retrial. In a North Carolina murder case,[86] the jury was unable to reach a verdict, and the prosecution dismissed the case after the jury hung because it concluded that it had insufficient evidence to obtain a conviction. Several years later, sufficient evidence appeared, and the prosecution was revived with a new indictment and obtained a murder conviction over the defendant's double jeopardy argument. The North Carolina Supreme Court reversed based on double jeopardy grounds. The prosecution could have retried the defendant immediately after the hung jury, but by dismissing the case after the defendant had been in jeopardy, the state could not bring the case a second time without violating the double jeopardy provision of the Fifth Amendment. The defendant had to be set free, even though the second trial found him guilty of murder.

A landmark case Supreme Court case that demonstrates the concept of double jeopardy is *Benton v. Maryland*, 395 U.S. 784 (1969) (Case 12.5), where the defendant had been tried for burglary and larceny. Subsequent to his jury conviction of burglary and his acquittal of the larceny count, his convictions were reversed due to grand and trial jury irregularities. The court offered an option for re-indictment and retrial that Benton selected. Upon his re-indictment and retrial, the jury convicted Benton of both burglary and larceny, though the first jury had acquitted him of the latter charge. Upon his appeal, the Supreme Court held that the Fifth Amendment provision protection against double jeopardy applied through the Due Process Clause of the Fourteenth Amendment to limit the states. Since Benton had once been at jeopardy for the larceny charge, and had been acquitted of that charge, to try him again constituted a violation of the double jeopardy provision, even though he had elected to be retried.

Case 12.5 LEADING CASE: SELECTIVE INCORPORATION OF THE PROHIBITION AGAINST DOUBLE JEOPARDY

Benton v. Maryland
Supreme Court of the United States
395 U.S. 784 (1969).

CASE FACTS:

The state of Maryland indicted and tried Benton for both burglary and larceny. The jury convicted him of the burglary charge and found Benton innocent of the larceny count. Prior to the time his appeal would have been heard, the Maryland Court of Appeals decided a case that invalidated a portion of the Maryland constitution that had required jurors to swear their belief in the existence of God.

Benton was given an option for re-indictment and retrial since both the grand jury which indicted Benton and the petit jury which convicted him had been selected under the invalid constitutional provision. He selected the option and received a new trial which resulted in a conviction for *both* burglary and robbery.

During the pretrial stage of the second prosecution, Benton alleged that the Fifth Amendment provision against double jeopardy precluded his being retried on the larceny charge since he had already been acquitted of the charge at the first trial. By making the double jeopardy argument prior to the second trial, the issue was properly preserved to be raised on appeal. The trial court denied Benton's contentions and the Maryland Court of Special Appeals considered the double jeopardy claim but denied relief. Maryland's highest court refused discretionary review. The Supreme Court granted certiorari.

LEGAL ISSUE:

Does the Fifth Amendment prohibition against double jeopardy apply to the States through the Due Process Clause of the Fourteenth Amendment to prevent a second state trial of a charge over which the defendant has previously been acquitted?

THE COURT'S RULING:

In construing the Fifth Amendment prohibition against double jeopardy, the Court determined that the provision applied against the states so that a judgment of acquittal to a crime operated to prevent a second trial for that crime.

Essence of the Court's Rationale:

III

In 1937, this Court decided the landmark case of *Palko v. Connecticut*, 302 U.S. 319. Palko, although indicted for first-degree murder, had been convicted of murder in the second degree after a jury trial in Connecticut state court. The State appealed and won a new trial. Palko argued that the Fourteenth Amendment incorporated, as against the States, the Fifth Amendment requirement that no person "be subject for the same offense to be twice put in jeopardy of life or limb." The Court disagreed. Federal double jeopardy standards [at that time in history] were not applicable against the States. Only when a kind of jeopardy subjected a defendant to "a hardship so acute and shocking that our polity will not endure it,"

id., at 328, did the Fourteenth Amendment apply. The order for a new trial was affirmed. In subsequent appeals from state courts, the Court continued to apply this lesser *Palko* standard. *See, e.g., Brock v. North Carolina*, 344 U.S. 424 (1953).

Recently, however, this Court has "increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law." *Washington v. Texas*, 388 U.S. 14, 18 (1967). . . . [W]e today find that the double jeopardy prohibition of the Fourteenth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled.

Palko represented an approach to basic constitutional rights which this Court's recent decisions have rejected. . . . Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of "fundamental fairness." Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice," *Duncan v. Louisiana, supra*, at 149, the same constitutional standards apply against both the State and Federal Governments. *Palko*'s roots had thus been cut away years ago. We today only recognize the inevitable.

The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence. As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries. "[T]he plea of *autrefois acquit*, or a former acquittal," he wrote, "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." Today, every State incorporates some form of the prohibition in its constitutional or common law. As this Court put it in *Green v. United States*, 355 U.S. 184 (1957), "[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly "fundamental to the American scheme of justice." The validity of petitioner's larceny conviction must be judged, not by the watered-down standard enunciated in *Palko*, but under this Court's interpretations of the Fifth Amendment double jeopardy provision.

IV

It is clear that petitioner's larceny conviction cannot stand once federal double jeopardy standards are applied. Petitioner was acquitted of larceny in his first trial. Because he decided to appeal his burglary conviction, he is forced to suffer retrial on the larceny count as well. As this Court held in *Green v. United States, supra*, at 193–194, [c]onditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.

* * *

V

Petitioner argued that his burglary conviction should be set aside as well. He contends that some evidence, inadmissible under state law in a trial for burglary alone, was introduced in the joint trial for both burglary and larceny, and that the jury was prejudiced by this evidence. The question was not decided by the Maryland Court of Special Appeals because it found no double jeopardy violation at all. . . . We do not think that this is the kind of determination we should make unaided by prior consideration by the state courts. Accordingly, we think it "just under the circumstances," 28 U.S.C. Section 2196, to vacate the judgment below and remand for consideration of this question. The judgment is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

It so ordered.

CASE IMPORTANCE:

The *Benton v. Maryland* case overruled the case of *Palko v. Connecticut*, 302 U.S. 319 (1937) and had the effect of incorporating the Fifth Amendment prohibition against double jeopardy into the due process clause of the Fourteenth Amendment so that an acquittal in a criminal case could not be retried by the prosecution. Following this case, the double jeopardy provision had the same effect in both state and federal courts.

21. Alleging Double Jeopardy Violation: Requirement of Same Offense

The case *United States v. Dixon*[87] demonstrates the principle that successive prosecutions must be for the same offense to qualify as a double jeopardy violation. The *Dixon* Court held that the defendant had been subjected to prosecution twice for the same crime where he had been released on pretrial bail and was under a court order to commit no new crimes. While free, he was arrested for drug use, a direct violation of pretrial release conditions. At the end of a lengthy contempt of court hearing, he was found guilty of criminal contempt of court for his bail violation involving the recent use of cocaine while on bail. When he came to trial for his original drug offense committed while on bail, Dixon claimed a violation of double jeopardy because a trial

court had already taken judicial action on his most recent drug offense. The Supreme Court ruled in Dixon's favor on the double jeopardy issue, since the court order to commit no new crimes and the subsequent criminal contempt conviction included the same elements as the recent drug charge. In effect, Dixon had been tried twice for the same criminal conduct.

The double jeopardy provision of the Fifth Amendment is not violated when a defendant has been tried for the same statutory offense that was committed on two separate occasions. In a sexual assault case in Wisconsin,[88] the defendant had been acquitted of a series of acts with a named minor, which occurred in the "late summer or fall," but was subjected to a new prosecution related to sexual assault conduct with the same female fifteen-year old victim based on the date of her October pregnancy. He alleged, on double jeopardy grounds, that the acquittal of the first case prevented him from being tried again for sexual assault that occurred in October of the same year. There was some ambiguity concerning whether the first case covered any conduct in October, but the reviewing court found that the first prosecution did not cover any events in October between the defendant and the teenaged victim. Here, the evidence in the record indicated that the sexual assault that resulted in the minor's pregnancy occurred after the events for which he had been acquitted. Even though the same crime had been alleged to have occurred on at least two occasions, they were separate offenses since the time alleged indicated that the listed crime had occurred twice, separated by some elapsed time.[89] Therefore, he had been tried for the same listed crime that he had committed on two different occasions, and no double jeopardy argument could be successful.

22. Separate Offenses: The *Blockburger* Test

Proper application of double jeopardy claims and resolution of allegations of violations of double jeopardy require that courts determine whether a course of conduct constitutes two separate crimes or whether the government is prosecuting twice for the same offense. In *Blockburger v. United States*,[90] the defendant had completed the illegal sale of a controlled substance and immediately made a second sale of the same drug to the same person, separated by only a brief interval. The defendant alleged that there was only one offense, not two separate transactions. According to the *Blockburger* Court concerning separate offenses, the sale of each quantity of drug was separated into a distinct transaction, which created a separate, though virtually identical, new offense that occurred at a different time from the first offense. Therefore, no violation of double jeopardy prohibition could be argued successfully.

Under current double jeopardy interpretation, a prohibited prosecution would follow where the government obtained a conviction or acquittal for robbery and proceeded to try the defendant for *armed* robbery arising from the same facts as the initial prosecution. The test for determining whether a second prosecution is for the "same offense" involves a consideration of whether each of the two criminal offenses under consideration requires proof of an additional fact or element that the other does not.[91] Robbery and armed robbery are examples of crimes that could not be prosecuted successively by

the same sovereign if the charges arose from the same criminal act because each offense does not require proof of an element different from the other.

In an effort to generate clarity in the context of double jeopardy, the Court in *United States v. Dixon* suggested:

> In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test, the double jeopardy bar applies. See, e.g., *Brown v. Ohio*, 432 U.S. 161, 168–169 (1977); *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (multiple punishment); *Gavieres v. United States*, 220 U.S. 338, 42 (1911) (successive prosecutions). The same-elements test, sometimes referred to as the "*Blockburger*" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution.
>
> 509 U.S. 688, 696–697

Where each of the acts of which a defendant stands accused contains an element different from each other, the acts will be considered separate offenses, and prosecution of both will not be barred by the double jeopardy clause. In the same manner, where the crimes for which an accused is to stand trial contain a unique element that the proof of the other does not require, there is no bar to being tried for each crime, since they are considered separate offenses. However, where a defendant has been charged with two separate theories of committing the same crime, such as intentional murder and felony murder of the same victim, regardless of which crime the jury convicts, the defendant may be punished only one time for the single death without running afoul of the double jeopardy clause.[92]

Demonstrative of crimes that have unique elements not shared with the other but which seem very similar is a Virginia case[93] involving possession of child pornography and manufacturing child pornography. In this case, a seventeen-year-old male child made a video of a sixteen-year-old female child performing oral sex on him that he recorded on his cell phone and shared with friends. The Commonwealth charged the child with production of child pornography *and* with possession of child pornography, and he was convicted of both crimes in adult court. He contended that the two crimes were the same and double jeopardy prevented his conviction of both for the same act. In Virginia, possession of child pornography could simply involve having control of the video or image. The crime of production of child pornography would include the actual production of child pornography and, in addition, could be accomplished by accosting or soliciting an underage person to perform or be the subject of child pornography. Production of child pornography in Virginia could also involve producing or preparing or attempting to create child pornography, taking part in production, or knowingly financing child pornography. Thus, a person could be guilty of production of child pornography without ever possessing it, and one could possess child pornography without ever having produced it or have had anything to do with producing it. The Virginia reviewing court held that double jeopardy did not prevent the child's conviction for possession and a separate conviction for producing child pornography.[94] Each offense required proof of a different element that was not common to both crimes, and they were separate offenses.

23. Dual Sovereignty Doctrine: Successive Prosecution for Same Acts Permitted

Successive prosecutions are not prohibited under the Fifth Amendment double jeopardy provision where the same act or conduct violated the laws of two separate sovereign jurisdictions. As a result, citizens can be subject to the criminal laws of both the state and federal government, as well as being subject to two separate sovereign states of the United States, for the same act or course of conduct. Therefore, under what is known as the dual sovereignty doctrine, successive prosecutions by two separate and sovereign states for the same act or acts are not prohibited by the double jeopardy provision of the Fifth Amendment. In *Heath v. Alabama*,[95] the defendant had been accused of hiring two men to kill his pregnant wife by first taking her from Alabama to Georgia, where the men killed her. Heath pled guilty to murder in Georgia. To his surprise, Alabama subsequently extradited him from Georgia and charged him with the murder of his wife. The Alabama trial court convicted Heath of the death of his wife and sentenced him to death. His double jeopardy claim failed in the Supreme Court when the Court held that Heath had committed two separate offenses by committing murder under Georgia law and murder under Alabama law. As the *Heath* Court noted:

> The dual sovereignty doctrine is founded on the common law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences."
>
> 474 U.S. at 88

The crimes were described and made criminal both by the sovereign state of Georgia and by the sovereign state of Alabama. Murder in Georgia was not the same crime as murder in Alabama; the one act violated the peace and dignity of Georgia and also violated the peace and dignity of Alabama. Thus, the dual convictions were appropriate, and the convictions were upheld by the Supreme Court. Proof for each crime was different, since separate statutes were violated and each homicide offense required proof of an element not found in the other crime.

The dual sovereignty doctrine applies when the separate prosecutions involve the federal government and a state in successive prosecutions. The state of Illinois properly prosecuted an alleged bank robber after he had been acquitted of federal charges stemming from his robbery of a federally insured savings and loan association. In *Bartkus v. Illinois*,[96] the trial court considered a pretrial motion to dismiss the state charges but rejected the defendant's plea of *autrefois acquit*, or prior (former) acquittal. Illinois successfully prosecuted Bartkus on robbery charges involving the same transaction that had been the subject of the failed federal prosecution. The Supreme Court approved of the successive federal and state prosecutions on the theory that each jurisdiction was sovereign and the same act constituted two separate crimes under the dual sovereignty doctrine.[97]

Following similar legal reasoning, the double jeopardy clause did not prevent a Kentucky prosecution for driving under the influence of alcohol in a case where the

defendant fled from Kentucky and was apprehended by Indiana police. The successful Kentucky driving under the influence (DUI) prosecution occurred following the arrest and guilty plea by the defendant to a driving under the influence charge in Indiana. Since two separate sovereign governments elected to try the defendant for violation of the respective law of each state, no double jeopardy violation occurred under the circumstances.[98] Individual state governments within the United States did not get their power to try criminals from the United States Constitution or the Articles of Confederation; the states existed before the government under the Constitution or the Articles existed, so the states are separate sovereigns for criminal jurisdiction purposes. United States territories and other United States jurisdictions get power from the United States. Therefore, two Puerto Rico defendants could not be prosecuted for illegally selling a firearm to an undercover police officer without a permit in violation of Puerto Rican law when the two men had previously pled guilty to federal gun trafficking for the same act/conduct under the laws of the United States.[99] The Supreme Court held that Puerto Rico received its criminal jurisdiction from the United States based on a law passed by Congress, so Puerto Rico was the same sovereign as the United States.

Since the protection of the Fifth Amendment's provision against double jeopardy was designed to relieve a defendant of unfair multiple trials, it must be asserted prior to the start of the second trial to be effective in preventing the second trial. Therefore, as a general rule, the assertion of the right not to be tried twice for the same crime requires that the objection be raised during the pretrial phase so the trial judge has a chance to rule on the objection to the second trial. Failure to raise the issue at the appropriate time runs a strong risk that the right has been waived. Since the prohibition against being tried twice would be lost if the defendant could not take an immediate appeal from the trial court's ruling, as a general rule, an adverse ruling on double jeopardy grounds allows an immediate appeal prior to the alleged second trial. As the Supreme Court noted in *Abney v. United States:*

> [A]spects of the guarantee's protections would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid exposure to double jeopardy, and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.
>
> 431 U.S. 651, 662 (1977)

As a general rule, the sovereign government, whether state or federal, may not wear a defendant down by successive trials over the same events without violating the double jeopardy provision of the Fifth Amendment. However, the provision against double jeopardy does not create an absolute prohibition against successive trials. Some occasions and situations will allow second trials, such as where there has been a successful defendant appeal, a hung jury, or a lawfully declared mistrial, especially if the defendant requests the mistrial declaration.[100]

24. Summary

Pretrial motions may help focus the issues at trial by resolving and eliminating problems that would otherwise have to be considered in the middle of a trial. Legal arguments involving venue and jurisdiction should be resolved during the pretrial stage. Some motions that may be mandatory, such as an allegation that the right to a speedy trial has been violated or that the upcoming trial will violate principles against double jeopardy, need to be resolved prior to trial because the resolution of these issues may dispose of the need for a trial.

Legal issues concerning identification both prior to trial and during the trial must meet standards of due process, and it may involve questions concerning whether there is a right to counsel at some identification procedures. A post-indictment, post-information in-person lineup requires the presence of legal counsel under the Sixth Amendment unless a defendant waives that right. Pre-indictment, pre-information in-person lineups do not require the presence of legal counsel, and photographic arrays never require the presence of a defendant's counsel, regardless of when the photos are viewed. Where there are questions concerning the accuracy or reliability of an eyewitness's identification, the five-factor test under *Neil v. Biggers* should be considered. The opportunity for view, the degree of prior attention given by the witness, the accuracy of the prior description, the length of time since the crime scene view, and the certainty of the witness are important considerations when evaluating the reliability of eyewitness identification.

Once a defendant has been taken into custody, where a judge has issued an arrest warrant or where a grand jury has returned an indictment, there is no immediate need to seek a judicial determination involving probable cause. However, where the arrest has been based upon a police officer's decision involving probable cause or where the arrest has been based upon information filed by a prosecutor's office, the arrestee must have a judicial determination of probable cause within 48 hours. Different jurisdictions use varying labels to describe early hearings in the criminal justice process. An initial appearance may involve a mere reading of the charges against a defendant and the appointment of indigent trial counsel and may involve bail considerations. There is no federal constitutional right to a preliminary hearing, but where one is granted, generally a defendant has the right to counsel and the right to confront and cross-examine adverse witnesses. However, some jurisdictions do not permit a defendant to call any witnesses at a preliminary hearing. An early hearing in which the sole issue to be resolved is probable cause does not require the presence of the defendant, and there is no right for the defendant's counsel to be present. Bail considerations may arise at a preliminary hearing when they have not been addressed at a prior time and should be based on the individual defendant's situation and not exclusively based on the nature of the criminal charge. Under prior federal law, bail was the presumption, but changes made to the federal Bail Reform Act of 1984 permit the denial of bail in a variety of situations.

Federal defendants have a Sixth Amendment right to a speedy trial in federal prosecutions as well as under the federal speedy trial statute. State defendants similarly have the Sixth Amendment right to a speedy trial but, in all jurisdictions, also have a state constitutional, statutory, or decisional right to a speedy trial. Under the Sixth Amendment,

if the federal constitutional right to a speedy trial has been violated, absolute prejudicial dismissal of the case is the only remedy. Under the federal statutory right to a speedy trial and most states' statutes, absolute dismissal is the remedy as well. The length of the delay, the reason for the delay, the defendant's assertion or non-assertion of the right, and prejudice to the defendant's case are the four factors used to determine whether the constitutional right to a speedy trial has been violated.

If a defendant believes that he or she has once before been in jeopardy for the same exact offense, the defendant must file a pretrial motion alleging this error. Jeopardy is said to attach in a jury trial when the jurors take their oaths as jurors in the case and in a bench trial when the judge begins hearing the evidence from the first witness. Unless a defendant wins an appeal on the merits or a judge declared a mistrial for manifest necessity, a defendant cannot be tried again once jeopardy has attached. The theory is that, with all its wealth and resources, a government should not be able to wear down a defendant through a series of repeated trials until the government obtains a conviction.

REVIEW EXERCISES AND QUESTIONS

1. When does the right to have counsel present exist at in-person lineup? How does the assistance of counsel benefit a suspect who is a participant and a target in a post-indictment or post-information in-person lineup?
2. As a legal and practical matter, why does the right to counsel not exist at a photographic array (photographic lineup)?
3. The Supreme Court of the United States has approved the exhibition of individual suspects to a victim in some situations. Is this practice a violation of due process? Why or why not? See *Kirby v. Illinois*, 406 U.S, 682 (1972).
4. In the case of *Neil v. Biggers*, the Supreme Court developed a five-factor test by which to measure whether eyewitness identifications met the standard of due process. What are the factors in this test? Does this approach seriously reduce the chance of an irreparable wrong identification? Why or why not?
5. The preliminary hearing has been determined to be a "critical stage" of the criminal justice process. What assistance may an attorney offer a defendant who is subjected to a preliminary hearing?
6. What are some of the factors that courts consider in setting a monetary amount of bail?
7. Under what circumstances and in which situations may a federal court deny bail?
8. When does the Sixth Amendment right to a speedy trial begin to run? What are the factors used to determine whether the constitutional right to speedy trial has been violated?
9. Abdul Cohen engaged in the production of the recreational pharmaceutical known as methamphetamine. The success of this operation produced extensive

amounts of cash, and since Mr. Cohen did not use methamphetamine, he was able to save money and to retire from the business of producing and selling it. He moved to southern California and began a life of leisure. Due to previous investigatory work, Arkansas police presented sufficient evidence of Mr. Cohen's illegal activity to a prosecutor who used the evidence to procure an indictment against Abdul Cohen. Despite initial efforts to find Mr. Cohen, prosecution efforts failed, and police ended efforts directed toward his arrest. Due to his cache of cash, Abdul Cohen had no need to use credit cards or do other things that would produce an evidentiary trial that would have disclosed his location and identity. He lived openly and was ignorant about the indictment back in Arkansas. California life was good! Four years after his indictment, his small fishing boat was hit by a large yacht, and he required medical treatment that involved rescuers and police officers. This experience with law enforcement agents disclosed his true identity, and he was extradited to Arkansas to face trial. Two of the men who presented evidence at the earlier grand jury proceeding had passed away, and one defense witness Abdul Cohen wanted to call in his defense could not be located. An Arkansas judge denied bail, and his trial did not commence until a year after his arrest, which was four years after his indictment. In a pretrial motion, Abdul Cohen requested that the charges of manufacturing and selling methamphetamine be dismissed on the grounds that he did not receive a speedy trial. What factors should the court consider? How should the judge rule?

10. Explain the concept of double jeopardy and give an example where a court should refuse to allow a second trial to begin.

1. How Would You Decide?

In the Supreme Court of Iowa.

The defendant, Mr. Booth-Harris, who had been convicted of first-degree murder, partially based upon eyewitness identification, appealed his conviction. One of the grounds of his appeal involved the contention that police used unduly suggestive practices involving his photographic identification procedure. He alleged that the trial court improperly allowed the witness to identify the defendant at trial based on tainted pretrial identification procedures that violated due process.

The defendant and the victim had engaged in a verbal discussion that was a follow-up to an earlier altercation. The victim, Carter, told the defendant to "do what you gotta do," at which time the defendant/shooter opened fire, hitting Carter multiple times, resulting in his death. Other gunfire was involved, and the defendant was wounded in the exchange. An eyewitness, one Watson, later told police that the defendant, Booth-Harris, was the killer. On the same day, police presented eyewitness Watson with a photo array

that included a third man, Polk, among the others, because police initially suspected that Polk was the shooter. This array did not include a photo of Booth-Harris. Watson did not identify anyone as the shooter in the photos then presented. Watson was next presented with a single photo of defendant Booth-Harris, which he failed to identify, but he lied because Watson knew Booth-Harris.

Two days later, a police sergeant, who was not directly involved in the investigation, presented a photo array of six to ten photos that had been prepared by a different police officer. Admonitions to be careful in making identifications were read to eyewitness Watson. A photo of defendant Booth-Harris was included in this second array, and Watson identified him as likely being the shooter after quickly dismissing the other five photographs. In a third photographic array that included Booth-Harris, eyewitness Watson said that he was 70% sure that the man he picked was the shooter, and that photograph turned out to a photograph of the defendant. At one point, Watson was shown a single picture of the defendant, whom he identified as the guilty party.

The defendant was convicted of murder, partly on the strength of the eyewitness identification by Watson. The defendant then appealed, contending that the eyewitness identification was unduly suggestive and should have been excluded from his trial.

How would you rule on the defendant's contention that the photographic array used to identify the defendant violated due process because it was unduly suggestive or was otherwise unfair?
The Court's Holding:

[The reviewing court applied the five-factor test suggested by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972), involving the opportunity to view, the accuracy of the witnesses prior description, the level of certainty demonstrated by the eyewitness at the confrontation, and the length of time between the crime and the confrontation.]

* * *

The officers showed Watson a photo of Booth-Harris on three occasions. First, on the day of the shooting after Watson viewed the photographic array that included Polk's photograph and made no identification. Later, officers showed Watson a photo of Booth-Harris in a single-photographic display, but Watson did not identify Booth-Harris at that time. Second, two days later, Watson was shown a photographic array that included Booth-Harris's photo when he stated he was fifty percent sure that Booth-Harris was the shooter but could not say so definitively given the way his eyes looked. Lastly, that same day, the officers showed Watson another photographic array that included a more recent photo of Booth-Harris, and Watson identified him as the shooter and was 70% sure.

Booth-Harris contends the single-photographic display was impermissibly suggestive by making him stand out and appear familiar to Watson when Booth-Harris appeared again in the subsequent two photographic arrays. He claims it was unnecessary for the officers to show Watson his photograph in a single array given that there were no exigent circumstances and a photographic array could have been prepared and presented to Watson instead.

* * *

As in *Neil*, we do not find that the first photo misled Watson into making the subsequent identification. Watson did not initially identify Booth-Harris in the single photograph array, and he was careful not to select an individual whose facial features did not match his memory of the shooter. The photograph in the second array additionally showed a different angle and portion of Booth-Harris's face to reflect the portion of the shooter's face that Watson saw. Watson took care not to identify anyone until the facial features matched his memory of the shooter. *See State v. Rawlings*, 402 N.W.2d 406, 408 (Iowa 1987) (holding that the identification was not impermissibly suggestive despite the fact that the defendant was the only individual whose picture was repeated in the two arrays because "[a] reasonable effort to harmonize the lineup is normally all that is required"). Further, at trial, Watson stated that he had lied to the police about not knowing Booth-Harris when he was shown the single photograph array.

* * *

[W]e do not find that Watson's identification of Booth-Harris as the shooter was impermissibly suggestive.

2. The photographic identification procedures were reliable. To assess reliability under the second factor of our analysis, we turn to the five-factor [*Neil v.]Biggers* test.

> (1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Taft, 506 N.W.2d at 763. Veering from the *Biggers* test, Booth-Harris contends that the identification was unreliable for a variety of reasons: Watson did not initially identify him in the single-photographic display, it was a high-stress situation, Watson could not see Booth-Harris's face or did not get a good look at him, weapon focus can affect reliability, Watson's certainty does not amount to reliability, there was a time delay between the incident and the identification, and Watson's drug use negatively impacted the accuracy of the identification.

As stated above, we reject Booth-Harris's invitation to abandon the Biggers factors. We will review each factor in turn. Watson had ample opportunity to view the shooter. Watson's attention was focused on the individual who he saw with a gun before he ran away when shots were fired. Watson acknowledged that his view of the shooter's face was from his nose to his forehead, and he particularly focused on the shooter's eyes. Watson's description of the shooter was largely accurate with the exception of his height estimate. Watson identified Booth-Harris as the shooter in two of the three arrays, and he indicated his level of certainty in the identification each time. Additionally, Watson identified Booth-Harris's photograph and pointed out how the facial features matched that of the shooter whereas he quickly dismissed the other photographs in the array. Lastly, only two days passed between the incident and the positive identification. See Mark, 286 N.W.2d at 406 (holding that a timespan of one week between the incident and the identification was insufficient to defeat the reliability of the identification). Altogether, under the totality of the circumstances, the five factors weigh in favor of reliability.

* * *

We conclude the photo array identification was not impermissibly suggestive and unreliable. Therefore, the district court did not err in denying Booth-Harris's motion to suppress Watson's photo array identification of him.

[Appellant's convictions were affirmed.]

See *State v. Booth-Harris*, 942 N.W.2d 562, 2020 Iowa Sup. LEXIS 40 (2020).

2. How Would You Decide?

In the United States District Court for the District of Minnesota.

In a United States District Court in January 20, 2004, the federal government charged defendant Mohamed Abdullah Warsame with conspiracy to provide material support and resources to a listed foreign terrorist organization and with providing support and resources to a listed foreign terrorist organization, in violation of 18 U.S.C. § 2339B. In a superseding indictment that included the original charge, Warsame was also charged on June 21, 2005, with making false statements in violation of 18 U.S.C. § 1001(a)(2). In September 2006, he filed a motion to dismiss the charges against him based on a violation of his right to a speedy trial under the Sixth Amendment to the United States Constitution. Earlier in the case, in February of 2004, the trial court issued one of several orders granting continuances consistent with the federal Speedy Trial Act in which both defense and prosecution joined. Some of the involved evidence was classified information that was desired by the defense, and to allow the defense to see the data, the prosecution had to meet procedures under the Classified Information Procedures Act. Several more delays in 2005 were caused by problems with the statute, and both sides filed numerous pretrial motions, including motions to suppress evidence.

Defendant Warsame remained in custody in a maximum-security setting for the whole time from his arrest until the petitioned for a dismissal of the charges.

Other requests that caused delays in 2006 came from the defendant Mohammed Abdullah Warsame and involved data collected by the National Security Administration. Many of the delays were caused by governmental delays beyond the prosecutor's office, and some were caused by the defendant's motions. According to the District Court, the

> defense filed the instant motion to dismiss on September 22, 2006. Since that time, the Court has engaged in proceedings under CIPA [Classified Information Procedures Act] and has continued to oversee the prosecution's compliance with its discovery obligations. Specifically, the Court reviewed potential discovery on November 21, 2006, December 13, 2006, and February 27, 2007, and the prosecution will be providing additional information for the Court's review.

The federal judge prepared to rule on the defendant's federal constitutional speedy trial motion to dismiss the case.

How would you rule on the defendant's contention that the delays caused by federal security and secrecy laws and by other pretrial motions violated his Sixth Amendment right to a speedy trial and that the criminal prosecution should be dismissed with prejudice?

The Court's Holding:

[The trial judge reviewed the Sixth Amendment requirement that the accused must be granted the right to a speedy trial. The judge also gave due consideration to the federal Speedy Trial Act.]

The Supreme Court has identified four relevant inquiries in a claim involving the Sixth Amendment right to a speedy trial: 1) whether delay before trial was uncommonly long; 2) whether the government or the criminal defendant is more to blame for that delay; 3) whether, in due course, the defendant asserted his right to a speedy trial; and 4) whether he suffered prejudice as a result of the delay. *Doggett v. United States*, 505 U.S. 647, 651, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992) (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)). Courts refer to these four inquires as the *Barker* factors.

The Sixth Amendment right to a speedy trial attaches at the time of arrest or indictment, whichever comes first. Here, the right to a speedy trial attached on January 20, 2004, and over three years have passed since that date. To trigger speedy trial analysis, the defendant must allege that the interval between accusation and trial has crossed a line "dividing ordinary from 'presumptively prejudicial' delay." *Doggett*, 505 U.S. at 651–52. The Eighth Circuit has held that a 37-month delay is presumptively prejudicial. *United States v. Walker*, 92 F.3d 714, 717 (8th Cir. 1996); *cf. Titlbach*, 339 F.3d at 699 ("A delay approaching a year may meet the threshold for presumptively prejudicial delay. . . ."). The delay here is presumptively prejudicial, so the Court must engage in the speedy trial analysis and weigh the *Barker* factors.

The first *Barker* factor is the length of delay, which has been uncommonly long. The second factor is the reason for the delay. As explained above, the delay can be primarily attributed to the need to provide the defendant with discovery derived from classified materials. The blame for this delay is not attributable to defendant, but this fact does not make the delay inexcusable. The Court believes that the prosecution and the Court have acted with reasonable diligence in working through the discovery issues in this case, and there is certainly no indication of bad faith. The delays experienced thus far have been largely inevitable given the unusual and complex nature of cases that implicate national security interests. As for the third *Barker* factor, Warsame has asserted his right to a speedy trial in due course by bringing this motion at this time.

The final factor considers whether defendant has suffered prejudice because of the delay. Prejudice may arise in the form of oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that dimming memories and loss of exculpatory evidence will impair the defense. Warsame has been held in the Administrative Control Unit of the Minnesota Department of Corrections facility at Oak Park Heights since February 2004. This is a maximum-security setting that allows few privileges and little contact with other people. . . . Warsame has been provided with increased recreational time, reading materials, and canteen privileges. It is nevertheless clear that uncommonly long pretrial detention under maximum-security conditions is a source of some prejudice for defendant. However, the most serious form of prejudice is impairment of the defense. Importantly, there is no indication that the delay here has impaired the defense in any way. The extent of the delay in this case is unfortunate, but the Court notes that the primary cause of the delay has been the efforts to provide discovery materials vital to the defense.

Based on its consideration of the *Barker* factors, the Court concludes that Warsame's constitutional right to a speedy trial has not been violated. See *United States v. Warsame*, 2007 U.S. Dist. LEXIS 16722 (D.C. D. Minn. 2007).

Notes

1. Courts have territorial jurisdiction where the crime must have occurred within the geographical territory covered by the court. In addition, courts may have special or limited subject matter jurisdiction and must not exceed their respective subject matter. If a court fails to have jurisdiction over the area or topic, a motion to dismiss the case may be proper.
2. See, for example, *People v. Venegas,* 74 Cal. Rptr. 2d 262 (1998), where the Supreme Court of California considered the admissibility of DNA (deoxyribonucleic acid) testing under the rules of evidence and prior case law.
3. *Simmons v. United States,* 390 U.S. 377, 384 (1968).
4. *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411, 1972 U.S. LEXIS 49 (1972).
5. See, for example, Donald A. Dripps, Miscarriages of Justice and the Constitution, *New Criminal Law Review* (Vol. 2, 1999); Keith A. Findley, Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions, *California Western Law Review* (Vol. 33, 333, 2002).
6. See *Perry v. New Hampshire*, 565 U.S. 228, 132 S.Ct. 716, 181 L.Ed.2d 694, 2012 U.S. LEXIS 579 (2012).
7. *United States v. Wade,* 388 U.S. 218 (1967).
8. *Id*. at 221.
9. *Id*. at 218.
10. Justice Brennan, in *United States v. Wade,* 388 U.S. 218, 232 (1967), at n.17, quoting Wall, *Eye-Witness Identification in Criminal Cases* 53, a commentator who had compiled a list of fact patterns illustrating the potentials for abuse in identification procedures.
11. The concept of formal charge does not include an arrest for federal constitutional purposes on the theory that the government has not made a clear decision on prosecution. See *Kirby v. Illinois,* 406 U.S. 682 (1972).
12. One could argue that in a photographic array, the same vices that legal counsel should prevent by being present in a post-indictment, post-information lineup could easily happen with no one present to complain.
13. *Id*. at 272.
14. *People v. Marion*, 193 A.D.3d 762, 763, 2021 NY Slip Op 02177, 141 N.Y.S.3d 865, 2021 N.Y. App. Div. LEXIS 2278 (2021).
15. *Id*.
16. 406 U.S. 682 (1972).
17. See *Moore v. Illinois*, 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424, 1977 U.S. LEXIS 163 (1977).
18. 413 U.S. 300 (1973).
19. *Id*. at 313.
20. *Id*. at 317.
21. *People v. Bowman*, 194 A.D.3d 1123, 1127 (2021).
22. See *People v. Jones*, 2021 Mich. App. LEXIS 223 (2021).
23. *Id*. at *20.
24. See *supra, Moore v. Illinois*.
25. *Morales v. United States*, 248 A.3d 161, 166 2021 D.C App. LEXIS 91 (D.C. 2021).
26. 388 U.S. 293 (1967).
27. 394 U.S. 440 (1969).
28. 409 U.S. 188 (1972).
29. *Biggers v. Tennessee,* 390 U.S. 404, 406 (1968).

30. 432 U.S. 98 (1977).
31. *State v. Hill*, 2021 Tenn. Crim. App. LEXIS 191 (2021).
32. *Id*. at *6.
33. *Id*. at *26.
34. 289 F.3d 461 (2002).
35. *Ibid*.
36. *Ibid*.
37. 432 U.S. 98 (1977).
38. For some alternative state approaches to identification problems that generally offer additional protections to defendants, see *Commonwealth v. Henderson,* 411 Mass. 309 (1991); *State v. Ramirez,* 817 P. 2d 774 (Utah 1991); *People v. Adams,* 53 N.Y.2d 241 (1981).
39. See Ohio Rules of Criminal Procedure, Crim. R. 5(B)(1). (2021).
40. See Cal. Penal Code § 860 (2021): "a defendant represented by counsel may when brought before the magistrate as provided in Section 858 or at any time subsequent thereto, waive the right to an examination before such magistrate."
41. See Ohio Rules of Criminal Procedure, Crim. R. 5(B)(2). (2021).
42. See *Coleman v. Alabama,* 399 U.S. 1 (1970).
43. See Constitution of the State of Ohio, Article I, § 9: Bill of Rights. Most jurisdictions provide for a complete denial of bail in some cases. Demonstrative of this concept is the case of Ohio law, which does not allow bail for persons charged with capital offenses where the proof is evident or the presumption strong. Similarly, bail can be denied to a person who is charged with a felony where the proof is evident or the presumption great and when the person poses a potential serious physical danger to a victim of the offense, to a witness to the offense, or to any other person or to the community (Anderson 2001).
44. See *Stack v. Boyle,* 342 U.S. 1 (1951), for the rationale about setting bail amounts.
45. Demonstrative of bail practice is the legal formulation of the state of Ohio. See the Ohio Revised Code, Section 2937.23, and Article I, Section 9, Ohio Constitution, for an example of typical bail practice.
46. Ex parte Leachman, 2021 Tex. App. LEXIS 4159 (2021).
47. See the State of Maine's Bail Statute, 15 M.R.S. § 1026(3). (2021).
48. 18 U.S.C. § 3141 *et seq*.
49. *Id*. at § 3142.
50. *Ibid*.
51. 18 U.S.C. § 3142(e). Where a judge has conducted a hearing under the act and when the judicial official "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial."
52. 481 U.S. 739 (1987).
53. *Id*. at 755.
54. See 18 U.S.C. § 3585(a) and (b).
55. 515 U.S. 50 (1995).
56. www.uscourts.gov/sites/default/files/ao470.pdf.
57. 495 U.S. 711 (1990).
58. *Id*. at 721.
59. See Ohio Rules of Criminal Procedure, Crim. R. 46(G)(1). (2021).
60. *Ibid*.
61. 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1, 1967 U.S. LEXIS 2028 (1967).
62. *Ibid*.
63. Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq*.
64. See Cal Pen Code § 1382 (2021). California law provides some exceptions such as when a defendant waives the time period or consents to a continuance of the matter to a later date than required by the statute.
65. The outer limit for a criminal prosecution would involve the statute of limitations. However, some states do not have a statute of limitations for all crimes, and the trend has been to lengthen the existing time limitations.

66. "Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself." *Barker v. Wingo,* 407 U.S. 514, 521 (1972).
67. ORC Ann. § 2945.71 (2021).
68. ORC Ann. § 2945.72 (2021).
69. See *Smith v. Hooey,* 393 U.S. 374 (1969). Where a defendant has been charged in one jurisdiction while serving time in another, upon request, the noncustodial jurisdiction has a duty to attempt to obtain custody for trial or risk violating the speedy trial portion of the Sixth Amendment.
70. 407 U.S. 514, 530–531 (1972).
71. See *Dillingham v. United States,* 423 U.S. 64 (1975), where a twenty-two-month delay between arrest and indictment and an additional twelve-month delay following indictment to trial did not constitute a violation of the Sixth Amendment right to a speedy trial. The delay alone was not sufficient to demonstrate a violation.
72. 505 U.S. 647 (1992).
73. *Doggett v. United States,* 505 U.S. 647, 654 (1992).
74. *State v. Long*, 163 Ohio St. 3d 179, 168 N.E.3d 1163, Ohio LEXIS2615 (2020).
75. *Id*. at P14.
76. *Id*. at P29.
77. See *Betterman v. Montana*, 578 U.S. 437, 136 S.Ct. 1609, 194 L.Ed.3d 723, 2016 U.S. LEXIS 3349 (2016).
78. 412 U.S. 434 (1973).
79. See *Sattazahn v. Commonwealth of Pennsylvania,* 537 U.S. 101 (2003).
80. *Mays v. Indiana,* 790 N.E.2d 1019 (2003).
81. See *People v. Gaines*, 2019 IL App. (3d) 160, 130 N.E.3d 583, 2019 Ill. App. LEXIS (2019). See also *Duval v. Texas,* 59 S.W.3d 773, 776, 777 (Tex. 2001). See also *State v. Nelson*, 2020 VT 94, 246 a.3d 937, 2020 Vt. LEXIS 109 (2020).
82. See *Downum v. United States,* 372 U.S. 734, 738 (1963).
83. See *Crist v. Bretz,* 437 U.S. 28 (1978).
84. *United States v. Dionisio*, 503 F.3d 78, 83, 2007 U.S. App. LEXIS 22132 (2nd Cir. 2007).
85. See *Serfass v. United States*, 420 U.S. 377 (1975).
86. See *State v. Courtney* 372 N.C. 458, 831 S.E.2d 260, 2019 N.C. LEXIS 794 (2019).
87. 509 U.S. 688 (1993).
88. *State v. Schultz*, 2020 WI 24, 390 Wis.2d 570, 939 N.W.2d 519, 2020 Wisc. LEXIS 26 (2020).
89. *Id*. at P56.
90. 284 U.S. 299, 304 (1932).
91. *Ibid*.
92. *Washington v. Johnson,* 113 Wn. App. 482; 54 P. 3d 155 (2002).
93. *Servalis v. Commonwealth*, 2020 Va. App, LEXIS 130 (2020).
94. *Id*.
95. 474 U.S. 82 (1985).
96. 359 U.S. 121 (1959).
97. Bartkus could have been tried and convicted in the Illinois state court even if he had originally been convicted of the federal charges. Double jeopardy would not apply because of the dual sovereignty doctrine.
98. *Commonwealth v. Stephenson,* 82 S.W.3d 876; 2002 Ky. LEXIS 165 (2002).
99. *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 136 S.Ct. 1863, 195 L.Ed.2d 179, 2016 U.S.LEXIS 3773 (2016).
100. *United States v. Newton,* 327 F.3d 17 (1st Cir. 2003).

Trial Procedure and Legal Rights 13

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Learning Objectives

1. Describe what the right to a trial by jury involves and articulate when the right to a trial by jury exists under the federal constitution.
2. Be able to explain the process by which a defendant can waive the right to a trial by jury.
3. Articulate the reasons the Supreme Court determined that jury verdicts in serious criminal cases must come to a decision by a unanimous vote.
4. Explain how the Sixth Amendment right to a jury trial was determined to be a fundamental right that had to be enforced against the state criminal justice systems.
5. Understand the requirement that trial jurors must be chosen from a panel of potential jurors that is representative of a fair cross-section of the people living within the court's jurisdiction.
6. Evaluate and articulate the differences between federal jury practice and the options that states constitutionally possess to alter the number of jurors below twelve in non-capital cases.
7. Demonstrate knowledge concerning when the right to free legal counsel exists for a person too poor to afford private assistance by explaining when a person can be granted free legal assistance

Chapter Outline

KEY TERMS

1. Challenge for cause
2. Fair cross-section requirement
3. Federal jury size
4. Non-unanimous jury verdicts
5. Peremptory challenge
6. Petit jury
7. Petty offense compared with serious offense
8. Requirement of unanimity
9. Right to appointed counsel
10. Selective incorporation
11. Six-person jury
12. Trial by jury
13. Voir dire of the jury
14. Waiver of trial by jury

1. Trial By Jury: A Sixth Amendment Constitutional Right

The concept that a group of individuals selected from the community should sit in judgment as a jury where one of their number had been accused of a crime was well known to the American colonists prior to the Revolutionary War. This practice continued in the colonies after the Revolution to the time when the United States Constitution replaced the Articles of Confederation. The Framers of the Constitution guaranteed the right to a trial by jury for defendants accused of federal crimes in Article 3, Section 2, where they wrote:

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Although this section of Article 3 indicates that all crimes shall be tried by jury, in reality only persons accused of federal crimes received this guarantee, and the right to a trial by jury in the several states remained a creature of state law or of the constitution of an individual state. The federal guarantee was reiterated in Amendment Six as part of the Bill of Rights when the Framers wrote:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

This restated and reinforced right to a trial by jury required only the federal government to grant a trial by jury; the original intent of the amendment was not to give any

guarantee to individual defendants in state criminal cases. The legal theory, often repeated in a variety of ways, was that there existed a fear of a strong national government, in relation to which the local states would have little power. For this reason, limitations on power and authority should be placed on the national government because the people in the states could control the way their respective state governments dealt with people with respect to criminal law and procedure.

The Sixth Amendment guarantee that "in all criminal prosecutions" the accused person shall have the right to have the case heard "by an impartial jury of the State and district" where the crime was committed could be interpreted as a guarantee to state criminal defendants. However, the reference to "the State" in the Sixth Amendment referred to the place of the trial, not the violation of state law. As originally conceived, this guarantee required the federal government to grant jury trials in federal criminal cases but left the states free to determine whether, when, and under what circumstances to offer a jury trial. Under the original legal theory, but not currently, a state could amend its constitution and eliminate the particular state's jury requirement without running afoul of the federal Constitution. In a slightly different vein, a state could determine that the traditional jury of twelve should be reduced in number to as low as six jurors, but current practice requires unanimity of juror votes whether it involves a twelve-person jury or a six-person jury. Currently, non-unanimous state or federal twelve-person jury verdicts are not allowed because they are not considered consistent with the Sixth Amendment.[1] Similarly, six-person state jury verdicts must be unanimous.[2]

During the 1960s, the Supreme Court of the United States, under Chief Justice Earl Warren, began to decide cases involving the right of due process emanating from the Fourteenth Amendment. As various cases came to the United States Supreme Court, the justices took the position that some of the rights mentioned in the Bill of Rights were so crucial to fundamental fairness that they should be incorporated into the Due Process Clause of the Fourteenth Amendment. This gradual application of the Due Process Clause, based on case-by-case analysis, was known as the selective incorporation doctrine. As part of this doctrine, the Warren Court decided that the right to a trial by jury was so fundamental that it must be considered part of due process and enforced in state courts.

2. Selective Incorporation of the Sixth Amendment Into the Due Process Clause

The Sixth Amendment jury trial provision was selectively incorporated into the Due Process Clause of the Fourteenth Amendment and made applicable to the states in *Duncan v. Louisiana* (see Case 13.1).[3] According to *Duncan*, since a jury trial was considered among the fundamental principles of liberty and justice that were part of the foundation of all our civil and political institutions, the federal Constitution through the due process clause of the Fourteenth Amendment required the states to offer jury trials. The Court also considered that the right to a jury trial was "basic in our system of jurisprudence"[4] and "a fundamental right, essential to a fair trial."[5] It is somewhat surprising, perhaps, that the Supreme Court concluded that the right to a trial by jury is fundamental to justice

when many defendants decide to reject jury trials and instead opt for a trial by a judge. Once *Duncan* made the jury trial mandatory on the states, regardless of what the state constitutions had to say about the matter, the states were required to grant jury trials in much the same manner as the federal government.

Case 13.1 LEADING CASE BRIEF: THE RIGHT TO A JURY TRIAL IS A FUNDAMENTAL RIGHT THAT IS INCORPORATED INTO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Duncan v. Louisiana
Supreme Court of the United States
391 U.S. 145 (1968).

CASE FACTS:

Appellant Duncan observed two of his cousins in a conversation with four white boys. Since racial incidents had occurred in the recent past, he stopped to see if anything was amiss. Duncan urged his cousins to come with him and was about to enter his automobile when a small altercation developed.

According to the white youths, appellant Duncan slapped one of them on the arm, while Duncan and his partisans offered a story that indicated Duncan had only lightly touched the elbow of one of the white boys. As a result of the encounter and following a criminal complaint by the white boys, Duncan was charged with simple battery, for which the maximum penalty was two years imprisonment and a $300 fine. The trial court rejected Duncan's request for a jury trial, citing Louisiana law which granted jury trials only where imprisonment at hard labor or the death penalty were potential sentences.

The trial court, sitting without a jury, rendered a conviction for simple battery and imposed a sentence that required Duncan to serve sixty days in the parish prison and pay a $150 fine. Having made an objection at trial to properly preserve the jury trial issue, Duncan requested that the Supreme Court of Louisiana hear the case. After the state supreme court declined to consider the case, Duncan applied to the Supreme Court of the United States for a grant of certiorari. Subsequently, the Court granted the writ.

LEGAL ISSUE:

Consistent with the Sixth Amendment, must a crime be considered a serious criminal offense for which a jury trial must be offered where the maximum punishment for that crime consists of up to two years' imprisonment and a $300 fine?

THE COURT'S RULING:

Following its decision that the Sixth Amendment right to a trial by jury constituted a fundamental right and must be incorporated into the due process clause in the Fourteenth Amendment, the Court decided that the right to a jury trial existed for serious cases and concluded that an offense for which two years was the maximum punishment was a serious offense and deserved a trial by jury.

ESSENCE OF THE COURT'S RATIONALE:

* * *

I

* * *

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Powell v. State of Alabama*, 287 U.S. 45, 67 (1932); whether it is "basic in our system of jurisprudence," *In re Oliver*, 333 U.S. 257, 273 (1948); and whether it is "a fundamental right, essential to a fair trial," *Gideon v. Wainwright*, 372 U.S. 335, 343–344 (1963). The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. The position of Louisiana, on the other hand, is that the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee. Since we consider the appeal before us to be such a case, we hold that the [federal] Constitution was violated when appellant's demand for jury trial was refused.

The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to the Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689.

* * *

The constitutions adopted by the original States guaranteed jury trials. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.

Even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court.

* * *

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher

authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaisant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

* * *

In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia v. Clawans, supra*, to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine. In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail. Moreover, in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term, although there appear to have been exceptions to this rule. We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense. Consequently, appellant was entitled to a jury trial and it was error to deny it.

The judgment below is reversed and the case is remanded for proceedings not inconsistent with this opinion.

CASE IMPORTANCE:

The Court determined that the right to a trial by jury in a particular state was a fundamental right protected by the Sixth Amendment to the United States Constitution in a situation where a person was charged with a serious crime. The Court did not determine the point at which a crime must be considered serious.

3. Application of the Right to a Jury Trial

Even though the Sixth Amendment speaks of allowing a jury trial in all criminal cases, the drafters of the Sixth Amendment did not contemplate that the trial of every minor offense should culminate in a jury trial. Once the right of trial by jury was required of the states, the Supreme Court had to determine exactly what the right meant in state courts and whether it might mean something different than in federal courts. In support of allowing petty offenses to be tried without juries, *Baldwin v. New York*[6] held that a jury trial is constitutionally required in a state case only where the potential sentence is greater than six months' incarceration. Thus, a reading of *Duncan v. Louisiana* and *Baldwin* requires a state to offer jury trials in serious cases punishable by incarceration longer than six months and permits a state to require bench trials for petty offenses for which six months or less is the maximum penalty. However, nothing in the Sixth Amendment prevents a state from offering a jury trial where the maximum penalty of incarceration in less than six months.

4. Determining Whether the Right to a Jury Trial Exists

Precisely what crimes should be considered "petty" offenses has been the subject of litigation by individuals who have contended that some crimes, because of the fact of incarceration, significant fine, or collateral consequences, should be considered serious crimes. As a general rule, an offense with a maximum penalty of six months or fewer is presumed to be a petty offense, unless a state legislature has added additional penalties that are sufficiently severe to indicate that the legislature considered the offense serious. There is authority for the proposition that if an offense was recognized by the common law as sufficiently serious to warrant a jury trial, then modern versions of old common law crimes might merit trial by jury based on the seriousness of the offense rather that the length of time for which incarceration might be imposed.[7] If defendants had been successful in convincing the Supreme Court that other factors besides length of incarceration should classify other offenses as serious for Sixth Amendment purposes, such a decision would have had the effect of extending the right to a jury trial to additional situations.[8] In *Blanton v. City of North Las Vegas,* 489 U.S. 538 (1989), the litigants contended that the offense of driving under the influence of alcohol should be construed as a serious offense for which the Sixth Amendment would mandate a jury trial. While the *Blanton* Court admitted that a crime's seriousness was to be judged by the maximum allowable custodial penalty,[9] and the Court was willing to consider the other penalties attached to such crime, it was not persuaded that the Nevada legislature considered the offense a serious crime. Thus, driving while intoxicated in Nevada did not require a trial by jury, but in some other contexts in other states, an allegation of driving while intoxicated may give rise to the right to a jury trial.[10]

The fact that a particular defendant might receive greater than six months incarceration due to multiple counts being tried at the same time does not require a trial by jury so long as the maximum sentence authorized for each offense is six months or fewer. In one case[11] where a defendant had been charged with two counts of obstructing the United States mail, he argued that the total potential penalty should be the benchmark for determining whether a jury trial was constitutionally required. The Supreme Court of the United States determined that the Sixth Amendment guarantee of the right to a trial by jury does not extend to petty offenses, even where the total sentences for several petty offenses might result in a sentence greater than six months. Multiple offenses did not change the seriousness of each individual offense.

Although adults possess the right to a jury trial based on the predetermined circumstance of the potential length of sentence, young persons tried in juvenile courts generally do not have that right. According to constitutional interpretation in *McKeiver v. Pennsylvania*, a person who is to be subjected to a juvenile adjudication in a juvenile court has no Sixth Amendment right to trial by jury.[12] Many practical considerations would have an impact if a juvenile were to be granted a jury trial because privacy has generally been a hallmark of juvenile adjudications, and privacy would cease to exist if a jury were empanelled to hear a juvenile case. Nothing prevents a state from offering a jury trial to a juvenile,[13] but it has never been interpreted as a constitutional mandate applicable in state trials. If, however, a juvenile is certified as an adult or is otherwise tried as an adult in a non-juvenile court, the usual standards determine whether a right to a jury trial exists.

5. Selecting Jurors From a Fair Cross-Section of the Jurisdiction

To meet constitutional requirements and as a general rule, the actual jury empanelled must have been selected from a fair cross-section of the community. This requirement does not come from the text of the Sixth Amendment but is derived from a traditional understanding of how the justice system can assemble a fair jury.[14] Even though the juries must have been selected from a pool of prospective jurors that meets the fair cross-section requirement, the Supreme Court has never imposed a requirement that the actual jury selected in a given case mirror the component groups making up the fair cross-section.[15] The Sixth Amendment requirement that the pool from which jurors are chosen must be composed of persons meeting a fair cross-section of the community is a means of ensuring not a representative jury but a fair jury. In a dissent, Justice Marshall noted that the fair cross-section requirement existed to guard against the exercise of arbitrary power and to ensure that the common-sense judgment of the community will act as a hedge against an over-zealous or mistaken prosecutor. Marshall added that the fair cross-section requirement helped preserve public confidence in the criminal justice system and helped implement our belief that sharing in the administration of justice is a phase of civic responsibility.[16]

One of the rationales for requiring that identifiable groups be included in the fair cross-section is that otherwise the exclusion of identifiable groups or segments of the community prevents the excluded groups from sharing the civic responsibility of the administration of justice.[17] Congress has expressed the view that the requirement that a jury should be chosen from a fair cross-section of the community is fundamental to the American system of justice.[18] In order for a defendant to claim a violation of the fair cross-section requirement, the defendant must allege and prove that the underrepresented group is distinctive and identifiable, that the particular group has been systematically excluded from potential jury service, and that the group's underrepresentation is unfair and unreasonable.[19]

To generate a pool of potential jurors, the jurisdiction must devise a method whereby all distinctive groups are represented and included as members of the pool from which actual jurors will be selected. For example, to call for jury service all citizens whose names appear on a list of income tax payers would fail to generate a representative pool, since the poorest citizens may not be included within the class of people who pay income taxes. Relying on voter lists of the jurisdiction supplemented by adult drivers' license data generally produces a sufficiently fair cross-section of the population. A defendant does not possess the right to have an actual jury chosen that reflects the precise demographic composition of identifiable groups within the community, but the actual array of prospective jurors must generally be representative of a fair cross-section of the community.

6. Violation of the Fair Cross-Section Requirement: Proof and Remedy

Where a defendant believes that the jury was not chosen appropriately, the defendant usually must meet the burden of proof by presenting evidence that establishes a prima facie violation. As a general rule, a defendant's evidence should be able to demonstrate that the identifiable group alleged to be excluded from potential jury service possesses distinctive group characteristics in the community, that the representation of this group in the pool of potential jurors from which actual juries are selected is not fair and reasonable considering the number of such persons in the community, and that the under representation is due to recurring attempts to exclude the group during the jury selection process.[20] Where a trial jury has been chosen from a pool of citizens in an irregular manner that failed to follow the state statute exactly but still produced a randomly selected jury pool that was not based on race, the fair cross-section requirement was properly met and the jury was not constitutionally defective.[21] Merely demonstrating that African American and Hispanic persons constituted distinctive groups within the community was insufficient to prove a violation of the fair cross-section requirement in the absence of proof that the jury pool excluded members of the recognizable groups and that any underrepresentation was the result of a systematic effort at exclusion.[22]

Where a defendant has reason to believe that the jury in his or her case has been selected from a group that did not fairly represent a cross-section of the population in the court's jurisdiction, the initial burden rests with the defendant to raise the issue. A defendant must offer an allegation that the jury was not selected from a fair cross-section and is required to offer some proof that the alleged underrepresented group has distinctive characteristics and a group identity and that the distinctive group has been systematically excluded by the legal system from eligibility for jury service and that the underrepresentation of the group is unfair and unreasonable.[23] In a Nevada case,[24] the convicted defendant had filed a motion for a hearing based on his allegation that Hispanics and African Americans had not been properly included in the pool of prospective juror members. The court system mailed jury summons to particular zip codes but did not determine what percentage of each population resided in which zip codes, resulting in an imbalance in backgrounds. In addition, the defendant alleged that the system did not follow up when people failed to appear and made no other effort to include some minorities in the jury pool, resulting in additional nonrepresentation of his specified groups. The Nevada Supreme Court sent the case back with orders to conduct a hearing of his fair-cross-section violation allegation.

7. Waiver of the Right to a Trial by Jury

Most constitutional rights, whether state or federal, may be waived by criminal defendants who desire to forgo the protections that the constitutional rights normally provide. Waiver of a right to a jury trial often occurs within the context of a negotiated plea bargain, and so long as the defendant understands the significance and substance of the rights being released, waiver is appropriate.

Some defendants, as trial strategy, may waive the federal or state right to a trial by jury in order to obtain a bench trial. Waiver of a jury trial might be an appropriate legal strategy, especially where some of the evidence will be particularly gruesome or other "rough" facts might have a tendency to inflame the passions of a jury. Under the theory that most judges have seen and heard almost anything and everything, rough evidence may have less effect on a "case-hardened" judge. Where a defendant desires to waive the right to a jury trial, most states, through court decision or law, require that the trial judge make a concerted inquiry into this preference. For example, in Alabama, a defendant cannot waive a jury trial unless the waiver gains the consent of both the prosecutor and the trial judge. Additionally, the defendant may waive personally in writing or in open court or through the trial counsel if the waiver is made in open court and the defendant is present.[25] Similarly, Ohio courts allow a defendant to waive the right to a jury trial, but the waiver must be made in open court after arraignment and after the defendant has consulted with an attorney. The waiver must be contained in writing, signed by the defendant, and filed in the case as part of the record.[26] A failure to follow the strict Ohio requirements will be ineffective to waive a trial by jury and has the effect of removing jurisdiction of the court to hear the case. Michigan uses a form (Figure 13.1) in which a person formally waives the right to a jury trial following proper advisement.

STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY	WAIVER OF TRIAL BY JURY AND ELECTION TO BE TRIED WITHOUT JURY	CASE NO. and JUDGE

ORI
MI-

Court address

Court telephone no.

THE PEOPLE OF ☐ The State of Michigan ☐ _____	v	Defendant's/Juvenile's name, address, and telephone no.
		CTN/TCN: SID:

In the matter of _____

I, _____ , defendant/juvenile in this case, voluntarily waive and relinquish my
Name (type or print)

right to a trial by jury and elect to be tried by a judge of the court in which the case may be pending. I fully understand that under the laws of this state I have a constitutional right to a trial by jury.

Date _____ Signature _____

Defendant's/Juvenile's attorney signature _____ Bar no. _____

Name (type or print) _____

Prosecutor's consent:

Signature _____ Bar no. _____

Name (type or print) _____

THE COURT FINDS:

1. The defendant/juvenile has been arraigned and properly advised of the right to a jury trial.
2. The defendant/juvenile has had an opportunity to consult with counsel.
3. Waiver occurred in open court as required by law.

Approved:

Judge signature and date

Approved, SCAO
Form MC 260, Rev. 1/21
MCL 712A.2d(7), MCL 763.3, MCR 6.402(B)
Page 1 of 1

Distribute form to:
Court
Defendant/Juvenile
Defendant/Juvenile attorney
Prosecutor

FIGURE 13.1 Waiver of Trial by Jury Form.[27]

In a Louisiana case,[28] the reviewing court determined that a defendant properly waived the right to trial by jury in a robbery and kidnapping case even though the defendant did not know that a Louisiana jury could reach a verdict where ten of twelve jurors agreed. The trial judge had personally addressed the defendant in

open court to ensure that the defendant's waiver was being done freely, voluntarily, and intelligently and with the assistance of counsel. The defendant contended that the discussion with the trial judge was too general for him to have made a knowing and intelligent decision when he did not know that a twelve-person jury could render a verdict on a vote by ten jurors. The reviewing court held that the trial judge was only required to determine whether the defendant made a jury trial waiver on a knowing and intelligent basis and was not required to explain to him the intricacies of jury voting.

In one habeas corpus case that was heard by a federal district court,[29] the defendant contended that his attorney failed to properly represent him in a criminal cause of action by allowing him to waive his right to a trial by jury. As a general rule, the waiver of the Sixth Amendment right to a jury trial must be made in a voluntary, knowing, and intelligent manner. In this particular case, the attorney previously had discussed the matter with the client, made sure that the client had take his medication properly, and examined the client under oath in open court concerning the matter, and both the client and the attorney had signed a waiver form. In rejecting the habeas corpus petition of Langel, the district judge noted the defendant had been informed of his constitutional right to a jury trial and that if he waived the right, a judge would make a determination of guilt or innocence. The judge also noted that it was undisputed that the defendant had signed a jury waiver form, and therefore he could not overcome the presumption of correctness that attached to the trial court determination. Where a defendant properly waives the right under the Sixth Amendment to a trial by jury, so long as it was done intelligently and voluntarily, second-guessing that decision after a guilty verdict will not normally result in a new trial.

8. Jury Size: Difference in State and Federal Requirements

The trial jury in a criminal case generally consists of twelve persons who possess citizenship and are representative of the local community who are empanelled to hear or judge a case. Federal criminal trials require twelve-person juries who generally must reach a verdict by a unanimous vote[30] but may, with the consent of both parties, constitutionally render a verdict with fewer than twelve jurors.[31] The rules of criminal procedure for federal courts permit the use of a jury smaller than twelve if the judge and the parties consent in a written stipulation.[32] A federal court judge may allow a jury of eleven persons to return a verdict, even where the parties refuse to stipulate to a smaller jury, if deliberations have begun and the court finds good cause to excuse one of the twelve jurors.[33] State practice varies, since the tradition of a jury of twelve was not originally a federal constitutional requirement imposed by the United States Constitution upon the states.[34] However, following the Supreme Court case of *Ramos v. Louisiana*,[35] which interpreted the Sixth Amendment as requiring the same interpretation of that amendment for state and federal criminal trials and held that unanimity in twelve-person jury verdicts in state cases was a constitutional requirement, *Ramos* may foretell a future case that prohibits fewer than twelve-person juries in state criminal cases. Such an interpretation

would eliminate the six-person juries used in Georgia and Florida for some criminal cases. Currently, however, most serious state criminal trials involve twelve-person jurors, and where a trial verdict carries the possibility of the death penalty or life in prison, a jury of twelve must be used.

Where a defendant possesses a right to a jury trial in a state criminal case, generally he or she may agree to accept a jury composed of fewer jurors than the state statute dictates. The right of a defendant to consent to a smaller jury stems from the right to completely waive a jury trial, and the same procedural safeguards that are required when formally waiving a jury trial should be followed prior to permitting a defendant to accept a reduction in jury size.[36] Among the reasons a defendant might wish to waive a right to a statutorily required number of jurors might be illness of a sitting juror, removal of a juror for cause during a trial, or juror misconduct when alternative jurors are not available. The consent might be in the defendant's best interests, since the particular jury might appear to be leaning favorably toward the defendant and there would be a desire to keep that jury rather than accept a mistrial.

The jury hears the evidence and renders a verdict based on the facts and evidence presented by each party. To produce a decision, juror balloting, in most criminal cases, must be unanimous for either a conviction or an acquittal. The general rule is that a less-than-unanimous vote requires that the case be retried before a different jury. The costs of a jury trial (or retrial) to a municipality, county, or state can be significant, especially if the trial is lengthy. To be required to retry a case that has been terminated without a verdict because of a hung jury creates additional expense to the jurisdiction and has caused states to experiment with methods of reducing costs without reducing the quality of justice. In one Georgia case,[37] where the jury vote generally had to be unanimous given the type of case for which the defendant was on trial, the foreman of the jury sent a notice that the jury was deadlocked eleven to one and two jurors were having some problems with that vote. Georgia procedure permits a non-unanimous verdict if the prosecution and defense agree; however, following the *Ramos v. Louisiana* case [see Section 10, this chapter] in 2020 that held that the Sixth Amendment applied the same in federal and state courts, it may be an open question whether a defendant will be permitted to waive the full jury of twelve requirement of the Sixth Amendment. Under current Georgia practice, to accept fewer than twelve jurors, the defendant must make that decision freely and voluntarily after being told that he has the right to demand a unanimous twelve-person jury verdict. After agreeing to accept the eleven-person jury vote and after having been convicted, the defendant unsuccessfully appealed, arguing that his counsel had encouraged him to accept the eleven-person verdict and that he did not intelligently waive his right to a unanimous verdict. The reviewing court found no merit in the defendant's allegations and approved the verdict based upon eleven jurors voting to convict.

Several states use fewer that twelve jurors for misdemeanor cases where the type of offense allows a jury trial. Along with some other states, for misdemeanor cases, Ohio uses eight,[38] Indiana uses six,[39] and Georgia uses six-person juries for some misdemeanors,[40] but a Georgia defendant may ask for a twelve-person jury. Whether the *Ramos* decision foretells that all states will have to move to a twelve-person jury for misdemeanor cases has not yet been decided.

9. State Efforts to Reduce the Size of Juries

As noted in prior sections, if the Sixth Amendment must be followed by the states exactly as is the practice in federal courts, juries with fewer than twelve members will be ruled unconstitutional. Until that time, states using six-person juries in non-capital and non-life imprisonment cases will be permitted. Some states that had a goal of reducing public expenditures for jury trials have experimented with different approaches designed to minimize the size of the jury while maximizing the chances that it will come to a verdict.[41] Smaller juries cost less to empanel and pay than a full jury of twelve, and the time that the judge or the attorneys spend on voir dire of the jury is reduced. Presumably, a smaller jury will be able to deliberate and reach a decision in a shorter amount of time. A common criticism of smaller juries revolves around the argument that opportunities for minority participation will be reduced as the jury size shrinks. The government costs required for selecting and managing the jury system of the several states are significant, so measures that make their respective systems less expensive and more decisive have proven attractive. The goal is to balance cost reduction with the maintenance of an appropriate level of justice consistent with fairness and due process.

In *Williams v. Florida* (Case 13.2),[42] the Court approved the use of unanimous six-person juries in a serious, noncapital case. The Court noted that the selection of the number twelve was probably a historical accident, even though that number appears in the Bible in connection with the twelve tribes and the Twelve Apostles. Since the required number of jurors may have been pure happenstance, and since the original intent of the Framers of the Sixth Amendment concerning jury size remains unknown, the *Williams* Court approved Florida's use of a six-person jury as consistent with the United States Constitution. Following Florida's example, Connecticut allows the use of unanimous six-person juries in serious prosecutions not involving the death penalty or life imprisonment cases.[43] In a sexual assault case[44] that involved a conspiracy count, one juvenile defendant made the argument that where evidence on separate sexual assaults had been offered, and where the evidence could have been interpreted by the jury in a manner that some of them might have believed that some of the counts had been proven while others might believe that only some other sexual assaults had been proven, a question existed involving proof beyond a reasonable doubt and juror unanimity. The defendant's concern on appeal was that the six-person jury might not have been unanimous on underlying crimes that supported the conspiracy count for which they returned a verdict. The reviewing court held that so long as the jury returned a unanimous six-person verdict, there was no real concern that the jury had failed to unanimously determine which specific acts supported the conviction for the conspiracy to commit sexual assault.

Case 13.2 LEADING CASE BRIEF: SIXTH AMENDMENT DOES NOT REQUIRE TWELVE-PERSON JURY IN MOST STATE CRIMINAL TRIALS

Williams v. Florida

Supreme Court of the United States

399 U.S. 78 (1970).

CASE FACTS:

Prior to his trial for robbery, defendant Williams filed a pretrial

motion to request a twelve-person jury for his trial. Under Florida law, Williams was entitled to a six-person jury. In contending that he should have been entitled to a traditional jury of twelve, Williams noted that a twelve-person jury was the size commonly used at the time of the adoption of the Constitution and the Sixth Amendment. The trial court denied Williams' pretrial motion to have a twelve-person jury empanelled. The smaller jury convicted Williams as charged, resulting in a sentence of life in prison.

The Florida District Court of Appeal affirmed Williams' conviction and rejected, among other claims, Williams' Sixth Amendment argument that he possessed the Sixth Amendment right to have a twelve-person jury consider his case. In acting on Williams' petition, the Supreme Court granted a writ of certiorari to consider whether the Sixth Amendment requires a twelve-person jury in a serious, non-capital state prosecution.

LEGAL ISSUE:

In serious, noncapital state criminal prosecutions, does the Sixth Amendment require that juries be composed of twelve persons?

THE COURT'S RULING:

Since there was no indication that the Framers of the Sixth Amendment intended to require the common law usage of twelve jurors, it is not an explicit requirement so long as a modified jury system serves the function of the traditional jury of twelve.

ESSENCE OF THE COURT'S RATIONALE:

* * *

While "the intent of the Framers" is often an elusive quarry, the relevant constitutional history casts considerable doubt on the easy assumption in our past decisions that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution. Provisions for jury trial were first placed in the Constitution in Article III's provision that "[t]he Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." The "very scanty history [of this provision] in the records of the Constitutional Convention" sheds little light either way on the intended correlation between Article III's "jury" and the features of the jury at common law.

* * *

We do not pretend to be able to divine precisely what the word "jury" imported to the Framers, the First Congress, or the States in 1789. It may well be that the usual expectation was that the jury would consist of 12, and that hence, the most likely conclusion to be drawn is simply that little thought was actually given to the specific question we face today. But there is absolutely no indication in "the intent of the Framers" of an explicit decision to equate the constitutional and common-law characteristics of the jury. Nothing in this history suggests, then, that we do violence to the letter of the Constitution by turning to other than purely historical

considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution. The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial. Measured by this standard, the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment.

The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government.

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.
>
> *Duncan v. Louisiana, supra*, at 156

Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a fact finder hardly seems likely to be a function of its size.

* * *

We conclude, in short, as we began: the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance "except to mystics." *Duncan v. Louisiana, supra*, at 182 (Harlan, J., dissenting). To read the Sixth Amendment as forever codifying a feature so incidental to the real purpose of the Amendment is to ascribe a blind formalism to the Framers which would require considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions. We do not mean to intimate that legislatures can never have good reasons for concluding that the 12-man jury is preferable to the smaller jury, or that such conclusions—reflected in the provisions of most States and in our federal system—are in any sense unwise. Legislatures may well have their own views about the relative value of the larger and smaller juries, and may conclude that, wholly apart from the jury's primary function, it is desirable to spread the collective responsibility for the determination of guilt among the larger group. In capital cases, for example, it appears that no State provides for less than 12 jurors—a fact that suggests implicit recognition of the value of the larger body as a means of legitimating

society's decision to impose the death penalty. Our holding does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury. Consistent with this holding, we conclude that petitioner's Sixth Amendment rights, as applied to the States through the Fourteenth Amendment, were not violated by Florida's decision to provide a six-man rather than a 12-man jury.

The judgment of the Florida District Court of Appeal is Affirmed.

CASE IMPORTANCE:

The Court's approval of a six-person jury in a serious state criminal case indicates that the Sixth Amendment right to a trial by jury in a state case is not an identical right to the federal jury trial right. Under the Sixth Amendment, the states have some freedom to innovate their criminal jury procedure.

In utilizing the theory of *Williams*, Florida and other states that adopted the six-person jury could enjoy the financial benefits of lower costs, as well as the probability that there would be fewer hung juries and thus fewer retrials. Of course, if a six-person jury offered monetary savings and other benefits, an even smaller jury would further enhance these advantages. Moving in the direction of a smaller jury system, Georgia attempted to reduce the six-person jury to a five-person jury for noncapital cases. In *Ballew v. Georgia*,[45] the Court refused to approve the five-person jury trial for serious, noncapital cases[46] on the theory that it would prove too small to allow for effective group deliberation and might produce a greater number of inaccurate verdicts. The *Ballew* Court noted:

> [R]ecent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts. Generally, a positive correlation exists between group size and the quality of both group performance and group productivity.
>
> *Ballew v. Georgia*, 435 U.S. 223, 232–233, n. 11 (1978)

The *Ballew* Court also noted that the smaller the group, the less likely it would be to overcome any biases held by its members and obtain an accurate result. Neither the financial nor the time-savings benefit of smaller juries influenced the Court; the benefit to Georgia would not offset the substantial threat to the constitutional guarantees that the Court believed would occur if it permitted Georgia to reduce the jury from six to five. Six-person juries are permissible, but the verdicts they render must be unanimous. In a Florida case, however, a defendant was permitted to waive his right to a six-person jury and have his case decided by the remaining five members. Since the right to a trial by jury has been deemed a waivable right, and although the federal Constitution has been construed as requiring at least a unanimous six-person jury in a state criminal case, a defendant may waive the right to a six-person jury and choose to accept the verdict from a five-member jury.[47]

In situations where a defendant has the right to a twelve-person jury, as a general rule, where the defendant consents, a decision may be rendered by fewer than twelve.[48] This situation may occur where a juror becomes ill and alternate jurors are not available. In a recent Alaska case,[49] the defendant was entitled by the state constitution to a jury of twelve persons. At the start of the complicated trial, alternative jurors were selected, but along the way, several were excused for various reasons. When the Alaska jury was down to twelve, with the judge's consent, another juror became unable to continue. The prosecution indicated that it could continue with fewer than twelve jurors, and the judge gave the defendant the option of continuing with eleven jurors, or he would declare a mistrial and the case would be retried. Each side signed a written waiver of a twelve-person jury, and a guilty verdict was rendered by eleven jurors. On appeal, the defendant contended that the judge committed error in excusing the twelfth juror even though the defendant signed a waiver and argued that, in any event, he should get a new trial by twelve jurors. The court found that the remedy he wanted was offered previously by the trial court and he rejected it and wanted to go with eleven jurors. The court upheld the guilty verdict rendered by the eleven-person jury.

The general rule that may be distilled from this case is that a jury of twelve is a waivable number and that states may proceed to trial with fewer than twelve jurors where a defendant's counsel agrees to the reduction and where the defendant has made no objection.

10. The Concept of Jury Unanimity

In another area of jury reform, Louisiana in the 1890s and Oregon in the 1930s eliminated the unanimity requirement for serious, non-capital cases,[50] permitting a vote of fewer than twelve jurors to be sufficient for either a conviction or an acquittal. Verdicts of 11–1 and 10–2 were permitted in both states, while Louisiana allowed 9–3 verdicts. Allowing non-unanimous jury verdicts lessened the number of hung juries, consequently lowering the number of retrials required and creating a savings to the adopting jurisdictions. There was also a belief in both states that the less-than-unanimous verdict concept reduced the effect of minority persons who might be seated on the jury by making their respective votes largely irrelevant.[51] The Supreme Court approved the procedure despite allegations that a non-unanimous verdict called into question whether proof beyond a reasonable doubt was possible where one or more jurors believed in innocence. In *Johnson v. Louisiana*,[52] the Court upheld the non-unanimous verdict of nine to three and rejected the contention that three dissenters would tend to impeach the vote of the other nine. In a companion case, the Court rejected an argument that the Sixth Amendment requires jury unanimity in order to give effect to the burden of proof in criminal cases. The Court held that the reasonable doubt standard, while perhaps mandated by due process requirements, had no merit, since, in any event, the Sixth Amendment did not require proof beyond a reasonable doubt.[53]

Case 13.3 LEADING CASE BRIEF: A NON-UNANIMOUS STATE CRIMINAL JURY VERDICT VIOLATES THE SIXTH AMENDMENT RIGHT TO A TRIAL BY JURY

Ramos v. Louisiana
Supreme Court of the United States
___ 476 U.S. ___ (2020).

CASE FACTS:

Evangelisto Ramos had been charged and convicted on one count of second-degree murder based on the 10–2 verdict of a twelve-person Louisiana trial jury. Two jurors did not find guilt beyond a reasonable doubt. The victim had been killed and stuffed into a trash barrel, allegedly following a sexual assault. The trial court sentenced him to life in prison, without parole.

In 48 other states, had he been so charged and a 10–2 verdict rendered, there would have been a hung jury, no conviction, and no life sentence because the other 48 states require a unanimous verdict to render a decision.

Ramos's appeal to the Fourth Circuit Court of Appeal of Louisiana was not successful, and the court affirmed his conviction. The Supreme Court of the United States granted certiorari to hear the case.

LEGAL ISSUE:

When a state uses a twelve-person jury, consistent with the Sixth Amendment, is a 10–2 verdict constitutional, given the history of the trial by jury at the time of the adoption of the Sixth Amendment?

THE COURT'S RULING:

A defendant's constitutional right to a trial by jury of twelve jurors must include a unanimous verdict on all elements for a conviction to be valid.

ESSENCE OF THE COURT'S RATIONALE:

Justice Gorsuch announced the judgment of the Court.

[The Court noted that one of the rationales for Louisiana adopting the non-unanimous verdict was to reduce the effect that minority voters might have on criminal trials. Similar motives were attributed by the Court to Oregon's move to use non-unanimous verdicts.]

* * *

We took this case to decide whether the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense. Louisiana insists that this Court has never definitively passed on the question and urges us to find its practice consistent with the Sixth Amendment. . . .

I

The Sixth Amendment promises that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The Amendment goes on to preserve other rights for criminal defendants but says nothing else

about what a "trial by an impartial jury" entails.

Still, the promise of a jury trial surely meant something—otherwise, there would have been no reason to write it down. Nor would it have made any sense to spell out the places from which jurors should be drawn if their powers as jurors could be freely abridged by statute. Imagine a constitution that allowed a "jury trial" to mean nothing but a single person rubberstamping convictions without hearing any evidence—but simultaneously insisting that the lone juror come from a specific judicial district "previously ascertained by law." And if that's not enough, imagine a constitution that included the same hollow guarantee twice—not only in the Sixth Amendment, but also in Article III. No: The text and structure of the Constitution clearly suggest that the term "trial by an impartial jury" carried with it some meaning about the content and requirements of a jury trial.

One of these requirements was unanimity. Wherever we might look to determine what the term "trial by an impartial jury trial" meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.

The requirement of juror unanimity emerged in 14th century England and was soon accepted as a vital right protected by the common law. As Blackstone explained, no person could be found guilty of a serious crime unless "the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion." A " 'verdict, taken from eleven, was no verdict' " at all.

This same rule applied in the young American States. Six State Constitutions explicitly required unanimity. Another four preserved the right to a jury trial in more general terms. But the variations did not matter much; consistent with the common law, state courts appeared to regard unanimity as an essential feature of the jury trial.

It was against this backdrop that James Madison drafted and the States ratified the Sixth Amendment in 1791. [Originally, the Sixth Amendment only applied to the federal government.] By that time, unanimous verdicts had been required for about 400 years. If the term "trial by an impartial jury" carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity.

Influential, postadoption treatises confirm this understanding. For example, in 1824, Nathan Dane reported as fact that the U. S. Constitution required unanimity in criminal jury trials for serious offenses. A few years later, Justice Story explained in his Commentaries on the Constitution that "in common cases, the law not only presumes every man innocent, until he is proved guilty; but unanimity in the verdict of the jury is indispensable." Similar statements can be found in American legal treatises throughout the 19th century.

Nor is this a case where the original public meaning was lost to time and only recently recovered. This Court

has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity. As early as 1898, the Court said that a defendant enjoys a "constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons." A few decades later, the Court elaborated that the Sixth Amendment affords a right to "a trial by jury as understood and applied at common law, . . . includ[ing] all the essential elements as they were recognized in this country and England when the Constitution was adopted." And, the Court observed, this includes a requirement "that the verdict should be unanimous." In all, this Court has commented on the Sixth Amendment's unanimity requirement no fewer than 13 times over more than 120 years.

There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and incorporated against the States under the Fourteenth Amendment. [The Sixth Amendment was made effective against the States in *Duncan v. Louisiana*, 391 U.S. 145 (1968).] This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.

II

A

How, despite these seemingly straightforward principles, have Louisiana's and Oregon's laws managed to hang on for so long? [In *Apodaca v. Oregon*, the justices framed the issue, not as if history required unanimity, but whether unanimity served an important "function" in contemporary society. Justice Powell in *Apodaca* mentioned that there was a dual track, that some incorporated amendments might mean something different when applied to the states.]

* * *

Still, Justice Powell frankly explained, he was "unwillin[g]" to follow the Court's precedents. So he offered up the essential fifth vote to uphold Mr. Apodaca's conviction—if based only on a view of the Fourteenth Amendment that he knew was (and remains) foreclosed by precedent.

B

In the years following *Apodaca*, both Louisiana and Oregon chose to continue allowing nonunanimous verdicts. But their practices have always stood on shaky ground. After all, while Justice Powell's vote secured a favorable judgment for the States in *Apodaca*, it's never been clear what rationale could support a similar result in future cases. Only two possibilities exist: Either the Sixth Amendment allows nonunanimous verdicts, or the Sixth Amendment's guarantee of a jury trial applies with less force to the States under the

Fourteenth Amendment. Yet, as we've seen, both bear their problems. In *Apodaca* itself, a majority of Justices—including Justice Powell—recognized that the Sixth Amendment demands unanimity, just as our cases have long said. And this Court's precedents, both then and now, prevent the Court from applying the Sixth Amendment to the States in some mutated and diminished form under the Fourteenth Amendment. So what could we possibly describe as the "holding" of *Apodaca*?

Really, no one has found a way to make sense of it. In later cases, this Court has labeled *Apodaca* an "exception," "unusual," and in any event "not an endorsement" of Justice Powell's view of incorporation. . . . Louisiana embraces the idea that everything is up for grabs. It contends that this Court has never definitively ruled on the propriety of nonunanimous juries under the Sixth Amendment—and that we should use this case to hold for the first time that nonunanimous juries are permissible in state and federal courts alike.

III

Louisiana's approach may not be quite as tough as trying to defend Justice Powell's dual-track theory of incorporation, but it's pretty close. How does the State deal with the fact this Court has said 13 times over 120 years that the Sixth Amendment does require unanimity? Or the fact that five Justices in *Apodaca* said the same? The best the State can offer is to suggest that all these statements came in dicta. But even supposing (without granting) that Louisiana is right and it's dicta all the way down, why would the Court now walk away from many of its own statements about the Constitution's meaning? And what about the prior 400 years of English and American cases requiring unanimity—should we dismiss all those as dicta too?

Sensibly, Louisiana doesn't dispute that the common law required unanimity. Instead, it argues that the drafting history of the Sixth Amendment reveals an intent by the framers to leave this particular feature behind. [Some early and historical drafts of the Sixth Amendment did not explicitly include unanimity and actually deleted the word, as well as some other provisions.]

* * *

Louisiana would have us infer an intent to abandon the common law's traditional unanimity requirement.

But this snippet of drafting history could just as easily support the opposite inference. Maybe the Senate deleted the language about unanimity, . . . because all this was so plainly included in the promise of a "trial by an impartial jury" that Senators considered the language surplusage. . . . [A]t the time of the Amendment's adoption, the right to a jury trial meant a trial in which the jury renders a unanimous verdict.

* * *

IV

* * *

V

On what ground would anyone have us leave Mr. Ramos in prison for

the rest of his life? Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment. No one before us suggests that the error was harmless. Louisiana does not claim precedent commands an affirmance. In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. But where is the justice in that? Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right. The judgment of the Court of Appeals is

Reversed.

CASE IMPORTANCE:

The Ramos Court reaffirmed that the Sixth Amendment right to a trial by jury historically required twelve jurors to come to a unanimous decision concerning guilt or innocence. Where a right enshrined in the first Ten Amendments is applied to the states through the due process clause of the Fourteenth Amendment, it has the exact same meaning in the states as it does when applied to the federal government.

All of this changed in 2020 because the Court found that the principle of allowing non-unanimous verdicts conflicted with the Sixth Amendment right to a trial by jury. In a Louisiana case, *State v. Ramos*, the defendant was found guilty of second-degree murder and sentenced to life in prison based upon a non-unanimous jury verdict of 10–2.[54] The Supreme Court granted certiorari to consider whether unanimous verdicts were required in serious criminal state prosecutions.[55] Had Ramos been tried in one of the other 48 states that require unanimous voted, he would have been granted a mistrial. The Supreme Court reviewed the two major cases in non-unanimous jury verdict issues, considered historical precedent that required unanimity of jury verdicts, and looked at the fact that unanimous juries were required at the time of the writing of the Constitution and of the adoption of the Sixth Amendment right to a jury trial. The Court noted that by the time the states ratified the Sixth Amendment, "unanimous verdicts had been required for about 400 years. If the term 'trial by an impartial jury' carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity."[56] The *Ramos* Court noted that the meaning of the Sixth Amendment was the same whether applying to a federal or a state jurisdiction because all of the rights that the Court had incorporated into the due process clause of the Fourteenth Amendment have the same meaning whether applied in state or federal jurisdictions. From this point onward, juries composed of twelve members must render a unanimous verdict, and the *Ramos* case overruled all prior cases that were inconsistent with this view.

Defendants who had previously been convicted by non-unanimous twelve-person juries had some hope that the *Ramos* decision might help them on collateral habeas corpus reviews. Such hopes were dashed by the Supreme Court's decision in *Edwards*

v. Vannoy[57] in 2021. Edwards contended that his Louisiana non-unanimous jury convictions for robbery, rape, and kidnapping should be reversed because he argued that *Ramos* should be given retroactive effect. The Court noted that cases that were still on direct appeal could benefit, but that old cases using a collateral attack theory could not receive the benefit of *Ramos* since that case only announced a new rule of criminal procedure. Thus, the *Ramos* jury requirement of unanimity does not have retroactive effect for litigants pursuing a collateral attack on their convictions.

11. Combination of Smaller Juries With Unanimous Verdicts

With language in *Ramos v. Louisiana* that indicated the states must conform to twelve-person juries for criminal cases, it is possible that the next Sixth Amendment jury case will involve an allegation that at six-person jury is not consistent with the requirements of the Sixth Amendment. For the near term, states like Connecticut, Florida, and Georgia that use a six-person jury for non-serious criminal cases will continue to be considered constitutional.

With costs savings available through the use of less-than-unanimous verdicts and reduced expenditures with smaller juries, it was not surprising that some state jurisdictions would try to achieve greater savings by combining the two concepts. However, efforts to unite reduction in juror numbers with non-unanimous jury verdicts ran aground in *Burch v. Louisiana*,[58] where the Court ruled that a non-unanimous six-person jury (a 5-to-1 vote) was not constitutionally permissible in serious, non-capital cases. According to the *Burch* Court, even though the state of Louisiana possessed a substantial interest in reducing the time and expense associated with administering its system of criminal justice, the state's interest proved an insufficient justification for its use of non-unanimous six-person juries. Where the state had reduced its jury size to the minimum permitted by the Court, any attempt to introduce non-unanimity in the legal equation began to threaten constitutional principles. The line had to be drawn somewhere concerning voting practice. The Court found the line in *Burch* and refused to move further away from the traditional unanimous vote of twelve persons of the community.

12. Trial by Jury: Issues Involving Racial and Gender Discrimination

The federal Constitution, state constitutions, and case law require that fair and unbiased juries be empanelled as part of a guarantee of a fair trial. Although both the prosecution and the defense desire a fair jury trial, most often, each side would prefer a jury more "fair" to that side than the other. In the not-so-distant past, various strategies have been employed by states and by various individuals, for a variety of reasons, to keep persons of color and other minorities from serving on juries altogether or from serving on some juries in particular. The use of the poll tax[59] prevented many minorities from

registering to vote,[60] which kept persons from being selected when prospective jurors were summoned from voting lists. Literacy tests[61] as a prerequisite for voting registration had an effect similar to the poll tax, which indirectly prevented minority members of society from serving as jurors. In the past, some jurisdictions used what has been called a "key man" system, which resulted in members of identifiable minority groups being underrepresented on trial and grand juries. Where courts appointed "key men" to select potential jurors, the tendency was to pick potential jurors who were known to the "key men" and not to select other members of society who were members of minority groups.[62] "Key man" jury selection schemes have been known to keep minorities from jury service when white men were the "key men" doing the selecting.[63] Where jury service was permitted, other methods and intimidation had been devised to prevent particular individuals from seeing jury duty.

For more than 140 years, the Supreme Court has considered state-sponsored racial discrimination a transgression of the guarantees of the Fourteenth Amendment's Equal Protection Clause. In *Strauder v. West Virginia*, the Court held that a state violated the Fourteenth Amendment guarantee of equal protection of the laws when it put a black defendant before a jury from which [all] members of his own race had been purposefully excluded.[64] The Court invalidated a state statute that provided only white men could serve as jurors. This case seems to have been the genesis of the Supreme Court design to remove factors involving racial discrimination from the courts in general and from jury selection in particular.

The Court has continued its efforts to remove racism when it appears in the state or federal justice system. As an example, with respect to racially motivated efforts to exclude potential jurors, in 2005, the Supreme Court reversed a conviction and death sentence where the prosecution used peremptory challenges to remove ten of eleven black potential jurors. In *Miller-El v. Dretke*,[65] the Court offered the opinion that happenstance was unlikely to have produced the racial disparity demonstrated by the large number of potential black jurors who were removed from jury service when white prospective jurors with similar views and opinions were not removed.

In a state murder case from California,[66] the defendant contended that some potential jurors with African American and Hispanic ethnic heritage were excluded from jury service by the use of peremptory challenges due to race and ethnicity. The trial judge, without allowing the defense to hear, listened to the prosecutor's explanations that involved one juror who appeared to be under the influence of drugs; one had been a holdout juror when hearing a different case, and some of them indicated that they could not impose the death penalty in this capital murder case. The trial judge found no racial or ethnic reasons for the use of the peremptory challenges to the removed jurors. The defendant was convicted of murder. After exhausting all state appeals, the federal Ninth Circuit granted a writ of habeas corpus based on its view that racial and ethnic discrimination had occurred in jury selection, and the Supreme Court granted certiorari. The top California court previously found that the prosecutor's reasons for exercising the peremptory challenges to remove specific jurors were race neutral and could have been applied regardless of a prospective juror's race or ethnicity. However, since the California Supreme Court had previously found that the error was harmless beyond a reasonable doubt and such a ruling was not in conflict with clearly established federal

law or interpretations, the Supreme Court upheld the prior decisions, reversed the Ninth Circuit, and reinstated the convictions. The Supreme Court held that the rights of the defendant were violated by the judge by listening to the prosecutor's excuses for his peremptory challenges in the absence of the defendant's counsel but that the reasons for excluding jurors were appropriate and the trial court's error was harmless.

Where provable racial discrimination appears in a case before the Supreme Court, the justices seem united in their determination to end such discrimination as a way to foster fair trials and meet the requirements of the Constitution.

Gender discrimination in the selection of jurors, whether the trial involves a criminal case or a civil case, has been prohibited since the landmark case of *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), where defendant in a paternity case objected to the government using its peremptory challenges to remove all males from the jury that was to determine paternity. The defendant contended that for the government, representing the mother, to purposefully remove all male jurors on the basis of gender violated his rights to equal protection of the laws under the Fourteenth Amendment. The Court, speaking by analogy in racial terms, noted that although a defendant has no right to have a jury composed in whole or part of members of his own race, a defendant has the right to be tried by a jury whose members were selected by following nondiscriminatory standards. To pass muster under equal protection standards, classifications based on gender require an exceedingly high level of justification in order to meet equal protection standards. The Court refused to permit clear gender discrimination in jury selection and noted that whether discrimination is based on race or gender, it causes harm to the litigants, the community, and to the individual prospective jurors who are improperly excluded from civic participation in the court process. In reversing the Alabama Court of Civil Appeals, the Supreme Court stated, "When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women."[67]

In the selection of trial jurors, neither the parties nor the court may base exclusion of any state or federal juror based on the individual's race or gender due to the violation of equal protection[68] that harms the individual defendant, the excluded juror, and the community as a whole.

13. Removal of Prospective Jurors: Proper and Improper Rationales

During the jury selection process, under the concept of removal for cause, both the prosecution and the defense are permitted to remove from a prospective jury any juror who can be shown to have a bias, prejudice, or interest involving the case. Since bias, prejudice, or interest may affect the juror's view of the merits of the case and could result in a decision on an improper basis, both parties are permitted unlimited removals of prospective jurors for cause. Alternatively, peremptory challenges to prospective jurors permit the prosecution or defense to remove any particular juror for any reason or for no stated reason. Each party generally has a limited number of peremptory challenges, which vary in number based on the type of case, that may be asserted in a given case,

and a peremptory challenge has the effect of excusing the prospective juror from serving on that jury. A constitutional limitation on the use of peremptory challenges exists where a party uses a constitutionally prohibited, though unstated, reason to remove a potential juror. A defendant may not exercise a challenge to remove a prospective juror *solely* on the basis of the juror's gender, ethnic origin, or race.

If a defendant could prove that a prosecutor both had used peremptory challenges to remove prospective black jurors from a particular case or had historically followed a pattern of doing so, a violation of equal protection would be proven.[69] In *Swain v. Alabama*,[70] the defendant was unable to demonstrate that the prosecutor in his case had practiced discrimination based on race because he could not prove that the prosecutor demonstrated a pattern of discrimination. Two African Americans served on the grand jury that indicted Swain, and eight were on the panel of prospective jurors, but none actually served on the petit jury.[71] The *Swain* Court distinguished *Strauder v. West Virginia* because Alabama by law had not systematically excluded persons of color from jury service. In order to prevail in Swain, the convicted defendant would have to have proven that racial discrimination had occurred *in his case*. Under the *Swain* test, a prosecutor who discriminatorily removed jurors in only one case was not likely to have a verdict disturbed on appeal based on equal protection grounds. The virtually insurmountable burden that a defendant would have to meet would require proof of a pattern of discrimination, data that would be expensive and difficult to obtain from the prosecutor's office and probably not available anywhere else.

14. Using Peremptory Juror Challenges

Swain v. Alabama remained good law until the Court faced a similar claim in a more modern setting. In *Batson v. Kentucky*,[72] the judge conducted *voir dire* examination of the trial jury venire[73] and excused certain jurors for cause (see Case 13.3). Subsequently, the prosecutor used peremptory juror challenges to remove all four remaining persons of color from the jury, which left an all-white jury to hear the case of an African American defendant. The defendant could not meet the *Swain* test by showing that the prosecutor, in trial after trial, whatever the crime and whoever the defendant, had systematically removed blacks from serving as jurors or had removed persons of color from Batson's particular jury. However, the Court announced that the *Swain* test had been slowly eroded by later decisions and that, henceforth, a defendant could establish a *prima facie* case of purposeful discrimination solely on evidence concerning the prosecutor's use of peremptory challenges in the very case at bar. According to *Batson*, the defendant would have to show that he or she is a member of a cognizable racial group and that the prosecutor exercised peremptory challenges to remove members of defendant's race from the jury. The defendant must show that the facts raise an inference that the prosecutor excluded the jurors due to race, implicating the Equal Protection Clause of the Fourteenth Amendment. Under *Batson*, the burden then shifts to the prosecutor to come forward with a race-neutral explanation for challenging African American jurors, and a court must determine whether the defendant has carried its burden of proving intentional discrimination. *Batson* effectively overturned the *Swain* test and substituted a more rational and

workable approach that makes the allegation and proof of racial discrimination an easier path to follow. In *Batson*, the Court recognized that when a defendant makes an allegation of intentional racial discrimination on the part of the government in jury selection, such a claim raises issues concerning the basic fairness of the trial at hand, as well as the fairness of other trials within that particular judicial system.

Case 13.3 LEADING CASE BRIEF: RACIAL DISCRIMINATION IN THE USE OF PEREMPTORY CHALLENGES VIOLATES SIXTH AMENDMENT AND EQUAL PROTECTION CLAUSE

Batson v. Kentucky
Supreme Court of the United States
476 U.S. 79 (1986).

CASE FACTS:

A Kentucky grand jury indicted petitioner Batson, an African American, on charges of second-degree burglary and receipt of stolen goods. At the start of his trial, the judge conducted *voir dire* examination of the venire, excused certain jurors for cause, and permitted the parties to exercise peremptory challenges as they wished. Skillfully, the prosecutor used the allotted peremptory challenges to strike all four black persons from the trial jury. The final selections resulted in a jury composed only of white persons. Defense counsel objected to the way the jury had been selected. Defendant contended that the prosecutor's use of peremptory challenges to exclude members of defendant's race from the jury panel violated petitioner's rights under the Sixth and Fourteenth Amendments to have a jury selected from a fair cross-section of the community and to equal protection. The trial judge observed that the parties were entitled to use their peremptory challenges to "strike anybody they want to." The judge denied petitioner's motion, reasoning that the cross-section requirement applies only to selection of the venire and not to selection of the trial jury itself.

Following his conviction on both charges, ultimately, Batson appealed to the Supreme Court of Kentucky. He continued his argument that the prosecutor's use of peremptory challenges based on the race of specific jurors deprived him of his right to a proper jury trial under the Sixth Amendment. Petitioner also contended that the facts showed that the prosecutor had engaged in a "pattern" of discriminatory challenges in this case and established an equal protection violation under *Swain v. Alabama*, 380 U.S. 202 (1965). In rejecting Batson's claims, the Kentucky Supreme Court noted that, in another case, it had relied on the rule of *Swain v. Alabama* and had held that a defendant alleging lack of jury selection from a fair cross-section must demonstrate a systematic exclusion of a group of jurors from the venire. Batson had failed to make this demonstration, so the Supreme Court of Kentucky affirmed Batson's convictions. The Supreme Court of the United States granted certiorari to hear the case.

LEGAL ISSUE:

Where a state prosecutor used peremptory challenges with an apparent

purpose to remove all members of a defendant's race from the trial jury, did such use of peremptory challenges violate a defendant's rights under the Sixth Amendment and under the equal protection clause of the Fourteenth Amendment?

THE COURT'S RULING:

A defendant's constitutional right to a fair trial has been violated when a prosecutor uses peremptory challenges to systematically eliminate members of the defendant's race from sitting on the jury. Where proven racial discrimination exists in a particular case, any conviction based on that discrimination will be reversed.

ESSENCE OF THE COURT'S RATIONALE:

* * *

This case requires us to reexamine that portion of *Swain v. Alabama*, 380 U.S. 202 (1965), concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from [serving on] the petit jury.

I

In *Swain v. Alabama*, this Court recognized that a "State's purposeful or deliberate denial to [African Americans] on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *[Swain]* 380 U.S., at 203–204. This principle has been "consistently and repeatedly" reaffirmed, in numerous decisions of this Court both preceding and following *Swain*. We reaffirm the principle today.

A

More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his own race have been purposefully excluded. *Strauder v. West Virginia*, 100 U.S. 303 (1880). The decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire [i.e., the group] from which individual jurors are drawn.

* * *

II

A

Swain required the Court to decide, among other issues, whether a black defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury.

* * *

Accordingly, a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system was "being perverted" in that manner. For example, an inference of purposeful discrimination would be raised on evidence that a prosecutor, "in case after case, whatever the circumstances, whatever the crime and whoever the

defendant or the victim may be, is responsible for the removal of [African Americans] who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no [African Americans] ever serve on petit juries." Evidence offered by the defendant in *Swain* did not meet that standard. While the defendant showed that prosecutors in the jurisdiction had exercised their strikes to exclude blacks from the jury, he offered no proof of the circumstances under which prosecutors were responsible for striking black jurors beyond the facts of his own case. *[Swain]*, at 224–228.

* * *

The [current] standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since *Swain*. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, 345 U.S., at 562. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.

* * *

In this case, petitioner made a timely objection to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the trial court decides that the facts establish, prima facie, purposeful discrimination

and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be

Reversed.

CASE IMPORTANCE:

Batson reaffirmed the principle that where a case presents provable evidence of racial discrimination, the Court finds such discrimination intolerable and contrary to the Constitution and the Fourth Amendment guarantees of due process and equal protection. Where provable discrimination exists, the Court will reverse, or remand as appropriate, any resulting conviction.

Following an allegation and offer of prima facie proof of discrimination in the use of peremptory challenges, a trial court must sort through the evidence offered by both the defense and the prosecution and render an initial decision on the allegation. In applying *Batson*, a Connecticut court identified numerous factors that should be considered in determining whether a prosecutor has used peremptory challenges in an unacceptable and discriminatory manner. The court noted that the issues to consider include, but are not limited to, the following:

> (1) [T]he reasons given for the challenge were not related to the trial of the case. . . (2) the [party exercising the peremptory strike] failed to question the challenged juror or only questioned him or her in a perfunctory manner. . . (3) prospective jurors of one race [or gender] were asked a question to elicit a particular response that was not asked of the other jurors. . . (4) persons with the same or similar characteristics but not the same race [or gender] as the challenged juror were not struck. . . (5) the [party exercising the peremptory strike] advanced an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically . . . and (6) the [party exercising the peremptory strike] used a disproportionate number of peremptory challenges to exclude members of one race [or gender].[74]

In Connecticut, when an objection to the use of a peremptory challenge has been made, the prosecutor must offer a race-neutral explanation for the removal of that juror.[75] While the ultimate racial composition of the seated jury may not be determinative of the allegation of discrimination, it remains a factor that many courts consider in evaluating the prosecutor's explanation.[76]

In a Michigan case,[77] where impermissible use of race in exercising peremptory challenges was alleged, a black defendant had been convicted of carrying a concealed pistol without a valid license. During the jury selection, the prosecution had rejected an African American female from jury service, and the defendant made a *Batson* objection to her removal. The trial court heard the prosecutor's explanation that the reason for the removal was that the prospective juror appeared to have short-term memory problems. She could not remember when she had been a juror previously; she was not sure if she had ever had a bad experience when pulled over by a police officer; and she could not remember if family members had been victims of crimes. She also mentioned a "senior moment" when answering questions. The judge ruled that the *Batson* claim had not

been substantiated because there was a race-neutral basis for the use of the peremptory challenge. The Supreme Court of Michigan found that the proper procedures had been followed with respect to the particular prospective juror: an objection alleging racial discrimination in jury selection, the prosecutor's race-neutral explanation, and a court ruling based on the evidence that there was a race-neutral rationale for removing the person from jury service.

The *Batson* rationale applies regardless of the race of the defendant. In a further decision involving jury selection that involved racial discrimination, a white man had used peremptory challenges in a manner similar to what the prosecutor did in *Powers*. The defendant used his challenges to remove African Americans from the jury, partly because the victim in the case was a person of color. In *Georgia v. McCollum*,[78] the Court held that criminal defendants cannot use peremptory challenges based on race because the practice offends the Equal Protection Clause of the Fourteenth Amendment, and it harms the individual juror by subjecting him or her to open and public racial discrimination. In addition, such racially discriminatory practice creates harm to the community by undermining public confidence in the jury system. Just as the prosecutor in *Batson* had been prohibited from using racial criteria, the Court applied a similar reasoning to prevent a defendant from doing the same thing.[79]

Under the dictates of equal protection, defense attorneys may not exercise peremptory challenges in a racially discriminatory manner, and a trial judge does not cure the evil by permitting both sides to practice an equal degree of racial discrimination in an effort to level the field. In a Louisiana case, *State v. Lewis*,[80] the prosecutor first raised a *Batson* challenge to the defense use of peremptory challenges to remove white jurors from jury service. The prosecutor's objection occurred after the defense had excused three white men in a row from service. The ultimate trial court response involved allowing the prosecution the same latitude in striking prospective black jurors as was tolerated for the defense. For some of the challenged jurors, the judge did not require a race-neutral reason for the individual's rejection. When the defendant appealed his conviction, he contended that the prosecution practiced jury discrimination outlawed in *Batson*. The defendant proved successful in obtaining a reversal of his conviction because he demonstrated purposeful racial discrimination by the prosecution during the jury selection process, even though, arguably, he had engaged in similar discriminatory jury selection!

Where other factors that are not race related appear, prospective jurors who may be female or black or male or white may be excluded from jury service so long as there are non-gender and non-racial reasons for striking them from jury service through peremptory challenges. In *Rice v. Collins*,[81] a black prospective juror had been excluded from jury service because, according to the prosecutor, she had rolled her eyes when fielding a question from the judge. In addition, she was young, and the prosecutor feared that she might be unfairly tolerant of drug crimes, and she was single and lacked strong ties to the local community. The Supreme Court accepted these reasons as not being based on race, and such factors could properly be considered by a prosecutor or defense counsel in excluding prospective jurors from serving in state criminal cases.

Although a member of a racial minority can use the *Batson* test for judging discrimination in jury selection, the same theory may be employed by a member of a racial majority. In *Powers v. Ohio*,[82] a white man objected to the prosecutor's use of peremptory challenges

that removed seven black prospective jurors from the jury array. In deciding that a member of the majority racial group could use the *Batson* test, the Court focused on the rights of jurors rather than on those belonging to a defendant. As the *Powers* Court noted:

> [T]he Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.
>
> 499 U.S. 400, 409

Whether based on race, gender, or ethnicity, during the process of selecting a jury, neither the prosecution nor the defense should pursue legal strategies designed to remove representatives of identifiable groups from jury service.[83] Although the use of a racial animus in jury selection clearly transgresses the Constitution, the pursuit of gender goals resulting in discrimination was not always considered illegal. In *J.E.B. v. Alabama ex rel. T.B.*,[84] the government of Alabama used nine of its ten peremptory challenges allowed under state law to remove all males from a trial jury in a paternity case. The rationale of the state of Alabama was based on its perception that men who would otherwise be legally qualified to serve as jurors might be more sympathetic and receptive to the arguments of a man charged in a paternity action. In a sense, the Alabama government was following a stereotype that men would not be fair and impartial in a paternity case, and it could attempt to argue that it was not actively pursuing gender discrimination; it was attempting to secure a fair trial. The opposite view held by the defendant, that women equally qualified might be more sympathetic and receptive to the arguments of the child's mother, caused the defense to use peremptory challenges to remove female jurors. According to the Supreme Court, using gender as the factor in exercising peremptory challenges cannot be constitutionally supported since it is based on the very stereotypes the law condemns. The *J.E.B.* Court cited *Strauder v. West Virginia* in noting that the "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria."[85] The *J.E.B.* Court went on to conclude that the Equal Protection Clause of the Fourteenth Amendment prohibits gender discrimination where it is based on the belief that jurors will possess stereotypical gender-based prejudices and decide cases based on that bias.

The purpose of selecting a proper jury for a trial is to insulate the defendant from an unfair or overzealous prosecutor or judge. This role cannot be successfully implemented where the jury has been selected based on racial, gender, or ethnic characteristics. The goal of equal justice requires that a jury be selected appropriately and consistently with due consideration for meeting constitutional dictates.

15. Evolution of the Sixth Amendment Right to Trial Counsel

The original intention of the Framers of the Sixth Amendment was that the right to a jury trial existed for the most serious federal offenses and for some of the less serious offenses according to the practice of the common law. However, precisely

when the right to a jury trial matured was not clearly drawn even with reference to the common law. In addition, the Sixth Amendment appeared to permit the assistance of counsel to prepare one's criminal defense but did not advise a defendant how to find legal representation and did not address how a poor person would be able to afford an attorney. The original intent of this right was that if a defendant could afford to pay for an attorney, he or she could have legal assistance in the preparation and presentation of a defense in a federal court. The general right to have the assistance of counsel would have little value to a person who could not afford to pay a lawyer. If the government, be it state, local, or federal, viewed a criminal matter as sufficiently important that it hired a lawyer to act as a prosecutor, it would seem that a defendant should be able to fairly meet the government by using a lawyer for the presentation of a defense. The inability to afford a proper defense created a legal mismatch for most indigent defendants. This handicapping of impoverished defendants who faced professionally trained prosecutors with no defense counsel existed from the founding of the nation until 1966.

In a now famous landmark case, *Gideon v. Wainwright*,[86] Florida had charged the defendant with burglary, a serious felony, but failed to provide him with legal assistance. As a result, an impoverished Gideon proceeded to trial without counsel for having allegedly broken and entered a poolroom with intent to commit a misdemeanor, a crime that was considered a felony. At his trial, where he was convicted, Gideon requested the assistance of counsel, but the judge followed state law that only offered free counsel in capital cases and refused to appoint an attorney on his behalf. The burglary conviction resulted in a five-year sentence of incarceration. Still without the assistance of counsel, Gideon filed a request for a writ of habeas corpus with the Florida Supreme Court, which rejected his request on the merits. Having exhausted his state remedies, Gideon successfully applied for a writ of certiorari to the Supreme Court of the United States contending that he was being held illegally since he had been convicted without the assistance of counsel. With a bit of irony, that Court appointed free attorneys for Gideon to argue his case in the Supreme Court.

16. Constitutional Right to Counsel: Felony and Misdemeanor Cases

When Gideon's case reached the nation's top court in *Gideon v. Wainwright*,[87] the Court held that an indigent defendant charged with a serious, noncapital offense has the right to have appointed legal counsel to assist in his defense. The *Gideon* Court concluded that having the assistance of counsel was a fundamental right essential to a fair trial and that to force someone to trial without an attorney created a violation of the Sixth Amendment as applied to the states through the Due Process Clause of the Fourteenth Amendment. As Justice Black noted:

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the

> law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.
>
> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)

For the very first time, the Court recognized the existence of the right to free legal counsel for any defendant charged in a state felony case when the accused could not afford to hire an attorney. The generally accepted view was that this decision significantly leveled the inherent advantages of the prosecution and helped move the states toward a fair criminal justice system. Yet to come was the extension of the right to counsel to other offenses of a less serious nature.

Following *Gideon*, in a series of cases culminating in *Argersinger v. Hamlin*[88] and *Scott v. Illinois*,[89] the Court extended the right to free assistance of counsel to any crime for which incarceration might be imposed. In *Argersinger*, the defendant was an indigent who was tried for an offense punishable by incarceration and for which he could have been imprisoned for up to six months, could have received a $1000 fine, or both. He was actually given a ninety-day jail sentence after his court trial, at which he was given no right to court-appointed counsel. The state of Florida refused to grant free counsel on the ground that such a right extended only to trials involving serious offenses punishable by more than six months in prison. The Supreme Court of the United States rejected Florida's holding and determined that in the absence of counsel, no jail time may be given upon a conviction to an indigent who cannot afford legal representation and who has not been offered free assistance of counsel. In effect, if a judge determines not to appoint counsel for an indigent, the judge cannot later impose a jail or prison sentence. Incarceration cannot be imposed either at the end of a trial or later for a probation violation. "The Sixth Amendment secures to a defendant who faces incarceration the right to counsel at all 'critical stages' of the criminal process."[90] As a further limitation, a conviction may not be used under a multiple offense statute or as a "strike offense" in a three-strikes law context to convert a subsequent misdemeanor into a felony with a prison term.[91]

Where the right to counsel exists under the Sixth Amendment in a criminal case, the right would be somewhat hollow if there were no standards to govern the competency of an appointed attorney. Under *Strickland v. Washington*, 466 U.S. 668 (1984), the Court determined that the Sixth Amendment guarantee of the right to counsel also included the right to effective assistance of counsel. The concept of effective assistance of counsel contemplates that the attorney for a defendant was able to offer guidance, assistance, and performance to ensure a fair trial but not necessarily one that a defendant always wins. In order for an appellant to win an appeal based on a claim of ineffective assistance of counsel, the appellant must demonstrate that the "counsel's representation fell below an objective standard of reasonableness" and that "the deficient performance prejudiced the defense."[92] In a habeas corpus petition, the appellant would have to bring forth some evidence that his or her attorney had failed to make an investigation of the facts where that approach would have been reasonable, that the attorney failed to exercise due diligence to discover evidence of innocence or other evidence helpful to the accused, that the attorney had failed to properly prepare for trial, or that the representation during trial fell dramatically below acceptable standards given the complexity or simplicity of the case. As a general rule, there is a strong presumption that a defense attorney's

performance in a given case fell within a wide range of professional conduct. According to the *Strickland* Court,

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.[93]

An additional burden for an appellant who claims ineffective assistance of counsel is the requirement that the defendant must demonstrate his case experienced prejudice. This is another way of saying that the appellant must show that there some reasonable likelihood or probability that, but for the attorney's deficiency, the outcome in the defendant's criminal case would have been different. As a result of the standards announced by the *Strickland* Court, few appellants will be successful in obtaining new trials based on the incompetency of prior legal counsel.

17. Summary

Although the Sixth Amendment holds that in all criminal prosecutions, the defendant shall enjoy the right to a speedy and public trial by an impartial jury, not every criminal case merits a trial by jury under the Sixth Amendment. Article III, Section 2, of the Constitution of the United States also mandates that the "trial of all crimes, except in cases of impeachment, shall be by jury," but this provision has not been interpreted to mandate a jury trial for every minor federal or state criminal transgression. Due to the process of selective incorporation, the Supreme Court incorporated the Sixth Amendment and its guarantee of a trial by jury into the due process clause of the Fourteenth Amendment and made the right to a jury trial applicable to the states in the 1968 case of *Duncan v. Louisiana*. A subsequent case, *Baldwin v. New York*, determined that the right to a jury trial was constitutionally required in state cases only where the potential sentence was greater than six months incarceration. Juvenile courts are not constitutionally required to grant a trial by jury to juveniles tried in juvenile courts, but juveniles certified as adults who stand trial in adult court must be given the right to trial by jury as if the juvenile were an adult.

The actual selection of a trial jury requires that due process and fundamental fairness be exercised when making a determination of which persons shall sit as jurors. The general rule requires that the jury be chosen from a group that represents a fair cross-section of the different types of people residing within the jurisdiction. However, the actual jury seated need not be a mirror image of the identifiable groups that compose the fair cross-section of the community. In a situation in which a defendant believes that a jury was not selected from a fair cross-section of the community, the burden of proof rests with the defendant to establish a violation. The defendant must demonstrate that an identifiable group was precluded from representation or that underrepresentation of an identifiable group was based on an intentional design.

Although a federal criminal jury must be composed of twelve individual jurors, state juries may be composed of fewer than twelve but must have at least six jury members. A six-person state jury must reach a verdict by a unanimous vote.

In order to ensure that improper racial or gender issues have not intruded in a way that would influence a jury's deliberations, the use of peremptory challenges to remove prospective jurors based on race or gender is prohibited. Race and/or gender or ethnicity may not be a consideration or basis on which to prevent a prospective juror from serving. Persons being considered for jury duty may be removed when there is evidence that an prospective juror may not be able to render a fair and impartial verdict based on the evidence presented. Except for race or gender, an attorney may remove a person from jury service for any reason or no reason by exercising a peremptory challenge to the seating of that prospective juror. Peremptory challenges are usually limited in number, while challenges for cause do not have a numeric limitation.

The right to a trial by jury might not mean very much unless an individual has the right to counsel to assist in that person's defense. Where there is any chance that a conviction might result in a defendant's incarceration, that individual must be given free legal counsel if that person qualifies as an indigent. The right to counsel applies whether the charged crime is a felony or is a misdemeanor so long as there is any potential for incarceration.

REVIEW EXERCISES AND QUESTIONS

1. Explain why the Sixth Amendment right to a trial by jury originally applied only in federal criminal prosecutions.
2. Although the language in the Sixth Amendment would make it appear that a jury trial would be available to every federal defendant, when does the right to a jury trial arise under present interpretations of the Sixth Amendment?
3. What purposes are served by having a jury drawn from a representative fair cross-section of the community? Are there any other obvious purposes or benefits from selecting jurors from this pool?
4. In a prosecution for sexual assault, the prosecutor objected to the defendant's attorney using a peremptory challenge to remove a prospective female juror from serving on the panel. The prosecutor alleged that the juror was being excused because she was a female and noted that the sexual assault involved the defendant's alleged act against a female. The defense countered that its questioning of the prospective female juror indicated that she had a relative who had been raped and she thought police officers usually arrested the guilty and not the innocent. Is gender discrimination being practiced by the defense attorney, or is the prosecutor correct in that the juror has been excluded for illegal reasons? Explain your arguments and any assumptions that you add to this case.
5. Federal government juries must be composed of twelve persons in criminal cases, but the states have some freedom to experiment with

juror numbers. Why would states want to permit juries with fewer members than the traditional number of twelve?

6. What are some of the reasons some states have reduced the numbers of jurors below twelve for many criminal cases?
7. What factor determines whether an indigent defendant must be given legal counsel?
8. Why should criminal defendants who are too poor to afford legal counsel be granted access to free attorneys who will assist in presenting their defense?

1. How Would You Decide?

In the United States Court of Appeals of Arizona, Division One.

The defendant, Erin Crowell, had been cited for violating the Scottsdale, Arizona, city code that regulated nude performances by exotic dancers or adult service providers. The code permitted nude dancing but provided restrictions that the dancing women must honor. The prosecutor alleged that Ms. Crowell violated three provisions of the ordinance in that she had exotically danced without a permit, had danced less than three feet from a patron, and had allowed a patron to place money on her person or costume. A possibility existed that the penalties could be consecutive, resulting in greater than a six-month incarceration. A penalty of a $2500 fine or no more than six months imprisonment was the maximum that could be given for each offense. The defendant, Erin Crowell, argued that she should have the right to a jury trial because the ordinance preventing her conduct involving nude dancing was a direct outgrowth of common law offenses prohibiting indecent exposure. Regulating the right to a jury trial, in addition to federal constitutional case law is the Arizona state constitution, Article 2, Section 23 that provides that "[t]he right of trial by jury shall remain inviolate." To decide whether a defendant has a right to a jury trial under this provision, the court had to determine whether the defendant's offenses of which he or she is accused had a "common law antecedent that guaranteed a right to trial by jury at the time of Arizona statehood." *Derendal v. Griffith*, 209 Ariz. at 425, P36, 104 P. 3d at 156 (2005).

How would you rule on the defendant's contention that she should be permitted to have the right to a jury trial for her alleged exotic dancing infractions?
The Court's Holding:

[The appellate court reaffirmed that the right to a trial by jury shall remain inviolate and that the court must determine whether the offense that had been accused in this case was one that had a common law antecedent that would have guaranteed the right to the trial by jury at the time the Arizona became a state. According to the court, if the right to a jury trial did not exist in the Constitution, the court will evaluate the right to jury trial based on case law interpreting the Sixth Amendment of the United States Constitution. The court also noted that the defendant did not allege that that the ordinances carry additional consequences that might render them so serious as to warrant a jury trial pursuant other parts of the Arizona constitution or federal case law.]

In determining whether there is a common-law, jury-eligible antecedent to a modern offense, we compare the character of the modern offense with that of the common-law offense. *Id*. at 419, P10, 104 P. 3d at 150 ("We have further held that when the right to jury trial for an offense existed prior to statehood, it cannot be denied for modern statutory offenses of the same 'character or grade.'" (quoting *Bowden v. Nugent*, 26 Ariz. 485, 488, 226 P. 549, 550 (1924))).

The court in *Derendal* cited several cases as examples of modern crimes with common-law antecedents. *Id*. at 419–20 & n.4, PP11–12, 104 P. 3d at 150–51 & n.4. In *Bowden*, "a defendant charged with operating a poker game in violation of a city ordinance was entitled to a jury trial because the charge was similar in character to the common law crime of conducting or maintaining a gambling house and the elements of the crimes were substantially similar." *Id*. at P11 (citing *Bowden*, 26 Ariz. at 490, 226 P. at 550). Likewise, in *Urs v. Maricopa County Attorney's Office*, a charge of reckless driving, defined as "driv[ing] a vehicle in reckless disregard for the safety of persons or property," was similarly akin in "character" to the common-law offense of "operating a motor vehicle so as to endanger [any] property [or] individual." *Id*. at 420, P12, 104 P. 3d at 151 (alterations in original) (discussing *Urs*, 201 Ariz. 71, 74, P10, 31 P. 3d 845, 848 (App. 2001)).

* * *

In determining whether the offenses at issue in this case share the character of a common-law antecedent, we focus on the elements of the offenses. We regard a jury-eligible, common law offense as an antecedent of a modern statutory offense when the modern offense contains elements comparable to those found in the common law offense." *Id*. at 419, P10, 104 P. 3d at 150; *see id*. at 420, P11, 104 P. 3d at 151 (noting that elements of the modern crime in *Bowden* were "substantially similar" to the historical offense).

Crowell argues that, like the Tucson ordinance at issue in *Lee* [prohibiting nude dancing and exposure], the Scottsdale City Code provisions she is accused of violating have as their common-law antecedent the crime of indecent exposure, entitling her to a jury trial. She contends, and Scottsdale does not deny, that one charged with indecent exposure at common law was entitled to a jury trial.

[The court determined that she was not eligible for a trial by jury because the offenses were punishable only by six months or less and that the ordinance did not prohibit nude dancing; it merely regulated it. Therefore, it was different from the prior common law that outlawed indecent exposure and gave a jury trial to those accused of that crime due to the character of the crime. Here exotic nudity was not viewed with the same level of seriousness as purposely being indecent out in public, so no jury trial was available based on the crime.] See *Crowell v. Jejna*, 161 P. 3d 577; 2007 Ariz. App. LEXIS 108 (2007).

2. How Would You Decide?

In the Supreme Court of Nevada

Appellant Valentine had been convicted by a jury of multiple crimes stemming from a series of five armed robberies in Las Vegas, Nevada. As guaranteed by the Sixth

Amendment as applied to the states through the Fourteenth Amendment, the defendant has the right to have his jury chosen from a fair cross-section of the community. The defendant alleged that the jury pools from which his jury was chosen violated his right to have the jury selected from a fair cross-section of citizens of the jurisdiction. Valentine objected to the makeup of the 45-person array of citizens summoned for jury duty. He contended that two distinctive groups in the community, African Americans and Hispanics, were not fairly and reasonably represented in the venire when compared with the overall population within the jurisdiction. He believed that the underrepresentation was caused by systematic exclusion, based on two theories as to how the system operated. One theory was that the system did not enforce jury summonses, so if minority citizens failed to show for duty, their race/ethnicity was underrepresented. His second theory was that the system sent out an equal number of summonses to citizens located in each postal ZIP code without ascertaining the ethnic or racial percentage of the population in each ZIP code. The trial court denied his motion for a hearing to offer proof that would establish a violation of the right to a jury composed of a fair cross-section of the identifiable groups. Because the defendant made specific factual allegations that could be sufficient to establish a prima facie violation of the fair cross-section requirement, and those allegations were not disproved, he argued that he should get such a hearing, even after his convictions. The trial court denied Valentine's request for an evidentiary hearing. The defendant appealed to the Supreme Court of Nevada on his state and federal claims.

How would you rule on the defendant's request that the trial court should have held a hearing on his allegations that his right to a jury selected from a group that represented a fair cross-section of the community in which the alleged crime was allegedly committed was violated by the State of Nevada in that identifiable groups were not represented?

The Court's Holding:

Opinion

By the Court, STIGLICH, J.:

A defendant has the right to a jury chosen from a fair cross section of the community, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. This court has addressed the showing a defendant must make to establish a prima facie violation of this right. We have said little, however, about when an evidentiary hearing may be warranted on a fair-cross-section claim. Faced with that issue in this case, we hold that an evidentiary hearing is warranted on a fair-cross-section challenge when a defendant makes specific allegations that, if true, would be sufficient to establish a prima facie violation of the fair-cross-section requirement. Because the defendant in this matter made specific factual allegations that could be sufficient to establish a prima facie violation of the fair-cross-section requirement and those allegations were not disproved, the district court abused its discretion by denying Valentine's request for an evidentiary hearing. . . . We therefore vacate the judgment of conviction and remand for further proceedings as to the fair-cross-section challenge.

BACKGROUND

* * *

DISCUSSION

Fair-cross-section challenge warranted an evidentiary hearing

Valentine claims the district court committed structural error by denying his fair-cross-section challenge without conducting an evidentiary hearing. We review the district court's denial of Valentine's request for an evidentiary hearing for an abuse of discretion. [Citation omitted.]

"Both the Fourteenth and the Sixth Amendments to the United States Constitution guarantee a defendant the right to a trial before a jury selected from a representative cross-section of the community." *Evans v. State*, 112 Nev. 1172, 1186, 926 P. 2d 265, 274 (1996). While this right does not require that the [actual] jury "mirror the community and reflect the various distinctive groups in the population," it does require "that the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." [Citation omitted.] "Thus, as long as the jury selection process is designed to select jurors from a fair cross-section of the community, then random variations that produce venires without a specific class of persons or with an abundance of that class are permissible." *Williams v. State*, 121 Nev. 934, 940, 125 P. 3d 627, 631 (2005).

A defendant alleging a violation of the right to a jury selected from a fair cross section of the community must first establish a prima facie violation of the right by showing

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Evans, 112 Nev. at 1186, 926 P. 2d at 275 (quoting *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979)). To determine "[w]hether a certain percentage is a fair representation of a group," this court uses "the absolute and comparative disparity between the actual percentage in the venire and the percentage of the group in the community." [Citation omitted.] [W]e consider if the underrepresentation of a distinctive group is "inherent in the particular jury-selection process utilized." [Citation omitted.] Only after a defendant demonstrates a prima facie violation of the right does "the burden shift[to the government to show that the disparity is justified by a significant state interest." [Citation omitted.]

Here, Valentine asserted that African Americans and Hispanics were not fairly and reasonably represented in the venire. Both African Americans and Hispanics are recognized as distinctive groups. See id.; see also *United States v. Esquivel*, 88 F.3d 722, 726 (9th Cir. 1996). And the district court correctly used the absolute and comparative disparity between the percentage of each distinct group in the venire and the percentage in the community to determine that African Americans were fairly and reasonably represented in the venire but that Hispanics were not. See Williams, 121 Nev. at 940 n.9, 125 P. 3d at

631 n.9 ("Comparative disparities over 50% indicate that the representation of [a distinct group] is likely not fair and reasonable."). The district court denied Valentine's challenge as to Hispanics based on the third prong—systematic exclusion.

We conclude the district court abused its discretion in denying Valentine's request for an evidentiary hearing. Although this court has not articulated the circumstances in which a district court should hold an evidentiary hearing when presented with a fair-cross-section challenge, it has done so in other contexts. . . . In particular, it makes no sense to hold an evidentiary hearing if the defendant makes only general allegations that are not sufficient to demonstrate a prima facie violation or if the defendant's specific allegations are not sufficient to demonstrate a prima facie violation as a matter of law. [Citation omitted.] But unlike the postconviction context where the claims are case specific, a fair-cross-section challenge is focused on systematic exclusion and therefore is not case specific. . . . With these considerations in mind, we hold that an evidentiary hearing is warranted on a fair-cross-section challenge when a defendant makes specific allegations that, if true, would be sufficient to establish a prima facie violation of the fair-cross-section requirement.

Applying that standard, we conclude that Valentine was entitled to an evidentiary hearing as to his allegation of systematic exclusion of Hispanics. Valentine did more than make a general assertion of systematic exclusion. In particular, Valentine made specific allegations that the system used to select jurors in the Eighth Judicial District Court sends an equal number of jury summonses to each postal ZIP code in the jurisdiction without ascertaining the percentage of the population in each ZIP code. Those allegations, if true, could establish underrepresentation of a distinctive group based on systematic exclusion. . . . Having alleged specific facts that could establish the underrepresentation of Hispanics as inherent in the jury selection process, Valentine was entitled to an evidentiary hearing. Accordingly, the district court abused its discretion by denying Valentine's request for an evidentiary hearing. We therefore vacate the judgment of conviction and remand to the district court for an evidentiary hearing. [Citation omitted.]. . . . If the district court determines that the challenge lacks merit, it may reinstate the judgment of conviction, except as provided below.

* * *

The district court abused its discretion in denying Valentine's request for an evidentiary hearing on his fair-cross-section challenge. We therefore vacate the judgment of conviction and remand for the district court to conduct an evidentiary hearing and resolve the fair-cross-section challenge.

See *Valentine v. State*, 454 P. 3d 709, 719 (Nev.2019).

Notes

1. See *Ramos v. Louisiana*, ___ U.S. ___, 140 S.Ct 1390, 206 L.Ed. 2d 583, 2020 U.S. LEXIS 2407 (2020).
2. See *Willaims v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed. 2d 446, 1970 U.S. LEXIS 98 (1970).
3. 391 U.S. 145 (1968).

4. In re Oliver, 333 U.S. 257, 273 (1948).
5. *Gideon v. Wainwright,* 372 U.S. 335, 343–344 (1963).
6. 399 U.S. 117 (1970).
7. *Crowell v. Jejna*, 161 P. 3d 577, 2007 Ariz. App. LEXIS 108 (2007).
8. See *Sassano v. Brown*, 2006 U.S. Dist. LEXIS 90025 (D. N.J. 2006). A federal district court ruled that a driving while intoxicated is a petty offense for which no right to a jury trial exists even where the defendant was jailed for 180 days, had his license and registration revoked for ten years and was fined $1000 dollars and $300 in court costs and other surcharged penalties. See *Sassano v. Brown*, 2006 U.S. Dist. LEXIS 90025 (D. N.J. 2006).
9. For the offense and under the circumstances, the *Blanton* litigants faced a maximum of six months incarceration under Nevada law.
10. See *Solem v. Helm*, 463 U.S. 277, 280, n. 4 (1983).
11. *Lewis v. United States*, 518 U.S. 322 (1996).
12. 403 U.S. 528 (1971).
13. See ALM (Annotated Laws of Massachusetts) GL ch. 119, § 55A (2007), where a child who has received a complaint against him or her or has been indicted as a youthful offender in juvenile court has the right to a trial by jury.
14. *Holland v. Illinois,* 493 U.S. 474, 480 (1990).
15. *Ibid*., 482.
16. *Ibid*., 495.
17. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).
18. *Ibid*.
19. See *United States v. Downs*, 217 Fed. Appx. 841, 2006 U.S. App. LEXIS 27236 (11th Cir. 2006).
20. See *Duren v. Missouri*, 439 U.S. 357, 364 (1979).
21. See *Boston v. Bowersox,* 202 F.3d 1001; 1999 U.S. LEXIS 30660 (8th Cir. 1999).
22. *United States v. Brown,* 1997 U.S. App. LEXIS 13812 (2nd Cir. 1997).
23. See *United States v. Downs*, 217 Fed. Appx. 841, 2006 U.S. App. LEXIS 27236 (11th Cir. 2006).
24. See *Valentine v. State*, 454 P. 3d 709, 2019 Nev. LEXIS 77 (2019).
25. *Davis v. State*, 2003 Ark. App. LEXIS 112 (2003), citing Rule 31.1 and Rule 31.2 of the Arkansas Rules of Criminal Procedure.
26. *Ohio v. Baer*, 1998 Ohio App. LEXIS 4152 (10th App. Dist. 1998).
27. https://courts.michigan.gov/Administration/SCAO/Forms/courtforms/mc260.pdf.
28. See *State v. Campbell*, 960 So. 2d 363, 2007 La. App. LEXIS 1302 (2007).
29. *Langel v. Burt*, 2006 U.S. Dist. LEXIS 36476 (N.D Iowa 2006).
30. *Hawaii v. Mankichi*, 190 U.S. 197, 245 (1903). Justice Harlan, in dissent, offered his view on federal juries: "Whatever may be the power of the states in respect of grand and petit juries, it is firmly settled that the Constitution absolutely forbids the trial and conviction, in a federal civil tribunal, of anyone charged with crime otherwise than upon the presentment or indictment of a grand jury and the unanimous verdict of a petit jury composed, as at common law, of twelve jurors."
31. *Patton et al. v. United States*, 281 U.S. 276, 312; 50 S. Ct. 253, 263 (1930).
32. Federal Rules of Criminal Procedure, Rule 23(b)(2). See *United States v. Murphy*, 483 F.2d 639 (2007), where a jury of eleven was permitted to reach a verdict with the defendant's clear consent.
33. *Ibid*., Rule 23(b)(3).
34. *Jordan v. Massachusetts*, 225 U.S. 167 (1912). "In criminal cases, due process of law is not denied by a state law which dispenses with a grand jury indictment and permits prosecution upon information, nor by a law which dispenses with the necessity of a jury of twelve, or unanimity in the verdict." *Jordan* was cited with approval in *Johnson v. Louisiana,* 406 U.S. 356 (1972), a case that held that less than unanimous verdicts in state criminal cases do not offend the Sixth Amendment as applied to the states.
35. 590 U.S. ___, 140 S.Ct. 1390, 206 L.Ed.2d 583, 2020 U.S. LEXIS 2407 (2020).
36. See *Kansas v. Roland,* 15 Kan. App.2d 296; 807 P. 2d 705; 1991 Kan. App. LEXIS 149 (1991).
37. *Johnson v. State*, 277 Ga. App. 41, *48, 625 S.E.3d 411, 417, 2005 Ga. App. LEXIS 1252 (2005). In a recent case, a Georgia defendant was permitted to agree to a non-unanimous verdict where there was

full disclosure to the defendant and the state agreed. See *Jackson v. State*, 350 Ga. App. 80, 827 S.E.2d 919, 2019 Ga. App. LEXIS 245 (2019).
38. Ohio Crim. R. 23(B).
39. Ind. Jury R. 16(b).
40. Ga.Code Ann. 15–12–125.
41. For example, see Utah Const. Art. I, § 10. [Trial by jury.] "In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."
42. 399 U.S. 78 (1970).
43. Conn. Gen. Stat. § 54–82 (2021).
44. *State v. Joseph*, 196 Conn. App. 712, 230 A.3d 644, 2020 Conn. App. LEXIS 121 (2020).
45. 435 U.S. 223 (1978).
46. Ballew was initially sentenced to concurrent terms of one year in prison and a $1000 fine for showing an obscene film, *Behind the Green Door*.
47. See *Blair v. Florida*, 698 So. 2d 1210; 1997 Fla. LEXIS 1338 (1997).
48. *Godfrey v. State*, 2005 Tex. App. LEXIS 4050 (2005).
49. *Mati v. State*, 2019 Alas. App. LEXIS 109 (2019).
50. *Ramos v. Louisiana*, 590 U.S. ___, 140 S.Ct. 1390, 206 L.Ed.2d 583, 591, 2020 U.S. LEXIS 2407 (2020).
51. *Ibid*.
52. 406 U.S. 356 (1972). *Accord, Apodaca v. Oregon,* 406 U.S. 404 (1972).
53. See *Apodaca v. Oregon,* 406 U.S. 404, 411–412 (1972). Although the Court notes that the Sixth Amendment does not require proof beyond a reasonable doubt, the Due Process Clause of the Fourteenth Amendment was construed in *In re Winship,* 397 U.S. 358 (1970), as requiring proof beyond a reasonable doubt for proof of guilt in criminal cases.
54. *State v. Ramos*, 231 So.3d 44, 2017 La. App.LEXIS 2013 (2017).
55. *Ramos v. Louisiana*, 590 U.S. ___, 140 S.Ct. 1390, 206 L.Ed.2d 583, 2020 U.S. LEXIS 2407 (2020).
56. *Id*. at 588.
57. ___U.S.___, 141 S.Ct. 1547, 209 L.Ed.2d 651, 2021 U.S. LEXIS 39314 (2021).
58. 441 U.S. 130 (1979).
59. A poll tax was a levy imposed on those citizens who wished to vote. The Supreme Court held that the tax constituted a violation of the Equal Protection Clause of the Fourteenth Amendment in *Harper v. Virginia,* 383 U.S. 663 (1966). Prior to this decision, if a citizen had not paid the poll tax, he or she could not vote. If a person were not on the voting rolls, there was a virtual certainty that a call to jury service would not be forthcoming, since jury service was often based on being listed as a voter.
60. *South Carolina v. Katzenbach,* 383 U.S. 301 (1966).
61. *Oregon v. Mitchell*, 400 U.S. 112 (1970).
62. One "key man" system in Tennessee involved three jury commissioners who compiled a list of qualified potential jurors from which the actual grand jurors were selected at random. The Tennessee judge with criminal jurisdiction made all appointments of forepersons for the county grand juries. See *Rose v. Mitchell,* 443 U.S. 545 n.2 (1979). A "key man" system formerly followed in Texas allowed a state judge to appoint three to five jury commissioners who selected persons for jury duty who were believed to have a sound mind and who were of good moral character. But these "key man" systems did not always select from a fair cross-section of the community. See *Castaneda v. Partida,* 430 U.S. 482, 484 (1977).
63. *Hernandez v. Texas,* 347 U.S. 475, 479 (1954), and *Castaneda v. Partida,* 430 U.S. 482, 484 (1977).
64. 100 U.S. 303 (1880).
65. 545 U.S. 231 (2005).
66. *Davis v. Ayala*, 576 U.S. 257, 135 S.Ct. 2187, 192 L.Ed.2d 323, 2015 U.S. LEXIS 4608 (2015).
67. *J.E.B. v. Alabama* ex rel. T.B, 511 U.S. 127, 140 (1994).

68. The equal protection clause of the Fourteenth Amendment does not appear in the Fifth Amendment; the requirement of equal protection is deemed included within the Fifth Amendment's due process clause.
69. *Swain v. Alabama,* 380 U.S. 202 (1965).
70. *Id*.
71. *Id*. at 207.
72. 476 U.S. 79 (1986).
73. *Voir dire* of the jury occurs when the judge asks questions of the prospective jurors concerning bias, interest, or prejudice in their beliefs. In some jurisdictions, the court asks the questions posed by the attorneys, and some jurisdictions allow the attorneys to do the questioning of the potential jurors. The word *venire* refers to the whole body of citizens summoned by the sheriff under an old writ called *venire facias* that directed the sheriff to summon qualified citizens of the jurisdiction to serve as jurors. The modern term *jury venire* refers similarly to the body composed of citizens qualified to serve as petit (trial) or grand jurors.
74. *State v. Morales,* 71 Conn. App. 790, 804 A.2d 902, 2002 Conn. App. LEXIS 453, n.17 (2002).
75. *Id*. at 801.
76. In many cases, the defendant may face significant hurdles in proving that the prospective jurors removed actually possessed a particular racial identity or racial-ethnic identity. In *Collado v. Miller,* 157 F. Supp. 2d 227, 233; 2001 U.S. LEXIS 11788 (2001), the court noted that the defendant failed to show that challenged prospective jurors with Hispanic-sounding surnames were, in fact, Hispanic at all, or whether they simply carried Hispanic-sounding surnames with some different ethnic identity.
77. *People v. Kabongo*, 2021 Mich. LEXIS 847 (2021).
78. 505 U.S. 42 (1992).
79. In the interests of ensuring a fair trial, consistent with due process and equal protection, a white criminal defendant has the right to challenge state discrimination against African Americans in the selection of a grand jury foreman. In *Campbell v. Louisiana,* 523 U.S. 392 (1998), the court concluded that any accused suffers an "injury in fact" when a grand jury's composition has been tainted by racial discrimination. This theory applies equally to trial jury composition.
80. 795 So.2d 468; 2001 La. App. LEXIS 1938 (2001).
81. 546 U.S. 333 (2006).
82. 499 U.S. 400 (1991).
83. See *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395, 1991 U.S. LEXIS 2913 (1991). On the merits, where properly alleged, courts must consider ethnic discrimination when it is alleged to have occurred during jury selection.
84. 511 U.S. 127 (1994).
85. 100 U.S. 303, 305 (1880). While *Strauder v. West Virginia* was a criminal case and *J.E.B. v. Alabama* ex rel. T.B. was a civil matter with criminal enforcement overtones, the prohibition against gender discrimination was not limited by the Court to civil cases; the decision was all encompassing.
86. 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, 1963 U.S. LEXIS 1942 (1963).
87. 372 U.S. 335 (1963).
88. 407 U.S. 25 (1972).
89. 440 U.S. 367 (1979).
90. *United States v. Gutierrez*, 773 Fed. Appx. 367 (2019), quoting *Iowa v. Tovar*, 541 U.S. 77, 87, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004).
91. See *Baldasar v. Illinois*, 446 U.S. 222 (1980).
92. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).
93. *Ibid*., 689.

Appellate Practice and Other Posttrial Remedies 14

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Learning Objectives

1. Explain that the federal Constitution does not provide for any right of appeal in a criminal case.
2. Be able to articulate the reasons, in the interests of fairness and justice, a government should permit appeals of criminal convictions.
3. Develop an understanding concerning the reasons a state supreme court might choose to hear a particular criminal appeal and give an example of a case a state supreme court would likely choose to hear.
4. Orally detail how a state criminal case may eventually be heard by the Supreme Court of the United States.
5. State why the Sixth Amendment right to counsel applies only to the first appeal that is given as a matter of legal right and does not apply to subsequent appeals.
6. Explain the requirement that a defendant's trial attorney must properly make objections during trial in order to preserve the trial record for appeal purposes.
7. Be able to explain and discriminate between the concepts of plain error and harmless error.
8. Describe the options that might be available to the prosecution and to the defense following a successful appeal by the adverse party.

Chapter Outline

KEY TERMS

1. Collateral attack
2. Federal issue or federal question
3. Indigent right to appellate counsel
4. Indigent right to transcript
5. Notice of appeal
6. Plain error rule
7. Reversible error
8. Right to appeal
9. Writ of certiorari
10. Writ of habeas corpus

1. The Right to Appeal

> [T]he right of review in an appellate court is purely a matter of state concern.
> *Kohl v. Lehlback*, 160 U.S. 293, 299 (1895)

From its adoption to the present time, the Constitution of the United States imposes no duty and fails to require any state to provide appellate review of any criminal conviction. While the right to appeal a verdict rendered in a criminal trial would seem to be one of those constitutional rights found deeply embedded in the due process clause of the Fifth or the Fourteenth Amendments, a federal constitutional right to a criminal appeal does not exist.[1] Justice Scalia, concurring in an earlier case,[2] stated, "Since a State could, as far as the federal Constitution is concerned, subject its trial court determinations to no review whatever, it could *a fortiori* subject them to review which consists of a non-adversarial reexamination of convictions by a panel of government experts." The source for Justice Scalia's view on appellate rights comes from the language in an old case, which noted, "[T]he right of review in an appellate court is purely a matter of state concern."[3] In California, "the right of appeal is statutory; only such actions of a trial court may be reviewed on appeal as Legislature selects."[4] From the perspective of the United States Supreme Court, states would not have to give any review to criminal case determinations but have chosen to do so as a matter of state constitution,[5] state law, or state court decision.

Although a state is not required by the federal constitution to grant any right of appeal from a trial court, all states permit at least one appeal from an initial criminal court judgment. However, states do not and are not required to automatically allow appeals from an intermediate court of appeal to the top state court.[6] Justice Ginsburg recently reaffirmed the Court's position when she noted that states need not appoint counsel to aid an indigent person in discretionary appeals to a state's supreme court or to the Supreme Court of the United States.[7] In allowing at least one appeal, states may not condition this appeal in such a manner that the possibility or opportunity of a meaningful appeal depends upon the wealth of the appellant. As the Supreme Court of the United

States once noted, "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."[8] Thus, in order to make an appeal meaningful, states must appoint counsel for indigent persons for the first appeal, given as a matter of right, but a state is not required to provide free counsel for an indigent defendant who is seeking to appeal from the first appellate court to the state's top court.[9]

As a general rule, only final decisions of criminal trial courts are appealable, but some exceptions exist. In California, the rules of criminal procedure regulate the right of appeal.

An appeal may be taken by the defendant from both of the following:

> (a) Except as provided in Sections 1237.1, 1237.2, and 1237.5, from a final judgment of conviction. A sentence, an order granting probation, or the commitment of a defendant for insanity, the indeterminate commitment of a defendant as a mentally disordered sex offender, or the commitment of a defendant for controlled substance addiction shall be deemed to be a final judgment within the meaning of this section. Upon appeal from a final judgment the court may review any order denying a motion for a new trial.
>
> (b) From any order made after judgment, affecting the substantial rights of the party.[10]

Prosecutors may appeal in some situations,[11] but they may never appeal a verdict of acquittal in a way that can have any effect on the merits of the case, and double jeopardy prevents the prosecution from retrying a defendant following a not guilty verdict. Prosecutors may appeal court orders that set aside an indictment or information and are permitted to appeal a ruling ordering a new trial for a defendant. Court orders, whether trial or intermediate appellate, may be appealed when the order reduces the level of the conviction or punishment. If an order prior to trial suppresses evidence needed by the prosecution, the government may appeal such an order in an effort to have the suppression overturned.

A state's grant of the right to an appeal is not an absolute right and may be forfeited if a convicted defendant fails to appear for sentencing or escapes following a guilty verdict. Where a defendant has skipped bail after conviction or has intentionally not appeared as ordered for sentencing, at least one jurisdiction applies the "escape rule."[12] Under the escape rule theory, the right of appeal on the merits is ended, and trial and appellate courts will not hear any post-conviction motions. The escape rule limiting appeal and other relief applies only to errors that occurred prior to and up to the time of escape and does not include errors that may occur following the defendant's return to custody. The forfeiture of the right to appeal does not depend on the length of time that the convicted defendant has been absent from justice, whether it is fifteen days to greater than ten years.[13]

The primary rationale for allowing appeals following a conviction involves the desire to correct errors or unfairness that may have improperly influenced the court verdict. Although both prosecution and defense attorneys, as well as trial judges, are obligated by their oaths taken upon bar admission to support the United States Constitution

and laws and to support and defend their respective state constitutions and state laws, it is unlikely that every law and rule has been properly applied and enforced in every criminal trial. Errors in procedure and practice, in admission and exclusion of evidence, in impeachment and cross-examination, in jury selection and exclusion, in the opening and closing statements, and in a variety of other areas create a virtual certainty that no criminal trial will be error free. Some errors are so inconsequential that their effect on a verdict is minimal, but others may affect the outcome of a trial. Where a defendant can demonstrate a significant error to an appellate court, a reversal of the conviction may be the proper judicial remedy. If the major or structural error was of such magnitude that it might have changed the outcome of the trial, an appellate court will generally order a reversal and a new trial. However, when the error appears to have had no influence on the trial's outcome, the lower court decision will stand and not be reversed.

The zealous urge to prevail in a criminal case may prompt a defense counsel or a prosecutor to pursue a course of action that is, in the legal sense, erroneous. Some of these problems will be of a minor order of magnitude, and, when considering the whole body of evidence in a criminal case, the error will not be of great concern to either party. Such small errors will not be deemed to have created any lasting effect on the trial or any substantial influence on the overall outcome. In contrast, some errors have such a tremendous effect on the direction and outcome of a trial that it becomes impossible to say what the outcome of the case would have been without the error. The prosecutor and the defense counselor will most likely have different opinions concerning which errors have affected the outcome of a criminal case. One way to test the effect of a legal or constitutional mistake on a trial involves taking the case to an appellate court and allowing a panel of judges to review it. Upon careful consideration of the appellant's briefs and oral argument by the parties, an appellate court will render an opinion concerning whether the alleged error or errors require reversal of the conviction.

2. The Appeal Process: Generally

The courts in most states have a process for appeal that takes the case from the trial court to an intermediate court of appeal as a matter of statutory right, with the possibility of having the top court in the state hear the case, at its discretion. The move from the trial court to the court of appeal occurs as a matter of legal right because a court of appeal generally has no discretion concerning whether to hear a case. If the outcome is not favorable to the defendant in the court of appeal, additional litigation is possible within that state court system. Though theoretically it is possible to get a case to a state supreme court, in most instances, the top state courts have the right or the discretion to choose the cases they wish to hear.[14] A state supreme court may exercise its discretion to consider a case that has important public policy or legal ramifications. Where two separate courts of appeal within the same state have decided similar issues that have resulted in divergent and incompatible legal theories, a state supreme court, in the exercise of its discretion, may decide to take such a case to resolve the conflict. For example, in a Florida case,[15] two district courts of appeal had decided issues involving Florida's speedy trial statute time calculations and notification requirements quite differently. The issue

concerned time calculations for speedy trial purposes under circumstances when a case had been dismissed and later reinstated without notifying the defendant. The Supreme Court of Florida took the case as a vehicle to resolve conflicts among lower courts of appeal to set a uniform interpretation of the statute that applied statewide. In addition, if a case contains a legal theory that has been decided in a way that is inconsistent with an earlier state supreme court decision, the state's high court may take the case and use it as a vehicle to revisit the issue or to adopt the new view offered by the lower court.

3. The First Appeal: The Court of Appeals

The appellate procedure usually requires that the aggrieved defendant file a notice of appeal within a set period of time following the entry of the verdict/judgment/sentence. A failure to file the notice of appeal may preclude a higher court from considering the case. Subsequent to the notice of appeal, the defense attorney will consult the transcript of the trial and conduct legal research covering the disputed areas of law, which will be incorporated within a legal brief presented to the appellate court and served on the prosecutor. In a similar manner, legal research and writing will result in a brief in which the prosecutor's office will present its view of the legal merits of the case. In some cases, the attorneys for both sides will simply submit the legal briefs and allow the appellate court to render its decision based on the briefs in the absence of oral argument. More typically, each side may determine that the best chance to prevail involves personally addressing the judges and putting the best face possible on the case.

Once the appellate judges have read the briefs and listened to and participated in oral arguments, they will take the case under advisement and, in due course, render a decision. Appellate decisions may take several directions. Perhaps the most common resolution in criminal cases is that the trial court decision is upheld and the conviction stands. The conviction also could be reversed, with directions to the trial court to dismiss the case and allow the defendant to walk free. The defendant's conviction could be reversed and the appellate court could order a retrial of the case. In many jurisdictions, an appellate court has the power to reduce the level of offense and to enter a conviction for a lesser included offense that the court considers appropriate under the circumstances. If the reduction of the level of offense or punishment occurs, generally the prosecution may appeal such an order unless it was rendered by the top court of the state or by the Supreme Court of the United States.

4. The Appellate Role of a State Supreme Court

When an intermediate appellate court has rendered its decision, the prosecution and the defense may be faced with some hard decisions. If the appellate court has rendered a verdict in the defendant's favor and has ordered a retrial or some other disposition, the attorneys for the government may request that the intermediate court re-hear the case or may apply to the supreme court of the state to consider hearing the case. As a general rule, state supreme courts have almost total discretion over which cases they will take.

While there may be some cases under state law that state supreme courts must hear, criminal appeals do not normally fit into this category, and the intermediate court of appeal will generally be the last word on the merits of the case. Upon careful analysis of an adverse appellate court decision, a prosecutor's office may conclude that its best efforts should be directed toward a retrial because the legal conclusions may predict a lack of success at the state supreme court level. If the appellate court has upheld the conviction of the defendant, few options realistically remain. The defense attorney may suggest that the intermediate court of appeal re-hear the case or may elect to appeal the case to the state supreme court, realizing that there is only a small possibility that the top court will take the case or that the appellate court will re-hear. The appeal to a state supreme court may be a necessary prerequisite prior to filing a habeas corpus petition in the state or federal court system. For this reason, even though success in the supreme court may be only a distant hope, the attempt to obtain a hearing in a state supreme court may pave the way for appellate litigation on other theories in state or federal courts.

If either party has proven successful in getting a review by the state's supreme court, each side will prepare a revised brief that will target the latest legal theories on the issues and will prepare for oral arguments in front of the high court. A process similar to that followed in the intermediate court of appeal will be repeated at the supreme court level. Each attorney tries to convince the court that his or her position is the most logical, reasonable, and intelligent resolution of the legal issues. While the decision rendered by a state supreme court will probably constitute the final resolution of the criminal case, either party may request a rehearing by the top state court or ask the Supreme Court of the United States to hear any federal constitutional issues in the case, but actually obtaining a rehearing in a top state will remain only a remote possibility.

5. Supreme Court of the United States: Only a Potential for Review

A relatively small number of state supreme court decisions are successfully appealed to the Supreme Court of the United States, which, like state supreme courts, generally has control concerning whether to hear a particular case. Consistent with the Supreme Court's discretion in accepting cases, Rule 10 of the Rules of the Supreme Court states, "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons."[16] Rule 10 notes that the Court considers whether a state court of last resort has decided an important federal issue or question in a manner that conflicts with a different state court of last resort or has a conflict with a federal court of appeals decision. Additionally, the Court considers whether a state court has decided an important question of federal law that has not been decided by the Supreme Court but should be settled by the top federal court. If the United States Supreme Court deems a case sufficiently important where the case involves a federal question and where four justices vote to hear it, the Court will grant a writ of certiorari. The Court will be more likely to hear a case in which a state supreme court has decided a federal question in a manner that is in conflict with another top state court or where a state court has decided an important federal issue

that should be settled by the Supreme Court of the United States.[17] Because the Supreme Court has no power to interpret state law or to reconsider the conclusions of fact based on what was presented at a state trial court, the Court must restrict its selection of cases and its decisions to cases involving federal questions. For that reason, in order to invoke the jurisdiction of the Court, litigants often contend that some federal right belonging to a defendant has been violated by the state government in bringing the case to trial and pursuing the criminal suit.

6. Appellate Assistance to the Defendant: The Right to Counsel

The Sixth Amendment guarantees that a person accused of a crime has the right to the assistance of counsel. Although this right is often thought to be primarily a right to counsel at trial, by judicial decision, it has been extended to a variety of other stages of the criminal justice process. Assistance of counsel is available to the person undergoing custodial interrogation,[18] to a person in a postindictment or postinformation lineup,[19] and to a defendant involved in a preliminary hearing,[20] among other times. However, it is at the trial when assistance of counsel proves the most meaningful and where its absence would be so devastating.[21] The value of appeal counsel to a defendant is almost the same as the importance of trial counsel because the pursuit of an appeal requires careful legal maneuvering and contending with arcane procedural paths and time limitations in order to obtain meaningful appellate review.

In *Douglas v. California* (Case 14.1),[22] a California trial court convicted the two petitioners of thirteen felonies, including robbery and attempted murder. Douglas and his friend, both indigents, had rejected the assistance of counsel at their trial because they believed that the attorney was not properly prepared. However, their preparation and performance in court as their own attorneys also proved to be inadequate, since they were convicted on all charges. At the time, California law allowed appeals by indigents but first required an appellate court to look over the trial record to preliminarily consider the merits of the appeal. In this preliminary *ex parte* review, if the appellate court determined that the appeal might have merit or that an appeal would be of advantage to a defendant to have the assistance of appellate, it would appoint such counsel but would otherwise deny the assistance of free appellate counsel. In Douglas's case, the appellate court conducted the review and concluded that an appointed counsel for the appeal would not benefit the defendant or the court; Mr. Douglas received no legal appeal assistance. A person in Mr. Douglas's position would be able to pursue an appeal so long as such a defendant possessed sufficient financial resources to afford an attorney or managed to bring an appeal by his or her own efforts. Because Douglas possessed no money, and the appellate court screened his case away, he had no avenue by which to make his one statutory appeal effective.

The Supreme Court considered the *Douglas* case with reference to an earlier one in which the kind of an appeal depended on the amount of money a person had. In *Griffin v. Illinois*, the Court observed that there could be no justice when justice depended on the amount of money a person possessed. The *Griffin* Court held that a state may not

grant appellate review in such a way as to discriminate against convicted defendants on account of their poverty.[23] In Douglas's case, the type of appeal he would have received would have been based on his ability to pay for private legal counsel in the absence of a court determination on the preliminary merits of the case. If he could have afforded legal counsel for appeal, he could have obtained the same appellate scrutiny as any other person. The Supreme Court found in favor of Douglas's argument that he should have a right to free counsel for his first appeal granted as a matter of legal right. Thus, an indigent defendant must be granted free assistance of counsel for the initial appeal. For Douglas and for future defendants, this decision ensured a modicum of equality among the class of individuals who pursue criminal appeals.

Case 14.1 LEADING CASE BRIEF: AN INDIGENT MUST RECEIVE FREE APPELLATE LEGAL COUNSEL FOR THE FIRST APPEAL

Douglas v. California
Supreme Court of the United States
372 U.S. 353 (1963).

CASE FACTS:

Following the filing of a thirteen-count information, which included robbery, assault with a deadly weapon, and assault with intent to commit murder, against defendants Douglas and Meyes, the defendant-petitioners were tried together and convicted on all counts. Prior to the trial, the single public defender appointed as counsel to represent both defendants requested a continuance so that separate counsel could be appointed. The trial court denied the motion, and petitioners dismissed the defender, claiming he was unprepared, and again renewed motions for separate counsel and for a continuance. Subsequent to the conviction, petitioners requested, and were denied, the assistance of counsel on appeal, even though they were indigents. Under the California procedure at that time, the District Court of Appeal reviewed the record of the trial and came to the conclusion that the appeal was not meritorious and therefore refused to appoint appellate counsel. Although they pursued their appeal in the absence of an attorney, the appeal was heard without assistance of counsel, and their convictions were affirmed. The Supreme Court of California denied a discretionary review, and the Supreme Court of the United States granted a writ of certiorari.

LEGAL ISSUE:

Where the merits of the one appeal that an indigent legally possesses have been decided without the benefit of legal counsel, where fact of indigency was the only reason for lack of counsel, has there been a violation of the Sixth Amendment right to counsel as applied to the states through the Due Process Clause of the Fourteenth Amendment?

THE COURT'S RULING:

After hearing the arguments, the Supreme Court decided that where the quality and presentation of an indigent defendant's first appeal depend on the ability to afford appellate legal counsel, an unconstitutional line has been drawn between the poor and the rich person.

With considerations of due process, indigent appellants must be granted free legal counsel for the first appeal that is granted to every convicted person.

ESSENCE OF THE COURT'S RATIONALE:

* * *

[T]he type of an appeal a person is afforded in the District Court of Appeal hinges upon whether or not he can pay for the assistance of counsel. If he can, the appellate court passes on the merits of his case only after having the full benefit of written briefs and oral argument by counsel. If he cannot, the appellate court is forced to prejudge the merits before it can even determine whether counsel should be provided. At this stage in the proceedings, only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an ex parte examination of the record that the assistance of counsel is not required.

* * *

[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

When an indigent is forced to run this gauntlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure. In the federal courts, on the other hand, an indigent must be afforded counsel on appeal whenever he challenges a certification that the appeal is not taken in good faith. *Johnson v. United States*, 352 U.S. 565. The federal courts must honor his request for counsel regardless of what they think the merits of the case may be; and "representation in the role of an advocate is required." *Ellis v. United States*, 356 U.S. 674. In California, however, once the court has "gone through" the record and denied counsel, the indigent has no recourse but to prosecute his appeal on his own, as best he can, no matter how meritorious his case may turn out to be. The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between "possibly good and obviously bad cases," but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

We vacate the judgment of the District Court of Appeal and remand the case to that court for further proceedings not inconsistent with this opinion.

CASE IMPORTANCE:

Due process demands where a state permits an appeal of a criminal conviction and where a fair and meaningful appeal requires the guiding hand of appellate counsel, a state must provide an attorney for the first level of appeal.

The *Douglas* Court was not extremely clear in offering its justification concerning the constitutional basis of its decision requiring counsel for the first appeal. The Court indicated that the decision did not address any alleged right to counsel for discretionary appeals after the first appeal. In *Ross v. Moffitt*, 417 U.S. 600 (1974) (see Case 14.3), Justice Rehnquist attempted to offer an explanation concerning the basis for the *Douglas v. California* decision:

> The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment. Neither Clause, by itself, provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors. "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.
>
> *Moffit* at 608–609

In an effort to meet the requirements of *Douglas v. California*, the California procedure adapted to the revised requirements for granting a meaningful appeal to those of indigent status. In *Anders v. California*, 386 U.S. 738 (1967), the court-appointed appellate counsel had obtained and reviewed a copy of the trial transcript but refused to write a formal brief or otherwise pursue the appeal. After looking over the transcript, the appellate attorney concluded that there was no merit to the case and filed a "no merit" notice with the court of appeal. The court examined the record and affirmed the judgment of conviction. On a petition for a writ of habeas corpus, which Anders filed six years later, the appellate court found the appeal lacked legal merit. Upon appeal of the rejection of the application for the writ, the California Supreme Court dismissed the habeas corpus application. Anders appealed to the Supreme Court of the United States, which reversed the California court result. The *Anders* Court suggested the following procedure, which, if followed, would meet the requirements of due process:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*. The "no merit" letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably

> support the appeal. A copy of counsel's brief should be furnished the indigent, and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds, it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous), it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.
>
> *Anders* at 744

Despite the precedent of the *Douglas* case *and* the suggestions contained in the *Anders* case, the strength of a defendant's appeal may still have some relationship to the financial well-being of a defendant but still pass constitutional muster. In *Smith v. Robbins*, 528 U.S. 259 (2000), the Supreme Court approved a California process in which the appellate attorney for the defendant evaluates the merits and grounds for an indigent's appeal (see Case 14.2). If the attorney finds strong grounds for the appeal, the appellate process continues along the typical path. However, if the facts of the case are less promising from an appellate perspective, California permits a reduced level of appellate advocacy. Where the attorney determines that the appeal possesses no meritorious legal basis, he or she files a brief with the appellate court attesting that no appealable issues exist. In contrast, a person who could afford a privately retained attorney would be able to have the case briefed and heard by the court of appeals on its merits, rather than having an attorney merely look over the record and potentially determine that no real meritorious appealable issues exist. According to the *Robbins* Court, the indigent appellate procedure does not have to be followed exactly, as prior cases had proposed it should. The Court noted that proper appellate procedure was a "prophylactic framework" that it had established in *Douglas v. California* and later cases and was not to be viewed as a constitutional straitjacket. The states were permitted wide latitude in administering appellate procedures for indigents, subject to minimum standards of due process under the Fourteenth Amendment.

Case 14.2 LEADING CASE BRIEF: STATES MAY DEVELOP SCREENING PROCEDURES TO ELIMINATE COMPLETELY FRIVOLOUS INDIGENT FIRST APPEALS

Smith v. Robbins
Supreme Court of the United States
(2000).

CASE FACTS:

A state court jury in California convicted Lee Robbins of second-degree murder. Upon appeal, the court-appointed counsel, after looking at all the material, concluded that appeal would be frivolous and of no merit. The attorney filed a brief with the state court of appeal which complied with the appellate procedure developed to meet constitutional dictates emanating from *Anders v. California*, 386 U.S. 738 (1967). The new procedure, established in *People v. Wende*, 25 Cal.3d 436 (1979), allowed an appellate attorney, if the attorney concluded that a case had no merit, to

file a brief with the appellate court that summarizes the procedural and factual history of the case, with citations of the record. He also attests that he has reviewed the record, explained his evaluation of the case to his client, provided the client with a copy of the brief, and informed the client of his right to file a pro se supplemental brief. He further requests that the court independently examine the record for arguable issues. Unlike under the *Anders* procedure, counsel following *Wende* neither explicitly states that his review has led him to conclude that an appeal would be frivolous (although that is considered implicit; see *Wende*, 25 Cal.3d at 441–442, 600 P. 2d at 1075) nor requests leave to withdraw. Instead, he is silent on the merits of the case and expresses his availability to brief any issues on which the court might desire briefing.

The procedure was followed in Robbins' case, and the court of appeal agreed with the attorney's evaluation of the case that no arguable issues remained in the case. The court of appeal even considered two issues Robbins personally raised in a supplementary filing and denied Robbins' petition.

After Robbins exhausted his direct post-conviction remedies, he filed a petition for a writ of habeas corpus in the appropriate federal district court. Robbins alleged that he had been denied the effective assistance of appellate counsel because his lawyer's brief to the court of appeal failed to comply with the suggestions in *Anders v. California* for cases where the attorney found no merit in the appeal. According to the district court, if an issue might arguably have supported an appeal it should have been included in the brief, and since it was not, the district court concluded that a writ of habeas corpus should have been issued because the deviation in delivery of legal services amounted to deficient performance by counsel. The Ninth Circuit Court of Appeal agreed with the district and concluded that the brief filed by the appellate attorney was deficient because it did not, as the *Anders* procedure required, identify any legal issues that arguably could have supported the appeal. The Supreme Court of the United States granted certiorari.

LEGAL ISSUE:

Must states, while ensuring due process and adequate appellate equality between indigent litigants and more wealthy persons, follow exactly the suggestion of *Anders v. California*, 386 U.S. 738 (1967)?

THE COURT'S RULING:

A state need not require a court-appointed indigent's attorney to formally file an appellate brief containing legally unsupportable issues. So long as a state provides a method to address appellate issues that have merit, the state's indigent appellate process will meet the requirements of due process under the Fourteenth Amendment.

ESSENCE OF THE COURT'S RATIONALE:

II

A

In *Anders*, we reviewed an earlier California procedure for handling appeals by convicted indigents.

Pursuant to that procedure, Anders' appointed appellate counsel had filed a letter stating that he had concluded that there was "no merit to the appeal," *Anders*, 386 U.S. at 739–740. Anders, in response, sought new counsel; the State Court of Appeal denied the request, and Anders filed a *pro se* appellate brief. That court then issued an opinion that reviewed the four claims in his pro se brief and affirmed, finding no error (or no prejudicial error). *People v. Anders*, 167 Cal.App.2d 65, 333 P. 2d 854 (1959). Anders thereafter sought a writ of habeas corpus from the State Court of Appeal, which denied relief, explaining that it had again reviewed the record and had found the appeal to be " 'without merit.' " *Anders*, 386 U.S. at 740 (quoting unreported memorandum opinion).

We held that "California's action does not comport with fair procedure and lacks that equality that is required by the Fourteenth Amendment." *Id*. at 741. We placed the case within a line of precedent beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956), and continuing with Douglas, *supra*, that imposed constitutional constraints on States when they choose to create appellate review. In finding the California procedure to have breached these constraints, we compared it to other procedures we had found invalid and to statutory requirements in the federal courts governing appeals by indigents with appointed counsel. We relied in particular on *Ellis v. United States*, 356 U.S. 674 (1958) *(per curiam)*, a case involving federal statutory requirements, and quoted the following passage from it:

> If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied.
>
> *Anders, supra*, at 741–742 (quoting *Ellis, supra*, at 675)

In *Anders*, neither counsel, the state appellate court on direct appeal, nor the state habeas courts had made any finding of frivolity. We concluded that a finding that the appeal had "no merit" was not adequate, because it did not mean that the appeal was so lacking in prospects as to be "frivolous":

We cannot say that there was a finding of frivolity by either of the California courts or that counsel acted in any greater capacity than merely as amicus curiae which was condemned in *Ellis*. 386 U.S. at 743.

* * *

[A]ny view of the procedure we described in the last section of *Anders* that converted it from a suggestion into a straitjacket would contravene our established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy. In *Griffin v. Illinois*, 351 U.S. 12 (1956), which we invoked as the foundational case for our holding in

Anders, see *Anders*, 386 U.S. at 741, we expressly disclaimed any pretensions to rulemaking authority for the States in the area of indigent criminal appeals. We imposed no broad rule or procedure, but merely held unconstitutional Illinois' requirement that indigents pay a fee to receive a trial transcript that was essential for bringing an appeal.

* * *

III

Having determined that California's *Wende* procedure is not unconstitutional merely because it diverges from the *Anders* procedure, we turn to consider the *Wende* procedure on its own merits. We think it clear that California's system does not violate the Fourteenth Amendment, for it provides "a criminal appellant pursuing a first appeal as of right [the] minimum safeguards necessary to make that appeal 'adequate and effective,'" *Evitts v. Lucey*, 469 U.S. 387, 392 (1985) (quoting *Griffin*, 351 U.S. at 20 (plurality opinion)).

* * *

In determining whether a particular state procedure satisfies this standard, it is important to focus on the underlying goals that the procedure should serve—to ensure that those indigents whose appeals are not frivolous receive the counsel and merits brief required by *Douglas*, and also to enable the State to "protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent," *Griffin, supra*, at 24 (Frankfurter, J., concurring in judgment). For, although, under *Douglas*, indigents generally have a right to counsel on a first appeal as of right, it is equally true that this right does not include the right to bring a frivolous appeal and, concomitantly, does not include the right to counsel for bringing a frivolous appeal.

* * *

Since Robbins' counsel complied with a valid procedure for determining when an indigent's direct appeal is frivolous, we reverse the Ninth Circuit's judgment that the *Wende* procedure fails adequately to serve the constitutional principles we identified in *Anders*. But our reversal does not necessarily mean that Robbins' claim that his appellate counsel rendered constitutionally ineffective assistance fails. For it may be, as Robbins argues, that his appeal was not frivolous and that he was thus entitled to a merits brief rather than to a *Wende* brief.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

CASE IMPORTANCE:

Indigents will be able to pursue meaningful appeals with the assistance of appointed counsel but will not be permitted to file appeals that have absolutely no merit in law. The Court balanced the need for indigents to have attorneys for appeal purposes against the need for a state to conserve scarce financial resources in a manner that justice should be served.

According to dicta in *Douglas v. California*, states may choose to terminate additional assistance of counsel for indigents following the one appeal granted as a matter of right by state laws or constitutions. The federal constitution does not prohibit continued indigent legal assistance following the first appeal, but it does not mandate that a state continue to expend scarce state resources in funding any and all post-conviction appeals that a convicted defendant might desire. In *Ross v. Moffitt*, 417 U.S. 600 (1974), an indigent wanted court-appointed appellate counsel to assist him in his discretionary appeals beyond the first level (see Case 14.3). In rejecting the argument favoring court-appointed counsel for discretionary appeals, Justice Rehnquist noted that the appellate level is significantly different from the trial level because the defendant has actually been convicted of a crime and stripped of the presumption of innocence and had one appeal as a matter of right. Under either the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment, the fact that a defendant wants to pursue additional litigation at the appellate level does not require a state to provide counsel for every legal maneuver a defendant might wish to pursue.

Case 14.3 LEADING CASE BRIEF: DUE PROCESS DOES NOT REQUIRE STATES TO FUND INDIGENT APPEALS BEYOND THE FIRST POST-TRIAL APPEAL

Ross v. Moffitt
Supreme Court of the United States
417 U.S. 600 (1974).

CASE FACTS:

Pursuant to an indictment that charged Claude Frank Moffitt with two counts of forgery and with uttering a forged instrument, a North Carolina trial court convicted him on the charges. Moffitt had the benefit of legal counsel for his first appeal. In one case, involving a discretionary appeal, Moffitt wanted to appeal to the Supreme Court of North Carolina but was denied the assistance of a free attorney. In the other case, the North Carolina courts appointed counsel to prepare for an appeal to the Supreme Court of North Carolina. When Moffitt desired that counsel be appointed for an appeal to the Supreme Court of the United States, the North Carolina courts refused. In arguing for the right to free counsel as an indigent, Mr. Moffitt contended that the due process clause of the Fourteenth Amendment required that the state of North Carolina provide him with legal counsel for his appellate litigation. North Carolina courts rejected his contention, and he perfected his appeal to the Supreme Court of United States. When he pursued litigation in the federal court system, he had some initial success in the district courts, but the Fourth Circuit, 483 F.2d at 654, reversed portions of the federal district decision and remanded the case back to the lower courts. The Supreme Court granted Mr. Moffitt's request for certiorari.

LEGAL ISSUE:

In a state criminal proceeding, does due process require a state to furnish free legal counsel to indigent criminal appellants to pursue appeals beyond the initial appeal following trial?

THE COURT'S RULING:

The Justices determined that due process and fundamental fairness do not dictate that free counsel be given to indigent defendants because a state is not obligated to give any convicted defendant any appeal.

ESSENCE OF THE COURT'S RATIONALE:

* * *

II

This Court, in the past 20 years, has given extensive consideration to the rights of indigent persons on appeal. In *Griffin v. Illinois*, 351 U.S. 12 (1956), the first of the pertinent cases, the Court had before it an Illinois rule allowing a convicted criminal defendant to present claims of trial error to the Supreme Court of Illinois only if he procured a transcript of the testimony adduced at his trial. No exception was made for the indigent defendant, and thus one who was unable to pay the cost of obtaining such a transcript was precluded from obtaining appellate review of asserted trial error. Mr. Justice Frankfurter, who cast the deciding vote, said in his concurring opinion:

. . . Illinois has decreed that only defendants who can afford to pay for the stenographic minutes of a trial may have trial errors reviewed on appeal by the Illinois Supreme Court. *Id*. at 22.

The Court in *Griffin* held that this discrimination violated the Fourteenth Amendment.

Succeeding cases invalidated similar financial barriers to the appellate process, at the same time reaffirming the traditional principle that a State is not obliged to provide any appeal at all for criminal defendants. *McKane v. Durston*, 153 U.S. 684 (1894).

* * *

The decisions discussed above stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons. In *Douglas v. California*, 372 U.S. 353 (1963), however, a case decided the same day as *Lane, supra*, and *Draper, supra*, the Court departed somewhat from the limited doctrine of the transcript and fee cases and undertook an examination of whether an indigent's access to the appellate system was adequate. The Court in *Douglas* concluded that a State does not fulfill its responsibility toward indigent defendants merely by waiving its own requirements that a convicted defendant procure a transcript or pay a fee in order to appeal, and held that the State must go further and provide counsel for the indigent on his first appeal as of right. It is this decision we are asked to extend today.

This Court held unconstitutional California's requirement that counsel on appeal would be appointed for an indigent only if the appellate court determined that such appointment would be helpful to the defendant or to the court itself. The Court noted that, under this system, an indigent's case was initially reviewed on the merits, without the benefit of any organization or argument by counsel. By contrast, persons of greater means were not faced with the preliminary "ex parte examination

of the record," *id*. at 356, but had their arguments presented to the court in fully briefed form. The Court noted, however, that its decision extended only to initial appeals as of right. . . .

* * *

We do not believe that the Due Process Clause requires North Carolina to provide respondent with counsel on his discretionary appeal to the State Supreme Court. At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel is fundamental and binding upon the States by virtue of the Sixth and Fourteenth Amendments. *Gideon v. Wainwright*, 372 U.S. 335 (1963). But there are significant differences between the trial and appellate stages of a criminal proceeding.

* * *

This is not to say, of course, that a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review, would not prove helpful to any litigant able to employ him. An indigent defendant seeking review in the Supreme Court of North Carolina is therefore somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding. But both the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of discretionary review in the Supreme Court of North Carolina make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*. And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. We think respondent was given that opportunity under the existing North Carolina system.

* * *

The judgment of the Court of Appeals' holding to the contrary is Reversed.

CASE IMPORTANCE:

Settled case law guaranteed free counsel to indigent defendants for all trials and for the one appeal that is given to all defendants. Convicted defendants who desire to litigate beyond the first appeal and who are not given free legal counsel are not subjected to a violation of either due process or equal protection. A state does not have to grant free legal counsel to every post-trial remedy that a defendant might desire to pursue.

The right to counsel includes the right to effective assistance of counsel both at the trial level and beyond. This right does not mean the right to the most stellar counsel but to reasonably competent legal assistance. Under *Strickland v. Washington*, the Supreme Court noted that a defendant who makes a claim based on ineffective assistance

of counsel must demonstrate that the representation fell below an objective standard of reasonableness[24] and that the defendant's case had been prejudiced by the deficiency.[25] Legal representation above this level is deemed to meet the requirements of the Sixth Amendment. In a recent Supreme Court decision,[26] in a case where the convicted defendant's attorney failed to file a notice of appeal, despite his repeated requests, such representation was determined to fall below the proper legal standard. Due to the failure to allow the defendant have a meaningful day in appellate court, prejudice to the defendant's case was presumed and the unfavorable lower court ruling was reversed. In an Illinois case allegedly involving deficient attorney performance,[27] the defendant's attorney filed a notice of appeal but never pursued any action toward the appeal and never filed a brief. The appeal was dismissed on motion of the court after six months had elapsed and the court sent a notice to the attorney of record. Since the defendant jumped bail and did not attend his own trial, the attorney knew that the convicted defendant was missing. After eighteen years, the convicted defendant was apprehended, and only then did he file a motion for post-conviction relief and alleged a violation of the right to counsel due to ineffective appellate representation. A summary dismissal of the petition was reversed by the reviewing court. That court noted that the record indicated that the attorney had filed a notice of appeal that was dismissed for failure to prosecute the appeal. The reviewing court found that the defendant's recent motion was sufficient to defeat a summary dismissal of the post-conviction petition. As the court stated, "A postconviction claim of ineffective assistance of counsel based on the failure of counsel to perfect an appeal implicates both the right to counsel on appeal, as well as the right to appeal itself."[28]

7. Appellate Assistance to the Defendant: The Indigent's Right to a Transcript

Essential to prosecuting a criminal appeal, besides the assistance of counsel, is the ability to get an appellate court to hear a defendant's case. The process of getting a criminal appeal in front of an appellate court involves more than just giving the notice of appeal. Appellate briefs that clearly state the legal reasons the defendant thinks the case should be reversed need to be prepared and served on the opposing counsel and transmitted to the court of appeals. The cost of an appeal will vary with the complexity of the criminal case, the legal issues involved, the length of the original criminal trial, and, to some extent, the jurisdiction.

In *Griffin v. Illinois*,[29] state law gave defendants a right to an appeal, but a full, direct appellate review could be obtained only by furnishing the appellate court with a report of the trial proceedings, certified by the trial judge. These documents were considered difficult to prepare without an expensive stenographic transcript of the trial proceedings. Because Griffin had no funds with which to purchase a transcript, he filed a motion in the trial court that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished to him without cost. When the State of Illinois refused to furnish the trial transcripts, Griffin initiated a suit to force the state to pay for the transcript. When the case reached the United States Supreme Court, the Court expressed some concern that the only reason full appellate review was not available to Griffin was

because he was too impoverished and that a person in better financial shape would have available a different legal remedy. The *Griffin* Court did not hold that a trial transcript had to be furnished in every case, but it did state that if a transcript was central to pursuing a meaningful appeal, the state was bound to furnish a free transcript. In addition, the Court has recognized that an indigent defendant is entitled to a free transcript of the preliminary hearing as a matter of equal protection, since the level of fairness and justice should not depend upon a person's ability to pay for meaningful legal representation.[30] In at least one jurisdiction, a free transcript of a co-defendant's separate trial, where necessary to the defense, must be given to an indigent defendant, and a failure to do so may result in a reversal of the conviction.[31]

The philosophy of *Douglas v. California* and of *Griffin v. Illinois* tends to indicate that the first appeal must be provided in a meaningful manner to all defendants, including those who are poor or of modest means, so that the type of justice one receives is not the type of justice that one can afford but reasonably equal justice. These two cases and others involving related but similar issues are not recent decisions, but the Supreme Court of the United States has remained constitutionally sensitive to issues involving wealth that have the effect of denying substantially equal justice.

8. Laying the Groundwork for an Appeal: Preserving the Record

The general theory of the "preservation of error doctrine" is based on the concept that in order to alert the trial court and to note on the record that a perceived error has occurred, the objecting party must make a specific objection to the admission or exclusion of evidence or other error. Such a requirement permits the trial court to have an opportunity to consider the alleged error and to take corrective action if warranted. The attorney for a defendant must object on the record, since it would not be fair to the prosecution to allow a legal or constitutional claim to be raised for the first time on appeal when the matter could have been considered during the trial.[32]

During the trial, the defense counsel initiates the groundwork that will allow for an appeal if one is needed in the event of a conviction. Whenever the opposing side commits an error or the attorney believes that the judge made an erroneous ruling on procedure or on the admission or exclusion of evidence that is believed to be significant, the defense counsel will make a specific verbal objection. If the judge does not resolve the objection in favor of the defendant, this objection may become one of the grounds for a subsequent appeal. However, when "a party fails to raise and argue an issue in the trial court, it has failed to preserve the issue, and an appellate court will not typically reach that issue absent a valid exception to preservation."[33] As potential appealable errors multiply throughout the course of a criminal trial, the trial attorney builds a significant record for appellate purposes. As previously noted, the defense generally is required to raise an objection at the time the alleged error occurs so that the trial judge is made aware of the problem and has a chance to correct it. The defendant cannot wait to see if the outcome is positive for him or her, instead allowing the error to be uncorrected with the hope of a better result on appeal if the outcome is adverse to the defendant. The court's time and

the attorney's time would be more beneficially spent correcting the errors as they occur rather than waiting to address the errors during the appellate process and potentially creating the need for a complete new trial.

9. The Plain Error Rule: Ability to Appeal Without Preserving the Record

Even where the defense attorney failed to notice errors committed by the judge, errors by the prosecution, jury misconduct, or error attributed to the defense attorney, some errors may be so egregious and outrageous that an appellate court would consider reversing a case even though they were observed by no one involved in the trial. This theory, known as the plain error rule,[34] constitutes an exception to the general rule that an objection must be made at the trial to preserve the issue for appeal. Under the Federal Rules of Criminal Procedure, a plain error is one that affects substantial rights and may be considered by a reviewing court even where the error was not brought to the attention of the trial court.[35] In explaining how to evaluate plain error, an Alabama court stated that the standard of review under the plain error rule was stricter than in cases when an issue had been properly raised during the trial of the matter and that the plain error argument applied only where the error was particularly outrageous such that it seriously affected the fairness or integrity of the judicial proceedings.[36]

A reviewing court may find plain error on appeal when a trial or other procedural error was neither asserted nor was the subject of a complaint at trial but when the error was plainly evident from the record, when it prejudicially affects a litigant's substantial rights and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.[37] Generally, a court will find plain error only when a clear miscarriage of justice would otherwise occur. When a court is alerted to a plain error, whether or not there was a trial objection, the reviewing court may reverse a conviction in the interests of justice when a substantial wrong would occur to a convicted defendant if the error were left uncorrected.

The best chance for an appellate reversal of a conviction under the plain error rule may exist where breaches of constitutional rights have occurred and where no functionary of the court system took notice during the trial. For example, plain error could be demonstrated where the prosecutor used evidence that clearly had been taken in violation of that defendant's Fourth Amendment rights against illegal searches, and through inadvertence, negligence, or ignorance, the defense counsel made no objection during the trial. Plain error has occurred where a trial court neglected to instruct the jury concerning one of the elements of the crime.[38] The plain error rule could be applied by an appellate court where a prosecutor used a coerced confession, known to the defense trial attorney, without objection. Such a fundamental breach of a constitutional right should trigger the ability for an appellate attorney successfully to argue the plain error rule upon appeal. As Justice Brennan, speaking of the plain error rule, stated in dissent in *United States v. Frady*:

> The Rule has been relied upon to correct errors that may have seriously prejudiced a possibly innocent defendant, *see, e.g., United States v. Mann*, 557 F.2d 1211, 1215–1216 (CA5 1977), and errors that severely undermine the integrity of the judicial

> proceeding, *see, e.g., United States v. Vaughan*, 443 F.2d 92, 94–95 (CA2 1971). The plain error Rule mitigates the harsh impact of the adversarial system, under which the defendant is generally bound by the conduct of his lawyer, by providing relief in exceptional cases despite the lawyer's failure to object at trial.
>
> 456 U.S. 152, 180 (1982)

In an Illinois murder case,[39] plain error occurred when a defense counsel failed to object when the jury was individually polled to determine if each one had voted to convict. During polling, the trial judge only asked eleven jurors if the guilty verdict was theirs and failed to ask the twelfth juror the same question. No trial objection was offered, but the reviewing court found that such failure to ask all the jurors constituted plain error. The appellate court held that in the absence of a complete poll, the trial court was prevented from lawfully accepting the verdict. In addition, the reviewing court noted, "[L]eaving our of the poll of even one juror calls into question the integrity of the judicial process and, so, constitutes . . . plain error."[40]

In using the plain error rule to reverse a defendant's conviction of sexual imposition upon his 12-year-old stepdaughter, an appellate court held that evidence of prior criminal activity involving assault and stalking of adult women that had been admitted without objection for the limited purpose of showing that defendant has committed other criminal acts was not properly admissible for any reason.[41] The appellate court noted

> The testimony relating to accusations of assault and stalking is unrelated in nature to the offense of sexual imposition upon a child. This testimony suggests that Appellant generally engages in violence toward adult females. This is highly inflammatory. The only evidence of Appellant's guilt is the recanted testimony of a child with no attendant physical evidence. Because we cannot say that there is no reasonable possibility that the evidence relating to the 1993 accusations contributed to Appellant's conviction, the trial court's error in its admission is an abuse of discretion and grounds for reversal.

Allowing the evidence to be admitted constituted plain error, even in the absence of any objection, and, in addition, the trial court committed plain error when it failed to give a limiting instruction that should have directed the jury not to consider the evidence of the prior accusations of adult assault and stalking as constituting any proof of the crime charged, sexual imposition. This type of error was prejudicial, and the admission of evidence denied him his constitutional right to a fair trial and was the basis for reversal under the plain error rule.

By following the principles that support the plain error rule, justice may be done by appellate courts when an attorney for a defendant has allowed an important legal or constitutional point to pass unnoticed that, but for this theory, could result in substantial injustice.

10. Subject Matter Jurisdiction: Always an Appealable Issue

An issue that is always assertable upon appeal concerns the jurisdiction of the original trial court to hear the case. Even when no objection was made at a trial, if later developments indicated that the crime occurred in a different state than the one in which

the trial was held, it would become obvious that the trial court had no jurisdiction over the offense or the offender. The issue of jurisdiction over the crime is generally not a waivable defect and can be properly raised upon appeal even though no one raised the issue at, before, or during the trial.

For example, if criminal jurisdiction does not exist, a court may not lawfully try a defendant for a crime, and the question of jurisdiction is always appealable at any time. Demonstrative of this principle is a prosecution in an Oklahoma state court.[42] In cases where Congress has recognized an Indian tribe and established an Indian reservation, federal and tribal courts have exclusive criminal jurisdiction over crimes by or against Indians when committed in Indian Country in Oklahoma and elsewhere on Indian reservations. A defendant had been convicted in an Oklahoma state court of three counts of murder committed in Indian Country within the boundaries of the Chickasaw Nation's reservation. He contended on appeal that the state courts has no jurisdiction over crimes committed in Indian Country on the reservation and that only tribal or federal courts had jurisdiction over his alleged crimes committed on the Indian reservation. In reversing the murder convictions, the state appellate court noted,

> Absent any law, compact, or treaty allowing for jurisdiction in state, federal or tribal courts, federal and tribal governments have jurisdiction over crimes committed by or against Indians in Indian Country, and state jurisdiction over those crimes is preempted by federal law. The State of Oklahoma does not have concurrent jurisdiction to prosecute Petitioner.[43]

Here the victims were Indians and the crimes were committed in Indian country. Where no jurisdiction exists, no valid criminal conviction may be obtained.

11. The Appellate Process: Making It Work

Only final orders and judgments may be appealed by a defendant, as a strong general rule. If the rule were otherwise, trial courts would have an impossible position of attempting to try a case when a variety of issues were being pursued in appellate courts where resolution would have to be obtained before proceeding in a trial court. Preliminary orders and rulings by a trial judge are not normally appealable except that the prosecution can appeal orders and rulings in many situations because the prosecution can obtain no retrial if unfair rulings are permitted to stand and an acquittal occurred. As a general rule, an defendant's appeal may be taken only when the criminal conviction has reached a final judgment; prior to that time, an appellate court does not have jurisdiction. For example, in appeals from Ohio trial courts, the appellate court does not have jurisdiction until there has been a plea or verdict, a sentence had been conferred, the judge has signed the judgment entry, and the paperwork exhibits the time stamp of the clerk of court to indicate that the judgment has been entered into the court's journal.[44] Only then does the appellate court have jurisdiction. Georgia has a rule that allows appeals from trial court rulings only if the trial court issues a certificate of appealability,[45] which it would only issue for issues of extreme importance. The trial court certificate confers jurisdiction on the relevant Georgia appellate court to render a decision. Similar protocols involving

final judgments are required in most jurisdictions to indicate that a court decision has occurred from which an appeal may be taken.

Where a criminal appeal from a trial court decision has been briefed and argued before the appellate court, a variety of outcomes are possible when the court arrives at a decision. For the defendant, the best possible resolution would be for the appellate court to reverse the trial court decision and remand with instructions to dismiss the case with prejudice.[46]

In most cases, a court of appeals will affirm a trial court verdict, a decision that will most likely withstand additional litigation. A court's decision to affirm may be based on a clear view that the prosecution made its case beyond a reasonable doubt and that no substantial error affected the defendant's rights. Even an error that may appear to have a significant influence derogatory to a defendant's case may not cause an appellate court to reverse a conviction where the court deems the error to be "harmless error" beyond a reasonable doubt. In *Chapman v. California*, 366 U.S. 18 (1967), where the defendant's Fifth Amendment privilege against self-incrimination had been violated by the prosecution, the Supreme Court reversed the conviction since it could not say beyond a reasonable doubt that the constitutional violation had no effect on the outcome of the case (see Case 14.4). However, if there had been little chance that the error affected the outcome of the case and that the result would have been the same even in the absence of the error, the *Chapman* Court would have affirmed the convictions.[47]

Case 14.4 LEADING CASE BRIEF: CONSTITUTIONAL ERRORS IN CRIMINAL TRIAL MAY BE EVALUATED USING THE HARMLESS ERROR STANDARD

Chapman v. California
Supreme Court of the United States
386 U.S. 18 (1967).

CASE FACTS:

A California trial jury convicted Ruth Chapman of the robbery, kidnapping, and murder of a bartender. In the exercise of her privilege against self-incrimination, Chapman chose not to testify in her defense. The prosecutor offered extensive negative comments on her failure to testify. The constitutional interpretation at the time of the trial permitted the prosecutor to comment upon her failure to testify and allowed the jury to be told that it could draw adverse inferences from her failure to testify. Subsequent to the trial, but before Chapman's case had been considered on appeal by the California Supreme Court, the Supreme Court decided *Griffin v. California*, 380 U.S. 609 (1965), which held as invalid California's constitutional provision and practice of commenting on a defendant's failure to testify, on the ground that it put a penalty on the exercise of a person's right not to be compelled to be a witness against himself, guaranteed by the Fifth Amendment to the United States Constitution and made applicable to the states by the Fourteenth Amendment.

The California Supreme Court agreed that the defendants had been

subjected to an unconstitutional violation of rights by the lower court and the prosecutor who tried the case, but the Court refused to reverse Chapman's decision because it invoked the "harmless error rule." The harmless error rule holds that where a constitutional or other error has occurred, the verdict will stand despite the error if the reviewing court can determine that beyond a reasonable doubt, the error was not determinative of the outcome. The Supreme Court of the United States granted certiorari.

LEGAL ISSUE:

May a court use harmless error analysis to sustain a conviction where a defendant's federal constitutional rights have been violated?

THE COURT'S RULING:

The Justices determined that not all constitutional errors that occur during a criminal trial are so harmful to a defendant's case that an automatic reversal is constitutionally required. Where the error or errors would not have affected the result in the case, as tested by a "beyond a reasonable doubt" standard, a reversal of a conviction is not appropriate.

ESSENCE OF THE COURT'S RATIONALE:

* * *

II

We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 States have harmless error statutes or rules, and the United States long ago, through its Congress, established for its courts the rule that judgments shall not be reversed for "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111. None of these rules, on its face, distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which, in the setting of a particular case, are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

III

In fashioning a harmless constitutional error rule, we must recognize that harmless error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one. What harmless error rules all aim at is a rule that will save the good in harmless error practices while avoiding the bad, so far as possible.

* * *

We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy v. Connecticut*, 375 U.S. 85. There we said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id*. at 86–87. Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, this statement in *Fahy* itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless error statute, it emphasizes an intention not to treat as harmless those constitutional errors that "affect substantial rights" of a party.

* * *

IV

Applying the foregoing standard, we have no doubt that the error in these cases was not harmless to petitioners. To reach this conclusion, one need only glance at the prosecutorial comments compiled from the record by petitioners' counsel. . . . [T]he state prosecutor's argument and the trial judge's instruction to the jury continuously and repeatedly impressed the jury that from the failure of petitioners to testify, to all intents and purposes, the inferences from the facts in evidence had to be drawn in favor of the State—in short, that, by their silence, petitioners had served as irrefutable witnesses against themselves. And though the case in which this occurred presented a reasonably strong "circumstantial web of evidence" against petitioners, 63 Cal.2d at 197, 404 P. 2d at 220, it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions. Such a machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession. See, *e.g., Payne v. Arkansas*, 356 U.S. 560. Petitioners are entitled to a trial free from the pressure of unconstitutional inferences.

Reversed and remanded.

CASE IMPORTANCE:

Even though the errors in this case were not harmless errors and dictated a reversal of the conviction, the principle is that errors that do not have the effect of changing the outcome of a criminal case may generally be deemed to be harmless errors that do not require a reversal of a case.

The harmless error standard mentioned in the *Chapman* case has been followed in a variety of cases. In the federal court system, according to Rule 52 of the Federal Rules of Criminal Procedure, a harmless error consists of any error, defect, irregularity, or variance that does not affect substantial rights of a defendant. The harmless error rule

has been used to preserve criminal convictions in a variety of contexts and involving a variety of errors. In *Neder v. United States*, 527 U.S. 1 (1999), the harmless error rule was applied to uphold a conviction where the jury instruction omitted an element of the offense. In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the erroneous admission of evidence of a coerced confession in violation of the Fifth Amendment's guarantee against self-incrimination was deemed to be subject to the harmless error standard. But where other types of constitutional issues have arisen, the harmless error rule may not be applied.

However, the Court refused to follow the harmless error rule in *Vasquez v. Hillery*, 474 U.S. 254 (1986), in a case involving admitted racial discrimination in the context of a grand jury. The Court rejected the use of the harmless error rule because racial discrimination had been involved. The Court overturned a murder verdict. Essentially, the Court held that racial discrimination can never be harmless error and must have affected substantial rights of the defendant when practiced by the government. In a Louisiana case decided by the Fifth Circuit court of Appeals, *Pickney v. Cain*,[48] the defendant had alleged a violation of equal protection due to racial discrimination in the selection of the grand jury foreperson, but the claim had been procedurally defaulted, so the court declined to reach the racial discrimination claim. This decision, which did not go to the Supreme Court, calls into question the theory of automatic reversal for any case where racial discrimination may exist, since the *Pickney* court felt that the outcome would not have changed even if the defendant had prevailed on his discrimination claim.

The Court refused to follow the harmless error rule in a case where a defendant had been denied the right to select his own retained attorney under the Sixth Amendment.[49] The Supreme Court agreed with the lower court that a Sixth Amendment violation is not subject to harmless error analysis because the choice of counsel affects the way a trial is conducted and is not merely an error in the trial process. A denial of the use of a retained counsel, according to the Court, is not subject to a demonstration of actual prejudice; prejudice to the defendant is presumed.

In a small number of cases where constitutional or other errors substantially affected a defendant's rights, a court of appeals will reverse the case and order a new trial. Such errors that could be considered of sufficient magnitude to require a reversal include erroneous admission or exclusion of evidence, constitutional violations prior to or during the trial, prosecutorial misconduct, insufficiency of evidence, or jury misconduct, among other possibilities. If the appellate court has ordered a retrial, the prosecution must rethink its overall strategy and make a determination concerning whether to retry the individual as originally charged, offer a reduction in the charge in exchange for a plea bargain, or not to try the case again.

Alternatively, either the prosecution or the defense, depending on which side prevailed at the court of appeals, may elect to pursue the appeal to the next level. In most states that will be to the highest court of the state, often known as the supreme court. Since a court at this level generally possesses discretion considering which cases it will hear, the defendant may have a difficult time interesting the court in a single criminal case, but a prosecutor who has lost a case in the court of appeals may have a slightly easier time in getting the court to take the case. Where the top court of a state accepts a case

from a state appellate court, the case resolution has much the same possible outcome as when the court of appeals first considered it.

12. Adverse Appellate Results: The Next Step

The prosecution possesses some options where the state's highest court remands a case for retrial if the high court's decision was based on the United States Constitution; similarly, the defendant has some options if the case involves a federal question.[50] In either situation, when the case concerned an error involving a federal question, the losing appellate party may choose to petition the Supreme Court of the United States to consider the case. Such an option may be effectively removed where a top state court decided a particular case based on adequate and independent state law grounds.[51] In most situations, the Supreme Court will decline review and will not issue a writ of certiorari.

Where the court of appeals or the supreme court of the state has returned a case to the lower court for a retrial, the prosecutor must start the prosecution from the beginning. Alternatively, a prosecutor could make the decision that the evidence in the case does not support a successful retrial at the same level of severity and may opt for trial for a lesser offense or opt not to retry the case at all. The prosecutor could conclude that where a person has won a reversal after many years in custody, the jurisdiction's penal needs have been met by the time already served and choose not to pursue the case further. At any appellate level, the prosecutor could ask the reviewing court to reconsider the case a second time or, if the intermediate appellate court has made the decision, the prosecution may request that the top court in the jurisdiction consider the case. Upon retrial, some rules and limitations govern what crime the prosecutor may charge the individual with having committed. On the assumption that a defendant has been tried for first-degree murder, has been convicted, and has had the case reversed, the prosecutor may try the individual a second time for first-degree murder. Alternatively, if a defendant has been charged with first-degree murder but has been convicted only of second-degree murder, which was later reversed on appeal, the prosecution may not prosecute the defendant for first-degree murder. The legal theory in this case focuses on the fact that the original trial court acquitted the defendant of first-degree murder and convicted of second-degree murder. A violation of the Fifth Amendment provision against double jeopardy would occur if the state were permitted to retry the defendant for the top level of murder. This limitation would also apply if the defendant had been originally charged only with second-degree murder, had been convicted of second-degree murder, and became subject to a retrial. The prosecution could not elevate the charge to first-degree murder on the retrial. These principles apply in any situation where the government wishes to levy a higher charge than was the subject crime at the first trial; in general, where there has been a conviction for a lesser offense, the government may not recharge at a higher level.

While double jeopardy provisions prevent a prosecutor from trying a defendant for a second time for a higher offense following a reversal, that type of limitation does not apply when a defendant has successfully procured a new trial and has been charged a second time for the same level of offense.[52] Following a second trial, case precedent allows a judge to give an enhanced sentence upon reconviction based on events that have

come to light concerning the defendant's conduct since the first trial. The information may have come to the judge's attention from evidence presented at the second trial, from a subsequent presentence report, from the conduct record of the defendant while incarcerated on the original charge, and/or from general information available at the time of sentencing that was not presented at the earlier sentencing proceeding. A jury can impose an enhanced sentence following the second trial without offending due process so long as it remains unaware of the prior sentence so that the sentence enhancement could not have been given vindictively.[53] Sentence enhancement coexists with and is complementary to an extended sentence whether imposed under a habitual offender statute or under three-strikes legislation.

13. Collateral Attack: The Writ of Habeas Corpus

The purpose of requesting a writ of habeas corpus is to test the legality of the convicted defendant's detention or imprisonment. Black's Law Dictionary defines habeas corpus as a "writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal."[54] The pursuit of a writ of habeas corpus is known as a collateral attack, where the criminal conviction is attacked in a manner other than a direct appeal to a state court of appeals or a state supreme court or a petition within the federal system for federal convicts. If a defendant has pursued a direct criminal appeal through the state or federal appellate system and has not received satisfaction, the convicted defendant may consider pursuing a collateral attack that can be mounted in a state or federal court, depending on where the case was tried. If the defendant complains in federal court concerning an illegal detention that arose from state court action and the petition is denied, the defendant cannot take an appeal to a federal circuit court of appeal unless a judge in a circuit or district court issues a certificate of appealability. If a district judge denies a certificate of appealability, the habeas corpus litigant may request a certificate from the appropriate court of appeals.[55]

In mounting a collateral attack on the conviction by filing a petition for a writ of habeas corpus, the defendant may initiate an action in the state criminal court that rendered the conviction or may file the petition in a federal district court. The general rule dictates that the defendant must have raised and fully litigated all potential legal issues at the proper times in the state court, whether the issue[s] arose at trial or upon appeal, so that the relevant courts have had an opportunity to correct any errors. If all direct appeal remedies have not been exhausted, a petition for habeas corpus will be denied, unless it is clear that pursuing the other issues would clearly be futile. Pursuing a writ of habeas corpus cannot be used as a vehicle for obtaining a second or third appeal of legal issues which were or should have been raised during the direct appeal proceedings. An exception exists where the defendant is able to demonstrate that good cause existed for a failure to object or otherwise raise the issue at the proper time and that prejudice to the defendant's case has resulted. If the defendant succeeds in demonstrating good cause as the basis for the procedural default as well as "actual prejudice" to the case, there is the slight possibility of federal habeas corpus relief.[56]

In a collateral attack requesting a federal writ of habeas corpus, the defendant must make an allegation that he or she is being held in violation of the United States Constitution, federal law, or treaty. Whether the defendant seeks federal or state habeas corpus, there must be a demonstration that all other possible avenues of relief have been pursued,[57] that relief has not been forthcoming, or that the pursuit would be futile.[58] Federal requirements decree that a litigant will not be deemed to have exhausted all state remedies if the defendant has the right under the law of the state that rendered the conviction to raise, by any available procedure, any federal question that is the center of the habeas corpus petition.[59] Where a federal district court determines that a defendant has remaining and unresolved state law claims, as a general rule, the district court must dismiss the petition. However, the defendant may return to federal court once the requisite exhaustion of remedies has occurred.[60] If a defendant meets the exhaustion test, the federal court will entertain the petition for the writ, but the burden of proof is on the applicant, who has the duty to rebut the presumption of state court correctness by clear and convincing evidence.[61]

Where a federal district court has denied a defendant's application for a writ of habeas corpus, an appeal of that denial of the writ may be made to the proper federal circuit court of appeal, only if the federal district court has issued a certificate of appealability.[62] The notice of appeal must be filed with the circuit court within the allotted amount of time or the court cannot hear the case. Since the time limits for filing the notice of appeal are considered jurisdictional in nature, when the notice of appeal is not filed in a timely manner or within any extension granted by court rule, the Federal Court of Appeals has no jurisdiction to hear a defendant's habeas corpus case.[63]

When filing for a writ of habeas corpus, the defendant must allege the factual underpinnings of all of the constitutional errors in the case and is not permitted to save any errors to assert during later litigation in a subsequent habeas petition. A failure to bring all the claims at one time generally constitutes a waiver, and those claims will be forever barred as a basis for requesting a writ of habeas corpus. Part of the legal necessity of having some finality to a habeas petition surrounds the concept that there is no formal res judicata effect to a habeas corpus petition, whether granted or denied. Without a concept like abuse of the writ, a petitioning defendant could offer requests for relief without limit or merit, and courts would have to entertain them. Under modern court practice, the ready availability of appellate review dictated the need for some modification of the common-law rule that allowed endless habeas corpus petitions. Thus, under the legal theory of abuse of the writ, where a defendant brings a second or successive habeas corpus petition, a court will generally dismiss the petition.[64] The government has the burden of pleading "abuse of the writ with particularity."[65] If the prosecution produces evidence that writ abuse has occurred, the burden of going forward with the evidence shifts to the other party. The defendant must demonstrate that there has been no abuse of the writ in seeking successive habeas corpus relief[66] involving an old claim or one that should have been included in the earlier habeas petition.

Where a federal district court grants the writ, the defendant will not normally gain immediate freedom but will remain in custody pending further litigation by the prosecution. The attorney for the state or federal government might decide to appeal the district court decision to the appropriate federal circuit court of appeal. Alternatively,

if the federal district court denies the writ of habeas corpus, the defendant has a right of appeal similar to that of the prosecution, but the defendant must obtain a certificate of appealability from the federal district court. Once a federal court of appeal renders a judgment, either side is free to request a review (apply for a writ of certiorari) by the Supreme Court of the United States.

A federal defendant who claims the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States is permitted to file an application for a writ of habeas corpus in the court that rendered the conviction with a request to vacate, set aside, or correct the conviction or sentence.[67] Subject to some exceptions, the applicant must file within one year following the date the judgment of conviction became final, the date that a new Supreme Court ruling became retroactive, on the date on which new facts became available to the convicted defendant.[68] The federal prisoner must make a similar demonstration, as state court applicants must offer in state courts, of the exhaustion of remedies to be entitled to consideration for relief. Upon a ruling in favor of the defendant, the federal prosecutor may appeal the decision; if the court fails to grant the writ of habeas corpus, the defendant may choose to appeal to the relevant federal circuit court of appeal and pursue a path that is similar to a state defendant in the federal court system seeking the same remedy. Procedurally, the application must be accompanied by the certificate of appealability.

In the event that the state or federal habeas corpus litigant has reached the end of the process in a federal circuit court of appeal, the defendant may petition the Supreme Court of the United States to hear the case. In cases that come to the Court on the basis of habeas corpus, the Court will either take the case or refuse to consider the merits. There is no other recourse other than to request that the Court reconsider its refusal, a path that will not normally result in a different decision.[69]

14. Summary

While there is no federal constitutional right to appeal any criminal conviction, all jurisdictions within United States permit at least one appeal as a matter of statutory law, state constitutional law, or federal law. The purpose of an appeal is to correct errors that occurred during a trial that have affected substantial rights of the defendant. As a general rule, only where an appellate court can determine that a trial court error affected the outcome of the case and that the verdict would have been different but for the error will the court reverse a criminal conviction. Where racial discrimination in a criminal case has been proven, courts generally will reverse the case even though the error may not have been outcome determinative.

In order to file an appeal, a defendant must generally file a notice of appeal and meet the procedural requirements involving the filing of an appellate brief and appellate reply brief and must follow any other rules of the appellate court system. Since all states provide for at least one appeal, every convicted defendant who desires to appeal a criminal conviction may have the benefit of one appeal. Following the initial appeal, obtaining a review by a state supreme court is a difficult matter because those courts take cases based on judicial discretion. An even more difficult path exists where a state defendant wants to

appeal to the Supreme Court of the United States because this court takes cases based on the discretion of four justices and requires that an issue involving a federal law, a federal treaty, or the Constitution of United States be present in the case.

Every defendant who is indigent and pursuing the first appeal granted as a matter of right is guaranteed the assistance of an attorney to file, brief, argue, and present the appeal. Where a meaningful appeal requires a transcript or other official documents, those items must be provided to the indigent litigant free of charge. While it overstates the case, a meaningful appeal should not be based upon whether a criminal defendant can afford to pay for appellate legal counsel.

Errors that occurred at a trial must have been noted and brought to the court's attention by the trial counsel through an objection or otherwise so as to preserve that issue for appeal purposes. If an error occurred and the trial attorney did not object and offer a chance for the error to be corrected by the trial judge, as a general rule, that error has not been properly preserved for appeal purposes. Where an outrageous error affected a defendant's substantial rights and an error occurred that should have been obvious to all parties at the criminal trial but was not noticed, an appeal based on the concept of plain error may allow this error to be argued on appeal despite the absence of any trial objection. If there is some defect in the court's subject matter jurisdiction, lack of subject matter jurisdiction is an error that may always be brought up at any time on appeal, despite the fact that it was never mentioned during trial.

Where a defendant has pursued an appeal as a matter of right, has taken the case through the state appellate system, and has exhausted all state legal remedies, the defendant may ask for writ of habeas corpus within the state judicial system. If this initial request is denied, as a general rule, it may be appealed through the state appellate system. Upon exhaustion of state remedies, the state litigant may request, but with little hope of success, that the Supreme Court of the United States consider the habeas corpus petition. The state litigant may later request a writ of habeas corpus from a federal district court contending that he or she is being detained in violation of a federal law, treaty, or the Constitution. Properly pursued, this avenue may allow a habeas litigant to reach the Supreme Court of the United States.

REVIEW EXERCISES AND QUESTIONS

1. Are there effective differences between the types or results of appellate justice that an indigent appellant might expect when compared to a wealthier individual? Are these differences especially significant?
2. Could a particular state decide not to grant any appeal following a conviction in a criminal court? Would the Supreme Court of the United States find such a practice unconstitutional?
3. Assume that an attorney appointed to represent an indigent person who has been convicted of a criminal offense determines that there is absolutely no merit in the legal sense to pursuing a criminal appeal. What type of process could a state arrange that would allow the attorney to meet obligations to the

court and to his or her client under this set of circumstances?

4. In a case involving domestic violence, the defendant did not take the witness stand in his own defense, and the prosecutor noted to the jury during closing arguments that the defendant had the right to take the stand and testify and that the defendant knew what really happened and chose not to tell the jury. For some reason, neither the judge nor the defense attorney was paying close attention at this particular point in the closing moments of the trial. No objection was made by the defendant's trial counsel to the prosecutor's inappropriate argument. Does the newly appointed appellate counsel have a chance to argue that the plain error rule should permit the appellate counsel to argue that the case should be reversed? Explain how the plain error rule operates.
5. Explain the concept of "harmless error" and why appellate courts that find such error in a criminal case do not always reverse the verdict and remand for a new trial.
6. What are the possible outcomes following a successful appeal for a defendant? What steps may a prosecutor take following a defendant's appellate victory? Explain.

1. How Would You Decide?

In the Supreme Court of the United States

After having been accused of criminal sexual activity, the defendant, Dwayne Halbert, entered a plea of *nolo contendere* and was convicted of two counts of second-degree criminal sexual assault. Under the circumstances of the plea that Halbert entered, the trial court was unable to appoint legal counsel to assist in his appeal because his *nolo contendere* plea ended his right to free legal counsel under Michigan law. On two subsequent occasions, Halbert requested the appointment of appellate counsel. The Michigan procedure contemplated that the intermediate appellate court would take a preliminary look at the merits of the claims that a convict made in his or her application to make a determination of whether to appoint an attorney. Since filing a petition to the intermediate appellant court was a difficult procedure to successfully accomplish without assistance, Halbert desired some legal assistance. Halbert wanted an attorney to help him prepare an application for permission to appeal to an intermediate Michigan court, stating that his sentence had been computed incorrectly and that he needed an attorney to preserve his legal issues before undertaking an appeal. When Michigan courts refused to consider his case, where he merely wanted counsel to assist him for one appeal past the trial court, he obtained a writ of certiorari from the Supreme Court of the United States. On this appeal, he relied on *Douglas v. California*, which held that a person would be given free counsel for the first appeal. Michigan contended that since he pled guilty, he had no right to counsel and that the Halbert case was controlled by *Moss v. Moffitt*, which held that any appeal past the first one did not carry with it any right to free legal counsel. The only way that Halbert could obtain free legal counsel after his *nolo contendere* plea was to petition for permission to appeal to the intermediate Michigan appellate court.

How would you rule on the defendant's contention that under the United States Constitution, he has a right to an appeal even after he has entered a *nolo contendere* plea and a trial court has entered a verdict of guilt?

The Court's Holding:

[The Supreme Court of the United States noted that the Constitution of the United States imposes no obligation on the states to grant any sort of criminal appeal. It noted that where a state decides to allow criminal defendants to appeal convictions, it must do so in a fundamentally fair way which may include the granting of the assistance of counsel for free to indigent appellants. In *Douglas v. California*, 372 U.S. 353 (1963), the Supreme Court held that free counsel must be made available to the first appeal that is granted as a matter of right if a litigant could not afford to pay for a lawyer. The Court reviewed its decision in *Griffin v. Illinois*, 351 U.S. 12 (1956), that required states to furnish the free trial transcript when those were essential to making a first appeal. The Court noted that the first appeal is the one that generally has the opportunity to correct errors that have occurred in the case. Subsequent appeals may not be as important as the first appeal with respect to the error correction function, and that factor played a role in the decision in *Ross v. Moffitt*, 417 U.S. 600 (1974), where the Court determined that a state need not furnish free counsel for subsequent appeals following the first one.]

* * *

A defendant convicted by plea who seeks review in the Michigan Court of Appeals must now file an application for leave to appeal pursuant to Mich. Ct Rule 7.205 (2005). In response, the Court of Appeals may, among other things, "grant or deny the application; enter a final decision; [or] grant other relief." Rule 7.205(D)(2). If the court grants leave, "the case proceeds as an appeal of right." Rule 7.205(D)(3). The parties agree that the Court of Appeals, in its orders denying properly filed applications for leave, uniformly cites "lack of merit in the grounds presented" as the basis for its decision.

* * *

Persons in Halbert's situation are particularly handicapped as self-representatives. As recounted earlier this Term, "[a]pproximately 70% of indigent defendants represented by appointed counsel plead guilty, and 70% of those convicted are incarcerated." Kowalski, 543 U.S., at 140, 160 L. Ed. 2d 519, 125 S. Ct. 564 (Ginsburg, J., dissenting). "[Sixty-eight percent] of the state prison populatio[n] did not complete high school, and many lack the most basic literacy skills." Ibid. (citation omitted). "[S]even out of ten inmates fall in the lowest two out of five levels of literacy—marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article." Ibid. Many, Halbert among them, have learning disabilities and mental impairments. See U. S. Dept. of Justice, Bureau of Justice Statistics, A. Beck & L. Maruschak, Mental Health Treatment in State Prisons, 2000, pp 3–4 (July 2001), www.ojp.usdoj.gov/bjs/pub/pdf/mhtsp00.pdf (identifying as mentally ill some 16% of state prisoners and noting that 10% receive psychotropic medication).

* * *

[There are issues that anyone may raise after a *nolo contendere* plea such as double jeopardy, jurisdiction of the court, sufficiency of the evidence at a preliminary hearing, preserved entrapment arguments, and claims of ineffective assistance of counsel, among others.]

Michigan's very procedures for seeking leave to appeal after sentencing on a plea, moreover, may intimidate the uncounseled. See Kowalski, 543 U.S., at 141–142, 160 L. Ed. 2d 519, 125 S. Ct. 564 (Ginsburg, J., dissenting). Michigan Ct. Rule 7.205(A) (2005) requires the applicant to file for leave to appeal within 21 days after the trial court's entry of judgment. "The defendant must submit five copies of the application 'stating the date and nature of the judgment or order appealed from; concisely reciting the appellant's allegations of error and the relief sought; [and] setting forth a concise argument . . . in support of the appellant's position on each issue.'" Kowalski, 543 U.S., at 141, 160 L. Ed. 2d 519, 125 S. Ct. 564 (Ginsburg, J., dissenting) (quoting Rule 7.205(B)(1)).

* * *

We are unpersuaded by the suggestion that, because a defendant may be able to waive his right to appeal entirely, Michigan can consequently exact from him a waiver of the right to government-funded appellate counsel. See Tr. of Oral Arg. 14. Many legal rights are "presumptively waivable," post, at 637, 162 L. Ed. 2d, at 577 (Thomas, J., dissenting), and if Michigan were to require defendants to waive all forms of appeal as a condition of entering a plea, that condition would operate against moneyed and impoverished defendants alike. A required waiver of the right to appointed counsel's assistance when applying for leave to appeal to the Michigan Court of Appeals, however, would accomplish the very result worked by Mich. Comp. Laws Ann. § 770.3a (West 2000): It would leave indigents without access to counsel in that narrow range of circumstances in which, our decisions hold, the State must affirmatively ensure that poor defendants receive the legal assistance necessary to provide meaningful access to the judicial system. See Douglas, 372 U.S., at 357–358, 9 L. Ed. 2d 811, 83 S. Ct. 814; *M.L.B. v. S.L.J.*, 519 U.S. 102, 110–113, 136 L. Ed. 2d 473, 117 S. Ct. 555 (1996); cf. *Griffin v. Illinois*, 351 U.S. 12, 23, 100 L. Ed. 891, 76 S. Ct. 585 (1956) (Frankfurter, J., concurring in judgment) (ordinarily, "a State need not equalize economic conditions" between criminal defendants of lesser and greater wealth).

[The Supreme Court vacated the decision against Halbert in the Michigan Court of Appeals and remanded for further proceedings.] See *Halbert v. Michigan*, 545 U.S. 605 (2005).

2. How Would You Decide?

In the Supreme Court of Hawai'i.

The defendant, Grindling, had been convicted in a trial court in Hawai'i for possession of methamphetamine and drug paraphernalia. Police had lawfully searched his residence and vehicle, where drugs were recovered. The defendant was indigent but was

not happy with several of his court-appointed attorneys so that different appointed ones represented him at different times. At trial, the prosecution informed the court that the parties had agreed on a stipulation that established the admissibility of four methamphetamine packets and a meth pipe, as well as a stipulation concerning the methamphetamine residue found on the pipe. The judge did not address the defendant in open court to determine if he wished to make the stipulations that removed some elements of the crimes from having to be proved by the prosecutor. In effect, he was partly pleading guilty to some elements of the crimes, and a guilty plea requires that the judge address the defendant directly. Other evidence that was presented in the case resulted in a jury convicting the defendant on both charges, and he received consecutive five-year sentences.

A different attorney represented him in a motion directed to the trial court and later on appeal. The attorney contended that the trial attorney's deficient performance denied defendant's constitutional right to the effective representation by counsel. It was argued that the attorney was ineffective when his trial attorney failed to request an on-the-record colloquy concerning the stipulations that helped prove guilt. The appellate attorney argued that to lawfully waive proof of some of the elements, there had to be a knowing waiver of the constitutional right to have all the elements proved beyond a reasonable doubt. In addition, the appellate attorney contended that error also occurred because the trial court should have conducted a discussion with the defendant on the record concerning his stipulation of some of the elements before accepting the stipulations. At trial, no objection was made to the stipulations for their acceptance by the defendant's attorney, so the record was not preserved for appeal, and the only avenue for redress remained on the use of plain error doctrine. A direct appeal could have been attempted, but the new attorney made efforts in the trial court to have it resolved at that level.

In a motion in the trial court, based on plain error, that court ordered a new trial, and the prosecution appealed. The Intermediate Court of Appeals ruled that the trial court erred in granting a new trial and refused to apply the plain error rule, stating that a higher burden of proof was necessary in order to prevail. The Supreme Court of Hawai'i agreed to hear the case.

How would you rule on the defendant's contention that the attorney's offer to stipulate to some of the elements and to some other evidence that would help render a guilty verdict was plain error and that, concerning the judge's error in addressing the defendant concerning defendant's stipulations, that failure also created plain error that could support a reversal of the convictions?

The Court's Holding:

[The Supreme Court of Hawai'i reviewed the ineffective assistance of counsel claim and determined that the responsibility for addressing the defendant personally rested with the trial court, and so the top court rejected the argument that the defense counsel had been ineffective. Since this was not a direct appeal and was, in effect, a collateral attack on the verdict that was successful in the trial court, the top court of Hawai'i rejected the intermediate Court of Appeals' ruling that a collateral attack using the plain error rule was inappropriate. It considered the application of the trial court's plain error rule.]

D. THE CIRCUIT COURT'S PLAIN ERROR CONCLUSION WAS CORRECT.

We now turn to whether the circuit [trial] court's application of plain error in this case was proper. The relevant inquiry in determining whether a lower court's plain error may be noticed is whether the error affected substantial rights. *State v. Hernandez*, 143 Hawai'i 501, 512, 431 P. 3d 1274, 1285 (2018). As this court made clear in *State v. Murray*, "[t]he defendant's right to have each element of an offense proven beyond a reasonable doubt is a constitutionally and statutorily protected right." 116 Hawai'i 3, 10, 169 P. 3d 955, 962 (2007) (internal references omitted). A knowing and voluntary waiver of such a right must come from the defendant and requires the court to engage in a colloquy with the defendant. Id. at 11, 169 P. 3d at 963. "[A] reviewing court has discretion to correct plain error when the error is 'not harmless beyond a reasonable doubt.'" *State v. Ui*, 142 Hawai'i 287, 297, 418 P. 3d 628, 638 (2018) (quoting *State v. Nichols*, 111 Hawai'i 327, 335, 141 P. 3d 974, 982 (2006)).

Grindling was charged with promoting a dangerous drug in the third degree in violation of HRS § 712–1243(1) and prohibited acts related to drug paraphernalia in violation of HRS § 329–43.5(a). At trial, the court accepted the stipulation establishing the chain of custody of several packets and a pipe received into evidence and the results of chemical testing of the evidence, which found the presence of methamphetamine. As the circuit [trial] court correctly found, the stipulation "established proof of an element to the offenses charged, i.e. the presence of methamphetamine." The trial court thus erred by not first conducting an on-the-record colloquy with Grindling to obtain a waiver of his right to have each element of the offenses against him proven beyond a reasonable doubt. See Murray, 116 Hawai'i at 14, 169 P. 3d at 966 (holding that the family court committed plain error when it, inter alia, accepted a stipulation without engaging the defendant in a colloquy regarding waiving proof of an element of the charge). Without the results confirming the presence of methamphetamine in this case, the jury could not have found Grindling guilty of the charged crimes and the trial court's error was therefore not harmless. See [*State v.*] *Ui*, 142 Hawai'i at 298, 418 P. 3d at 639 (holding that the "erroneously admitted stipulation formed the only basis from which a trier of fact could infer" the defendant's specific blood alcohol content exceeded the legal limit in a prosecution for operating a vehicle under the influence of an intoxicant and concluding that the district court's plain error was not harmless).

The circuit court correctly concluded that the trial court's failure to conduct an on-the-record colloquy with Grindling before accepting the stipulation establishing an element of the charged offenses was plain error. [*State v.*[*Ui*, 142 Hawai'i at 298, 418 P. 3d at 639; Murray, 116 Hawai'i at 14, 169 P. 3d at 966. We thus affirm the circuit court's Order Granting Petition on plain error grounds.

IV. CONCLUSION

Based on the foregoing, we vacate the ICA's May 2, 2018 Judgment on Appeal, vacate that portion of the circuit court's Order Granting Petition as to ineffective assistance of trial and appellate counsel, and otherwise affirm the Order Granting Petition. [The defendant will get a new trial.] See *Grindling v. State*, 144 Haw. 444, 445 P. 3d 25, 2019 Haw. LEXIS 141 (2019).

Notes

1. *Halbert v. Michigan,* 545 U.S. 605, 610 (2005).
2. *Martinez v. Court of Appeal of California,* 528 U.S. 152, 165 (2000).
3. *Kohl v. Lehlback*, 160 U.S. 293, 299 (1895).
4. Cal Pen Code Pt. 2, Title 9, Ch. 1.
5. S*ee* N.M. Const. art. VI, § 2, Supreme court; appellate jurisdiction. "Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court. In all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction as may be provided by law; provided that an aggrieved party shall have an absolute right to one appeal."
6. See *Ross v. Moffitt,* 417 U.S. 600, 610 (1974).
7. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005).
8. *Griffin v. Illinois,* 351 U.S. 12, 18 (1956).
9. See *Ross v. Moffitt*, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974).
10. Cal.Penal Code § 1237.
11. See Cal.Penal Code § 1238.
12. See *Loveall v. State*, 215 S.W.3d 753, 2007 Mo. App. LEXIS 402 (2007) and *State v. Vaughn*, 223 S.W.3d 189, 2007 Mo. App. LEXIS 780 (2007).
13. *Ibid*., 757.
14. Demonstrative of the discretion possessed by state supreme courts is the procedure followed by the Michigan Supreme Court. Mich. Comp. Laws Ann. § 770.3(6) Further review of any matter appealed to the court of appeals under this section may be had only upon application for leave to appeal granted by the supreme court.
15. *Born-Suniaga v. State*, 256 So.3d 783, 789, 2018 Fla. LEXIS 1880 (2018).
16. Rules of the Supreme Court of the United States, Rule 10, Considerations Governing Review on Certiorari. Adopted July 26, 1995.
17. *Ibid*.
18. See *Miranda v. Arizona,* 384 U.S. 436 (1966).
19. See *Gilbert v. California,* 388 U.S. 263 (1967).
20. See *Coleman v. Alabama,* 399 U.S. 1 (1970).
21. See *Gideon v. Wainwright,* 372 U.S. 335 (1963).
22. 372 U.S. 353 (1963).
23. 351 U.S. 12 (1956).
24. 466 U. S., at 687–688, 104 S. Ct. 2052, 80 L. Ed. 2d 674, 1984 U.S. LEXIS 79 (1984).
25. *Id*. at 692.
26. See *Garza v. Idaho*, 586 U.S.___, 139 S.Ct. 738, 203 L.Ed.2d 77, 2019 U.S. LEXIS 1596 (2019).
27. *People v. Sanabria*, 2021 IL App (1st) 190827, 2021 Ill. App.LEXIS 350 (2021).
28. *Id*. at P22.
29. 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, 1956 U.S. LEXIS 1059 (1956).
30. See *Roberts v. La Valle*, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 31, 1967 U.S. LEXIS 436 (1967).
31. See *People v. Jenkins*, 2020 IL App (3rd) 180551, 2020 Ill. App. LEXIS 931 (2020).
32. See *State v. Dessinger*, 958 N.W.2d 590, 361, 2021 Iowa Sup. LEXIS 44 (2021), citing *State v. Brown*, 656 N.W.2d 355 (Iowa 2003) and *Devoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002).
33. *Utah v. Martinez*, 2021 UT App 11, *P27, 480 P. 3d 1102, 2021 Utah App. LEXIS 11 (2021), citing *State v. Johnson*, 2017 UT 76, ¶ 15, 416 P. 3d 443, 2017 Utah LEXIS 175 (2017).
34. USCS Fed Rules Crim Proc R 52.
35. *Ibid*.
36. *Marshall v. State*, 2007 Ala. Crim. App. LEXIS 138 (2007).
37. *State v. Mann*, 302 Neb. 804, 925 N.W.2d 324, 2019 Neb. LEXIS 58 (2019). See also *State v. Price*, 306 Neb. 38, 944 N.W.21d 279, 2020 Neb. LEXIS 83(2020).
38. See *Penson v. Ohio,* 488 U.S. 75, 79 n. 1 (1988).
39. *People v. Jackson*, 2021 IL App (1st) 180672, 2021 Ill. App. LEXIS 122 (2021).

40. *Id*. at P3.
41. *State v. Smith*, 2006 Ohio 45, 2006 Ohio App. LEXIS 44 (2006).
42. *Bosse v. State*, 2021 OK CR 3, 484 P. 3d 286, 2021 Okla. Crim. App. LEXIS 3 (2021).
43. *Id*. at P28.
44. See *State v. Williams*, 2007 Ohio 1897, 2007 Ohio App. LEXIS 1750 (2007), referencing Ohio Crim. R. 32 (2007).
45. See *Duke v. State*, 306 Ga. 171, 829 S.E.2d 348, 2–19 Ga. LEXIS 406 (2019).
46. See *Burks v. United States*, 437 U.S. 1 (1978). The *Burks* Court held that the double jeopardy provision of the Fifth Amendment precluded a second trial once the appellate court determined the evidence insufficient to sustain the jury's verdict of guilty, and the only proper remedy available was to enter a verdict of acquittal. A retrial would not be barred if the reversal were based on trial error rather than on a failure of the prosecution to prove its case.
47. The harmless error analysis has been applied, inter alia, where a jury instruction omitted an element of the crime, *Neder v. United States,* 527 U.S. 1 (1999); where an error in jury instructions proved not to be harmless error, *O'Neal v. Mc Aninch,* 513 U.S. 432 (1995); in cases where the prosecution failed to disclose exculpatory evidence to the defense, *Kyles v. Whitley,* 514 U.S. 419 (1995); and where a jury instruction inadequately covered the concept of reasonable doubt, *Sullivan v. Louisiana,* 508 U.S. 275 (1993).
48. 337 F.3d 542, 2003 U.S. App. LEXIS 14566 (5th Cir. La. 2003).
49. See *United States v. Gonzales-Lopez*, 548 U.S. 140, 2006 U.S. LEXIS 5165 (2006).
50. A federal question may be considered part of the case where the federal Constitution, federal law, or a federal treaty has been implicated in the case in some fashion. For example, a federal question exists where a defendant has alleged that her apartment was illegally searched and evidence seized in violation of the Fourth Amendment as applied to the states. If a federal question exists, an appeal to the Supreme Court of the United States is possible.
51. For information concerning the doctrine that federal courts will not reverse state court decisions where they rest upon adequate and independent state grounds where no federal question is involved, see, for example, *Murdock v. City of Memphis,* 87 U.S. 590 (1875); also see *Michigan v. Long,* 463 U.S. 1032, 1040 (1983), where Justice O'Connor noted, "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." See also Westling, *Advisory Opinions and the "Constitutionally Required" Adequate and Independent State Grounds Doctrine*, 63 Tulane L.Rev. 379, 389, and n. 47 (1988).
52. See *North Carolina v. Pearce,* 395 U.S. 711 (1969).
53. See *Chaffin v. Stynchcombe,* 412 U.S. 17 (1973).
54. Black's Law Dictionary 854 (11th ed. 2019).
55. See Federal Rules of Appellate Procedure, Rule 22(b) and 28 U.S. C. § 2254.
56. See *Engle v. Isaac,* 456 U.S. 107 (1982). See also *Reed v. Ross,* 468 U.S. 1 (1984), where the Supreme Court believed that there was good cause shown for not raising the issue during the trial and appellate stages and that the issue properly could be first raised in a habeas corpus petition.
57. *Ex parte Hawk*, 321 U.S. 114, 116–117 (1944). In a per curiam opinion, the Court stated, "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted."
58. 28 U.S.C. § 2254(b)(1).
59. 28 U.S.C. § 2254 (c).
60. See *Rose v. Lundy,* 455 U.S. 509 (1982). The *Rose* Court held that a federal district court must dismiss habeas corpus petitions containing both exhausted and unexhausted claims.
61. 28 U.S.C. § 2254 (e).
62. 28 U.S.C. § 2253 (c).
63. See *Bowles v. Russell*, 551 U.S. 205, 2007 U.S. LEXIS 7721 (2007).
64. See, generally, *McCleskey v. Zant,* 499 U.S. 467, 477–503 (1991).
65. *Ibid*., 482.

66. *Ibid*.
67. 28 U.S.C. § 2255.
68. *Ibid*. § 2255(f).
69. But see *Boumediene v. Bush*, 539 U.S. 1328, 127 S.Ct. 1478, 2007 U.S. LEXIS 3783 (2007) where certiorari was denied in a habeas corpus case but where the Court reversed itself and granted certiorari. *Boumediene v. Bush*, 551 U.S. 1160, 127 S.Ct. 3078, 168 L.Ed.2d 755, 2007 U.S. LEXIS 8757 (2007).

Appendix A
The Constitution of the United States

THE PREAMBLE

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a Representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States and who shall not, when elected, be an

inhabitant of that state for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

Section 4. The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Section 5. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time: and no person holding any office under the United States, shall be a member of either House during his continuance in office.

Section 7. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two

thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Section 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;—And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Section 9. The migration or importation of such persons as any of the states now existing

shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto Law shall be passed.

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

Section 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

Section 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person

have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Section 3. He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper;

he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Section 4. The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

Section 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Section 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Section 3. New states may be admitted by the Congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

Section 4. The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same.

Done in convention by the unanimous consent of the states present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty seven and of the independence of the United States of America the twelfth. In witness whereof We have hereunto subscribed our Names,

G. Washington—President and deputy from Virginia

New Hampshire: John Langdon, Nicholas Gilman
Massachusetts: Nathaniel Gorham, Rufus King
Connecticut: Wm. Saml. Johnson, Roger Sherman
New York: Alexander Hamilton
New Jersey: Wil. Livingston, David Brearly, Wm. Paterson, Jona. Dayton
Pennsylvania: B. Franklin, Thomas Mifflin, Robt. Morris, Geo. Clymer, Thos. Fitzsimons, Jared Ingersoll, James Wilson, Gouv Morris
Delaware: Geo. Read, Gunning Bedford Jun., John Dickinson, Richard Bassett, Jaco. Broom
Maryland: James McHenry, Dan of St Thos. Jenifer, Danl Carroll
Virginia: John Blair, James Madison Jr.
North Carolina: Wm. Blount, Richd. Dobbs Spaight, Hu Williamson
South Carolina: J. Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler
Georgia: William Few, Abr Baldwin
Attest: William Jackson

Appendix B

The Bill of Rights and Other Amendments to the Constitution

[The First Ten Amendments to the Constitution are known as the Bill of Rights.]

Amendment I

(1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

(1791)

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III

(1791)

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

(1791)

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.

Amendment V

(1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

(1791)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII

(1791)

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

(1791)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

(1791)

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

(1791)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[The Amendments that follow the Bill of Rights.]

Amendment XI

(1798)

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII

(1804)

The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate; The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII

(1865)

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

(1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of Electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV

(1870)

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI

(1913)

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration.

Amendment XVII

(1913)

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and

each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII

(1919)

Section 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by Congress.

Amendment XIX

(1920)

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX

(1933)

Section 1. The terms of the President and Vice-President shall end at noon on the twentieth day of January, and the terms of Senators and Representatives at noon on the third day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the third day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice-President-elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President-elect shall have failed to qualify, then the Vice-President-elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President-elect nor a Vice-President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice-President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI

(1933)

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII

(1951)

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII

(1960)

Section 1. The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice-President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice-President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV

(1964)

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice-President, for electors for President or Vice-President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV

(1967)

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice-President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice-President, the President shall nominate a Vice-President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice-President as Acting President.

Section 4. Whenever the Vice-President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice-President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice-President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice-President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI

(1971)

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article Amendment by appropriate legislation.

Amendment XXVII

(1992)

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

Glossary

Administrative probable cause The level of suspicion, knowledge, or belief necessary to obtain a warrant for a noncriminal search of a home, business, or other location where the occupier of the premises will not consent to a search; a level of probable cause that requires a much lower level of suspicion or reason to justify a search directed toward enforcing administrative, zoning, or safety regulations.

Administrative search A governmental search designed to enforce a civil (as opposed to criminal) law or regulation; a search conducted under a lower standard of probable cause than criminal probable cause that may or may not require a warrant depending on the circumstances. Administrative probable cause may be based on the passage of time, the nature of a building, or the condition of an area of a city and does not have to be specific to the location being subjected to an administrative search

Administrative search business: A search of a commercial establishment to enforce zoning and regulatory and safety programs that can be conducted on a reduced level of probable cause that is lower than that required for criminal probable cause. Absent consent or other theory permitting entry, an administrative search usually requires a warrant.

Administrative search home: A search of a private dwelling not directed at a finding of criminal wrongdoing but focused on assuring compliance with zoning, safety, architectural, and other regulatory programs that does not require traditional probable cause but does require a warrant or some recognized exception to a warrant.

Adverse prosecutorial comment A violation of the Fifth Amendment privilege against self-incrimination occurs whenever a prosecutor calls attention to the fact that a defendant has not testified in his or her criminal case. A prosecutor's comment may or may not be a reversible error depending whether the comment was harmless error or a structural error.

Affidavit A written and sworn statement of fact or of belief given under oath and signed in front of a person legally qualified to execute oaths.

Affidavit for a warrant The written and sworn statement offered by a law enforcement official in written format to a judicial official that describes the facts and circumstances that the official believes constitute probable cause sufficient for the judicial official to issue a search or an arrest warrant.

Airport passenger search A consent-based search of airline passengers and luggage designed to detect the presence of objects/weapons that could be used to hijack the aircraft or to cause harm to the passengers, crew, or aircraft. The search must be reasonable and no more extensive or intrusive than necessary to meet the goal of airline safety.

Alford **plea** A plea of guilt to the charges, admitting to the truthfulness of the accusations and that they are sufficient to prove guilt while at the same time alleging that the defendant is not guilty of the charges. Some states will not accept an *Alford* plea. *See North Carolina v. Alford*, 400 U.S.25 (1970).

Amicus curiae An organization or a person, not a party to a lawsuit, who receives court permission to file a brief supporting the position of one party in an existing lawsuit with a view toward influencing the outcome; literally, "friend of the court." This brief usually is filed in appellate courts.

Arraignment An early postarrest hearing of the criminal justice process in which the charges are read to the arrestee, where counsel is often appointed, where bail may be set, and where the court typically asks the arrestee to enter a plea to the charges.

Arrest The seizure of the body of a person, under the authority of a government, for whom probable cause exists to warrant a person of reasonable caution to hold the belief that the seized person has committed a crime or crimes.

Arrest in the home A warrant is required for police to make a lawful seizure of a person who is inside that person's home. Several exceptions to the general rule allow a warrantless arrest under exigent circumstances (an emergency): hot pursuit into the home or consent to enter the home. Arrest of third party in home: A warrantless seizure of a person while he or she is a guest at another person's home violates the Fourth Amendment rights of the home occupier. Consent of home occupier allows warrantless arrest of third party.

Articles of Confederation The document that organized the American national government following the conclusion of the Revolutionary War. The national charter proved a weak form of central government that could not raise armies properly and had no power to regulate trade among the states. The form of government under the Articles of Confederation was replaced by a stronger national government under the Constitution of the United States in 1789.

Attachment of jeopardy A defendant is deemed to have been once at risk of a criminal conviction when a judge at a bench trial begins hearing evidence from the first witness and when the jury has been empanelled and sworn in a trial to a jury.

Attenuation See Doctrine of Attenuation.

Automatic standing The principle that anyone "legitimately on the premises" who becomes the subject of a police search has legal grounds to contest the illegality of the search under the Fourth Amendment. This doctrine has no application in federal trials after the concept was overturned in *United States v. Salvucci*, 448 U.S. 83 (1980) and has been rejected in most state criminal proceedings.

Bail The method of procuring the release of a person accused of a crime by payment of money; an amount of money or approved property that a judge or magistrate believes will cause an arrested person to comply with all conditions of release and to appear at court at all appropriate times; pretrial release on conditions set by the court.

Bail determination In making a felony bail decision, courts typically consider the strength of the prosecution's case, prior history while on bail, severity of the charged offense, whether the accused will commit additional crimes, the alleged offender's ties to the community, the wealth of the individual, and whether the alleged offender will harm members of the community or witnesses in the case.

Bailable offense Any offense that a legislature has determined would be appropriate for pretrial release on conditions; any offense other than those that a state or the federal legislature has determined do not merit consideration of pretrial release.

Bail provision of Eighth Amendment The part of the Eighth Amendment that prohibits excessive federal bail and regulates the manner in which federal bail statutes may be structured by Congress; the section of the Eighth Amendment that has never been incorporated into the Due Process Clause of the Fourteenth Amendment and therefore does not apply to the states and does not regulate state bail practice.

Bench trial Where the defendant elects to have the judge or a three-judge panel hear and decide the case in which the defendant has waived various legal rights, especially the Sixth Amendment right to a trial by jury. See Chapter 13.

***Bivens* remedy** The court-created remedy for an egregious violation of the Fourth Amendment by federal law enforcement officials in which the wronged individual may file a federal civil suit for money damages against the agents. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

***Blockburger* test for double jeopardy** Offenses are separate offenses for double jeopardy purposes if each crime requires proof of an element that the other does not.

Blood alcohol tests Scientific examinations that are conducted to determine the alcoholic content of individuals' blood following arrests for driving while intoxicated and that do not violate the Fifth Amendment privilege against self-incrimination.

Bond An amount of money or the value of assets placed with a court to obtain pretrial release of an accused; in misdemeanor cases, the amount of money set by a court, police agency, or statute to ensure the subject's appearance in court at all appropriate times. Bond for misdemeanor cases does not require consideration of the personal circumstances of each accused individual.

Breach of plea agreement Following the execution of a negotiated plea, if either party fails to perform its respective obligations, the plea may be withdrawn and the parties will be left where they were prior to the plea agreement. In some cases, specific performance of a plea agreement may be possible. *See Santobello v. New York*, 404 U.S. 257 (1971).

Burden of proof The quantum of evidence required to be produced by the prosecution to win a criminal case; a level of proof required to be demonstrated in affirmative defenses for criminal cases; the prosecution must introduce evidence to prove the case beyond a reasonable doubt.

***Carroll* doctrine** Judicial principle that permits a warrantless search of a moving or readily movable motor vehicle for which probable cause exists; an exception to the Fourth Amendment warrant requirement that permits warrantless searches of readily movable or moving vehicles, boats, and aircraft.

Challenge for cause The concept that a prospective juror can be removed for bias, interest, or prejudice in a criminal case where the attorney for a party can demonstrate lack of impartiality. Challenges for cause are theoretically unlimited in number.

Closely (heavily) regulated industry A business or industry that has traditionally been subject to intensive or pervasive governmental regulation such that persons engaging in such a business or industry may expect a diminished expectation of privacy and searches of their premises without prior notice, probable cause, or warrant. Firearms and explosives manufacturing, the production of distilled spirits, and automobile dismantling are examples of businesses and industries that have traditionally been closely regulated by different levels of government.

Cloud storage Remote servers/hard drives that store data for individual persons, institutions, and corporations remotely, freeing local storage for other tasks and serving to archive data in a safe secondary location. Cloud storage may be spread over multiple geographic locations for greater data security.

Collateral attack In a federal court, when a defendant has exhausted all direct state and federal appellate reviews and appeals without success and files court papers requesting that a court issue a writ of habeas corpus if it finds that the defendant is currently being held under a judgment in violation of, respectively, the state or federal constitution or laws. State habeas corpus petitions may be used in state courts when all state remedies have been exhausted.

Collateral estoppel Where a fact necessary to the prosecution of a second but different case

against the defendant has been clearly found in the defendant's favor at the first trial, the defendant cannot be forced to relitigate the same fact a second time at a second trial involving the same sovereign.

Compelled testimony No witness has the right to refuse to testify in front of a grand jury where the witness has been given use or transactional immunity that is co-extensive with the protections of the Fifth Amendment. See *United States v. Dionisio*, 410 U.S. 1 (1973).

Competency The mental ability of a defendant to comprehend the nature and importance of court proceedings and to have sufficient mental comprehension to properly assist counsel in preparing a defense; the requirement that a witness in a court case take an oath to tell the truth, to have possessed original perception of the events, to have a recollection of what happened, and to have the ability to communicate the facts to the judge or jury.

Composition of grand jury Members of a grand jury must be selected from a pool of citizens who represent a fair cross-section of the jurisdiction.

Concept of standing The requirement under the Fourth Amendment that an aggrieved party must demonstrate that a personal right of his or hers has been violated in order to be permitted to argue for suppression of evidence illegally seized in violation the rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), and the Fourth Amendment.

Confession The free and voluntary act by an accused of admitting to the material elements of a crime that are generally sufficient to generate proof beyond a reasonable doubt if believed by a trier of fact.

Consent search A search conducted by a governmental agent following the granting of permission by the individual holding dominion and control over the object or premises; a search justified where the occupier of the premises freely and voluntarily relinquished his or her Fourth Amendment rights and permitted a search. Voluntariness of consent is measured by the "totality of the circumstances" test.

Counsel Every accused possesses the right to an attorney under the Sixth Amendment, and where the accused has insufficient funds to afford legal representation, the government must furnish reasonably competent legal representation.

Curtilage The land area around a private dwelling that might reasonably be fenced, but it need not actually be fenced to qualify; land close to a home that is used intimately in conjunction with living in the dwelling house and for which an expectation of privacy reasonably exists.

Custody For *Miranda* purposes, exists when a governmental agent deprives an individual of his or her freedom of movement in any significant manner; one of the two triggering factors under *Miranda* that require police officers to offer *Miranda* warnings.

Derivative evidence Evidence discovered or disclosed by reference to exploiting other evidence already known; evidence that may be excluded if the original evidence was "tainted" or illegally seized under the Fourth Amendment.

Determination of bail amount The factors that courts use to evaluate the amount of money or approved property required to ensure that a bailed defendant will appear at all appropriate times. Courts consider, among other factors, the strength of the prosecution's case, the alleged offender's prior history while on bail, the severity of the charged offense, the alleged offender's ties to the community, the wealth of the individual, and whether the alleged offender will harm members of the community or witnesses in the case.

Doctrine of attenuation The theory that an illegally seized item of evidence, normally excluded under the Fourth Amendment's

exclusionary rule, may be admissible where that evidence and the act of illegal seizure have significant separation by time and distance sufficiently to break the chain of causation between the evidence and the illegal seizure.

Double jeopardy A provision of the Fifth Amendment of the United States Constitution that has been construed to prohibit an individual from being tried twice for the same crime prosecuted by the same sovereign jurisdiction. Rationale: prevents the prosecution with all the resources of the state from continuing to retry a defendant until, through successive prosecutions, it wears down the defendant's will to oppose the government.

Drug courier profile A set of characteristics developed from past law enforcement encounters with drug dealers and traffickers that may be used to identify persons who are not known to be involved in the drug trade but who may be drug carriers based on their possession or exhibition of the stereotypical characteristics. The profile may include demeanor, age, travel origin or destination, time of arrival at a transportation facility, lack of luggage or use of expensive luggage, and other factors. When properly applied, law enforcement agents may use the profile to briefly stop and inquire about a person's travel plans and ask other routine questions.

Dual sovereignty The concept that each of the several states is sovereign for the purposes of determining its criminal law and that the federal government is sovereign for the purposes of determining its criminal law. A state that prosecutes a person following a prosecution by a different state for the same act does not constitute a violation of double jeopardy, and both the federal government and one or more of the states may successively prosecute an individual for one act that violates the law of more than one jurisdiction.

Dual sovereignty doctrine A person may be prosecuted successively by one state and then another or by the state and then by the federal government for the same acts, which constitute different crimes under two or more separate jurisdictions. States and the federal government are separate sovereigns for the purposes of double jeopardy considerations.

Due process A constitutional guarantee found in the Fifth and Fourteenth Amendments to the United States Constitution which mandates that the state and central governments treat individuals with "fundamental fairness" when interacting with them, whether the situation involves lawmaking or law enforcement.

Due Process Clause of the Fourteenth Amendment The constitutional guarantee that the governments of the states will treat all persons found within their borders with "fundamental fairness" in all interactions between a state government and an individual.

Echo an electronic communication speaker and microphone by Amazon that allows humans to connect to other Internet devices and storage systems by using the digital assistant, Alexa. Commands may be given, depending upon setup and purchased features, to play music, control lights, and search the Internet based on voice commands given to software program, Alexa. Law enforcement may obtain some of this data if it becomes relevant in a criminal case by serving a search warrant on the custodian of the data that the Echo generates by using the digital assistant, Alexa. Similar devices and software such as Siri, Cortana, Bixby, and the Google Assistant perform some of these tasks and store information to a cloud server.

EDR see Event data recorder.

Effect of discrimination Where racial discrimination has been proved to have tainted a criminal case, the case will be reversed and will not generally be decided using the harmless error doctrine.

Emergency administrative search A search directed toward discovering items or conditions

that pose actual or potential harms to the general public or to a specific group of persons. It does not require a warrant and may not require administrative probable cause. Examples of emergency administrative searches include entry to a farm to destroy tubercular cattle, seizure of botulism-tainted tuna, and confiscation of misbranded prescription drugs.

Emergency exception The doctrine that permits governmental action under the Fourth Amendment where life or property may be in danger and when compliance with usual procedural requirements would not be reasonable.

Emergency exception to *Miranda* An excuse for conducting limited custodial interrogation of an arrestee where an immediate danger exists to the safety of the arresting officer or other persons; permissible custodial interrogation generally characterized by the presence of an unlocated firearm or explosive device.

Event data recorder Device on all late-model cars and light trucks sold in the United States that records vehicle parameters such as speed, accelerator position, braking, steering input, air bag deployment, seat belt usage, and some post-accident data. Device typically records and stores the last five seconds of operation of the vehicle.

Exceptions to warrant Arrest warrants will not be required to arrest within the home where exigent circumstances exist, where the arrest follows a hot pursuit, or under circumstances of consent. Search warrants generally will not be required for motor vehicle searches and are not necessary for consent searches, inventory searches, exigent circumstances, and searches incident to lawful arrests.

Excessive bail Under the Eighth Amendment, for federal bail purposes and under many state interpretations of state constitutions, bail has been deemed excessive when it has been set at an amount higher than the amount minimally necessary to ensure a defendant's appearance at all appropriate times. This part of the Eighth Amendment has not yet been applied to limit the states' bail practice.

Exclusionary rule A court-made rule that prevents the use of evidence illegally seized, in violation of the Fourth Amendment, during the prosecution's case in chief; a court-made rule designed to ensure respect for the Fourth Amendment by law enforcement officials by removing the incentive to conduct illegal searches and seizures.

Executory plea A negotiated plea that had received mutual assent by the parties but which has not been performed by both sides. Either party may withdraw at any time from an executory plea agreement, since no constitutional rights are enforceable in an executory plea bargain due to lack of performance.

Exigent circumstances An emergency situation characterized by a law enforcement official lawfully entering private premises or property without a warrant; situations where life may hang in the balance, which justifies an extraordinary law enforcement response involving a warrantless search and/or seizure.

Expectation of privacy A judicially recognized constitutional right based on the Fourth Amendment that limits governmental intrusion on areas of a person's life, property, papers, and effects. An expectation of privacy is not absolute and may be breached by a demonstration of an important and sufficient governmental interest.

Eyewitness identification A process in which a witness to a crime identifies the proper person, following procedures that must meet due process requirements to prevent misidentification; a process involving a lineup, photographic array, or one-on-one show-up where the law enforcement agents do not attempt to steer or otherwise assist in making an identification and during which the defendant may have a right of counsel.

Fair cross-section requirement The concept that the pool of citizens from which a grand jury or trial jury is to be selected must represent identifiable groups within the judicial community. Where identifiable groups have been intentionally excluded, there is the possibility of reversible error.

Federal jury size The Sixth Amendment right to a trial by jury has been judicially determined to require a jury of twelve, unless a defendant consents to a lower number.

Federal question Denotes that a particular cause of action may be tried in a federal court as federal cause of action; in the appellate or habeas corpus context, where a legal issue involves a federal law, the federal constitution, or a federal treaty, it may be litigated in a federal court.

Felony A serious offense for which the punishment may include a heavy fine and/or significant imprisonment (often greater than one year) up to life imprisonment or the death penalty; an offense of a serious nature that is greater than a misdemeanor but lower than treason.

Fifth Amendment privilege The constitutional right granted to every person, whether as a defendant or as a witness, to refuse to give testimony against himself or herself. A defendant has no duty to assist the prosecution in obtaining a conviction of the defendant.

Fifth Amendment privilege at lineup A defendant has no constitutional right to refuse to participate in a lineup, even though it may prove to be a link in a chain of evidence that results in a conviction.

First hearing The initial appearance of an arrestee before a judicial official where probable cause to hold may be judicially evaluated, where a not guilty plea or no plea may be entered, where the charges are read to the arrestee, and where the judge may set a bail amount.

FitBit A family of devices worn on the human body that records various wellness and fitness parameters, including heart rate and sleep data of the human who wears it, and creates an EKG of the heart. Some of this data can be secured by law enforcement by using a search warrant directed to the company that records and stores the data.

Fourth Amendment The portion of the Bill of Rights that generally requires warrants for searches and seizures but has been construed to permit warrantless arrests in most situations; the Amendment that is often cited as giving persons a right of privacy against any government.

Frisk A limited search of the outer garments of a detainee to discern whether the individual possesses a weapon or weapons that could be used to harm the officer or surrounding persons. Requires a reasonable basis to suspect criminal activity and that the subject may be armed and dangerous.

Fruit of the poisonous tree doctrine A corollary to the exclusionary rule whereby evidence may be excluded from an individual's criminal trial where the individual would have normally possessed no standing to suppress evidence; the theory that excludes evidence from a defendant's trial when the evidence was derivatively obtained in violation of the defendant's Fourth Amendment rights and would not have been discovered but for the violation of defendant's rights.

Functional equivalent of international border Any location similar to an airport or seaport where products and people enter or leave a nation and where customs and immigration services may be required. Searches and seizures conducted at these locations have minimal Fourth Amendment limitations concerning probable cause or scope of search.

Functional equivalent of interrogation Where police speak in front of a suspect in their custody in a manner that is clearly

designed to elicit an incriminating response from a suspect who has decided not to talk following receipt of *Miranda* warnings; any words or actions on the part of the police (other than those normally incident to arrest and taking a person into custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Fundamental fairness Description often given to explain the essential dictates of the Fifth and/or Fourteenth Amendment requirements of due process; the proposition that the government must offer each accused person sufficient notice and opportunity to be heard and to have a meaningful opportunity to defend against criminal charges.

Good-faith exception A judicially recognized exception to the *Mapp* exclusionary rule that permits prosecution use of evidence illegally obtained where the searching officers were reasonably unaware of the defect in the search warrant; permits use of illegally seized evidence where the judge or magistrate has made an error in issuing a search warrant where the law enforcement officials acted in an "objectively reasonable" manner and were ignorant of the error.

GPS tracker Global positioning satellite tracking devices that typically are used to determine precision locations of vehicles but can be used to track valuable assets such as boats, aircraft, shipping containers, electronic devices, and almost any object for which knowledge of its location is worthwhile. Some devices may use cell towers to triangulate the location of object being tracked as well as satellite location.

Grand jury A group of qualified citizens, theoretically eligible to be voters (often numbering from nine to twenty-four) selected from a fair cross-section of the community whose function is to determine whether probable cause exists to believe that a person has committed a specific offense or offenses; a body of persons who make the determination of whether to indict a person.

Grand jury secrecy Limitations: The secrecy surrounding a grand jury proceeding that cannot be violated except to prevent an injustice in a separate case (and therefore the need for disclosure is greater than the need for continued secrecy). However, individual grand jury witnesses may reveal the substance of offered testimony, and grand jurors may speak after the grand jury's term has expired.

Grand jury standard Probable cause: To render an indictment, the grand jury, by a simple majority vote, must be convinced that a person of reasonable caution, when presented with the facts and circumstances, would conclude that a particular person had committed a particular crime or crimes.

Grand jury target Refers to the individual the prosecutor believes committed the crime or crimes and who is the subject of the grand jury's particular investigation.

Guilty plea Admission by a criminal defendant that he or she is guilty of the crime or crimes for which charges have been alleged; a confession of guilt that allows the trial court to impose a sentence; a plea that waives the right to a jury trial, the right to confront and cross-examine adverse witnesses, the Fifth Amendment privilege against self-incrimination, the right to force witnesses to testify on one's behalf, the right to complain of violations of protections against illegal search and seizure, and, generally, the right to appeal the conviction.

Guilty plea effect Upon the acceptance of a guilty plea, the defendant has given up the right to a trial by jury, the right to contest most grand jury issues, the right to be represented by counsel at trial, the privilege against self-incrimination, the right to compel witnesses to testify, the right to confront and cross-examine adverse witnesses, the right to contest Fourth Amendment issues, the right to

a public trial, the right to a speedy trial, and the right to an appeal.

Habeas corpus A common-law writ that survives to the present that permits a criminal defendant or convict to request that a court issue the writ where the individual can prove that he or she is being held in violation of the particular state constitution or the national constitution; a writ that will permit the person who is illegally held to be freed from present custody or obtain a new trial where the defendant demonstrates that he or she has been held illegally in violation of due process of law.

Hearsay A statement offered in court substantially repeating a statement made by someone outside of that court and offered for its substantive truth; in-court statements made by a witness who is quoting someone else who was not under oath and made a statement while outside of the court.

Hot pursuit An exception to the usual requirement of a warrant that permits police to enter a private home and make an arrest when a felony suspect has fled to avoid arrest. Police may directly follow the fleeing suspect inside the structure to make an arrest; the doctrine that permits a warrantless arrest within a suspect's home where probable cause to arrest exists and the officer closely followed the suspect inside after a chase. However, hot pursuit does not apply where a suspect in a misdemeanor crime fled from police and went into the suspect's home.

Identification The *Neil* five-factor test: In order to determine whether an eyewitness made a proper identification of a suspect, the court must evaluate the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's original description of the criminal, the level of certainty demonstrated by the witness at the time of the confrontation, and the length of time between the crime scene identification and the confrontation.

Identification of defendant An eyewitness must make a fairly positive determination that the defendant is the one responsible for the crime and must make this determination in a manner that comports with due process for the accused.

Impeachment The art of placing a courtroom witness in a position where the truthfulness of the witness's testimony is called into question; a showing that the witness may intentionally not be telling the truth or a demonstration that the witness may have been mistaken for any of several reasons concerning what the witness thought he or she observed.

Impeachment use of confession The principle that a confession taken in violation of the *Miranda* warnings, but not in violation of the Fifth Amendment privilege against self-incrimination, may be used to cast doubt on a defendant's testimony when a defendant takes the witness stand and offers evidence that is contradictory to the *Miranda*-barred statement or contrary to an otherwise voluntary confession.

Impeachment use of *Miranda* Evidence that has been received in violation of the principles of *Miranda* may be used to impeach a defendant where the defendant takes the witness stand and offers a contradictory story from the one given subsequent to a defective *Miranda* warning.

Improper steering The making of subtle or overt suggestions to witnesses by government law enforcement agents during identification procedures. A violation of due process may render the eyewitness's testimony excluded from admission to evidence.

Independent source rule An exception to the exclusionary rule that permits the use of evidence that has been discovered through an illegal means where the evidence also has a lawful means of discovery; introduction of evidence discovered during an illegal search and seizure so long as the evidence was later obtained

independently by legal law enforcement activity unrelated to the initial illegality.

Indictment The written product of a grand jury issued when a simple majority of the members conclude that probable cause exists to believe that a particular person has committed a specific crime or crimes; a true bill returned by a grand jury that charges a person with a crime.

Indigent right to appellate counsel Where a state or the federal government allows one appeal as a matter of statutory right, a person too poor to afford to hire an attorney to pursue the appeal must be furnished with free counsel to prosecute the first appeal.

Indigent right to transcript Where an appeal requires a trial transcript to obtain meaningful appellate review, a person who is too poor to afford the price of a transcript is entitled under due process to have the proper number of transcripts prepared at governmental expense.

Individual show-up The identification procedure conducted prior to indictment or the filing of an information where the police exhibit a single suspect to an eyewitness for possible identification.

Infamous crime Under the Fifth Amendment, the crime required to initiate a federal criminal prosecution must be an offense punishable by hard labor or death or otherwise labeled an infamous crime.

Informants Individuals, whether paid or unpaid, who deliver information to law enforcement officials in an effort to assist in the apprehension of criminals or to frustrate criminal plans; individuals who must have a sufficient level of believability to help establish probable cause for arrest or for search.

Information One method of initiating a serious criminal case whereby the prosecutor, in a writing filed with the proper court, accuses, in plain language and with sufficient particularity, a person with having committed a specific crime or crimes; a method of initiating a criminal lawsuit that often requires that the potential defendant waive his or her right to a grand jury indictment and consent to the entering of criminal charges against him or her.

Infrared scan: A process that uses a thermal imaging device, which detects heat escaping from homes or other structures, to produce a picture that assists law enforcement agents in determining whether a building is being used to grow marijuana. The use of this technology to uncover details of the interiors of private homes implicates the Fourth Amendment and generally constitutes an illegal search when conducted without a warrant.

Initial appearance Often called an arraignment; the first instance where an accused meets a magistrate or judge to hear a reading of the charge(s) against him or her and where the accused may make an initial plea or response.

International border search Persons crossing a United States international border may be searched for any reason and without a showing of probable cause, since the Fourth Amendment has a diminished effect on international travelers at the point of entry or exit of the nation.

Interrogation The process of acquiring information from a suspect or eyewitness; under *Miranda*, questioning a suspect by speaking in a declarative voice with a view toward eliciting incriminating statements from the arrestee; the functional equivalent of questioning a suspect while in custody.

Inventory search An exception to the usual requirement of probable cause to search that permits a warrantless inventory or cataloging of items found on an arrestee or items in the immediate dominion and control of the arrestee.

Inventory search Motor vehicle: A lawful search not requiring probable cause that

police may conduct following the lawful receipt of a vehicle as evidence or for safekeeping. The purpose is to protect police from false claims of loss of personal items, to protect the owner from theft of personal property while the property remains in police custody, and to protect police or other custodians from harm from dangerous items in a vehicle. If a police agency has and follows a written policy regulating these searches, criminal evidence produced by the search will be admissible in court.

Inventory search Personal property: Police may without a warrant and without probable cause conduct a search of personal property that comes into lawful police custody or possession following an arrest. The purpose is to protect police from false claims of loss of personal items and to protect the owner from theft of personal property while it is in police custody. If a police agency has and follows a written policy regulating these searches, criminal evidence produced by the search will be admissible in court.

Inventory search policy Every jurisdiction that wishes to conduct searches based on an inventory search theory must have and routinely follow a departmental policy that regulates inventory searches. In the absence of policy regulation, the parameters of an inventory search will have no limits, and the search will be deemed unreasonable under the Fourth Amendment.

Involuntary confession Where the mind and will of an accused are overcome by governmental tactics, whether physical or psychological, and he or she offers evidence sufficient to meet the standard of proof beyond a reasonable doubt.

Jeopardy When a defendant has been placed in danger of losing money, freedom, or life; it attaches to a defendant in a bench trial when the judge begins hearing the first witness and attaches in a jury trial when the jury has been empanelled and sworn.

Judgment The decision rendered by a judge or jury following a trial, or the entry made by a judge following the acceptance of a negotiated plea.

Jury instructions The time in a trial, before the jury retires to deliberate, that the judge explains the law to be applied to the case, explains how the law is supposed to operate, tells the jury that it is the group that determines the facts in the case, and gives guidance on how the jury is to consider the case by only using evidence that has been presented in open court in reaching a verdict.

Knock and announce Fourth Amendment requirement that law enforcement officials notify occupants of real property that police are outside and have the legal authority of a warrant to enter. The necessity of notice is not absolute, and notice need not be given where the announcement would clearly expose police officers to unreasonable levels of risk or where officers reasonably believe that evidence might be destroyed. Supreme Court jurisprudence does not generally exclude evidence obtained in violation of the knock and announce requirement.

Lesser included offense An offense below the initially charged offense that lacks one or more elements necessary to prove the more serious offense. For example, second-degree murder would be a lesser included offense of first-degree murder, since second-degree murder would not require proof of premeditation.

Lineup An identification process whereby a witness observes several individuals, one of whom may be the police suspect, and is requested to indicate whether the person the witness observed at the crime scene is a member of the array; an identification procedure that requires the presence of counsel for the defendant if the process occurs following an indictment or the filing of an information.

Material witness An observer of the essential elements of the crime whose presence in

court may be essential to the prosecution or the defense; an essential witness who may be placed under bail or kept in official custody to ensure his or her presence at a criminal trial.

***Miranda* warnings** Legal advisement that must be made by a governmental official to an arrestee concerning constitutional rights that must be explained prior to any custodial interrogation; a warning to a person who is in custody that the individual has the right to remain silent and to consult with counsel prior to speaking, that anything that is said may be used against the individual in a court of law, and that a free lawyer is available for the arrestee.

Misdemeanor A criminal violation that is less severe than a felony; an offense often punished by custody of less than a year (time varies by jurisdiction) and/or a fine; a criminal violation that is punishable by local incarceration rather than custody in a state prison.

Misdemeanor bail An amount of bail or bond that normally does not involve individual consideration of a defendant and is set by a fee schedule based on the type of crime that has been charged.

Motion to suppress A request, normally filed with the court prior to trial, which seeks to have evidence excluded from consideration by the judge or jury; a pretrial request that the judge order evidence illegally seized in violation of the Fourth or Fifth Amendment excluded from trial consideration.

Necessary conditions for warning To be required to offer the *Miranda* warnings, *custody* of a subject must exist, and police must desire to conduct *interrogation* of the subject.

***Neil* five-factor test** In order to determine whether an eyewitness made a proper identification of a suspect, the court must evaluate the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's original description of the criminal, the level of certainty demonstrated by the witness at the time of the confrontation, and the length of time between the crime scene identification and the confrontation.

Neutral and detached judicial official A person who serves in a judicial capacity who has authority to issue arrest and search warrants and who has no preconceived reason either to grant or refuse to grant a warrant but makes his or her decision based only on the merits of the evidence.

Nolo contendere The Latin phrase, often called a "no contest" plea, denoting that a defendant has decided not to put on a defense and to allow the judge to determine guilt or innocence based on available evidence, most frequently resulting in a guilty adjudication.

Nontestimonial evidence Evidence that does not come from the mouth of a witness and may include conduct; physical evidence that may have the operative effect of proving guilt.

Non-unanimous jury verdicts Jury verdicts that are less than unanimous are not permitted according to interpretations of the Sixth Amendment right to trial by jury.

Notice of appeal The procedural requirement that alerts the trial court that a convicted defendant plans to appeal the conviction. As a general rule, if the defendant fails to notify the trial court within thirty days, the right of appeal extinguishes by operation of law.

Open field doctrine The principle that a farm field or field with substantial foliage, which the occupier has not taken steps to prevent individuals from observing, is not a house or an effect under the protections of the Fourth Amendment and does not merit constitutional protection. Erection of a farm or cattle fence with a locked gate has been held to be insufficient to create an expectation of privacy in an open field.

Parole Discharge from traditional confinement prior to the time originally scheduled for release; early discharge from custody under conditions that may include staying away from specific individuals, not consuming alcohol or illegal drugs, not gambling, not committing additional crimes, maintaining employment, and/or other conditions believed relevant to rehabilitation.

Particularity of description A requirement under the Fourth Amendment that items that are the subject of a search must be clearly and carefully described, so that any law enforcement official may know what items can be seized and what items are not subject to seizure. In the context of a search warrant, the items must be carefully described in language placed on an affidavit for a search warrant, and this description is carried over to the language used in a subsequent search warrant.

Peremptory challenge The practice of removing a prospective petit juror from trial service for any reason or no particular reason by requesting that the prospective juror be excused from further jury service consideration; a method of eliminating a trial juror without offering a reason for so doing, limited by the fact that removal cannot be based on the race or gender of the prospective juror.

Petit jury The jury of citizens that determines the guilt or innocence of the accused.

Petty offense An offense lower than a felony, often called a misdemeanor or infraction, but for which trial by jury must be accorded to any defendant who faces greater than six months in custody.

Photographic array The functional equivalent of an identification lineup conducted by law enforcement officials by the use of still photographs of persons who are similar in appearance to the suspect; a method of identifying suspects that does not require the presence of an attorney for the accused regardless of whether an indictment been issued or information has been filed.

Plain error rule The principle that, in the interests of justice, an appellate court may reverse a criminal conviction based on an extreme error that was not preserved for appeal by an objection at trial and would not normally be considered by an appellate court.

Plain feel doctrine A corollary of the plain view doctrine that permits instantaneous seizure of the object whose criminal nature becomes immediately apparent to a law enforcement officer who reasonably senses or feels the seizable material during a lawful pat-down or frisk of a person.

Plain feel search See Plain feel doctrine.

Plain view doctrine An exception to the usual requirement that an officer possess probable cause prior to conducting a search; permits the warrantless seizure and introduction of evidence taken by an officer who was lawfully in a position to observe the seizable property. Example: officer lawfully making a home search observes substances that were not expected but for which criminality is immediately apparent.

Plea The response a defendant offers to a judge during an arraignment, preliminary hearing, or other early judicial hearing that takes the form of a plea of guilty, a plea of not guilty, or a plea of *nolo contendere*. See Chapter 11.

Plea bargain Where a defendant agrees to plead guilty to a specific charge or charges in exchange for the government's agreement to dismiss other charges and/or for an agreed-upon sentence or recommendation of sentence; an agreement by the government to lower the level of the criminal charge in exchange for the defendant's agreement to admit guilt to the lesser crime.

Preliminary hearing An early hearing in the criminal justice process where a court determines probable cause to detain, where the bail amount may be set, where early psychiatric examinations may be requested, and where the

prosecution may be required to put on a prima facie case; an early hearing used in jurisdictions that begin serious prosecutions by the use of an information.

Pretrial detention When a judge or magistrate denies bail to an arrestee and the accused must remain in full custody awaiting trial; under the federal Bail Reform Act of 1984, a person deemed dangerous to others or who has been accused of particular federal crimes may be denied bail completely and kept in custody until and during trial.

Prima facie case The level of evidence sufficient to convict if no adverse evidence were introduced; the level of evidence necessary to survive a motion to dismiss for lack of proof beyond a reasonable doubt.

Private employer search Where workers employed by private corporations are subject to Fourth Amendment searches of personal property and searches of the person under the order of a government where the search may be based on less than probable cause. For example, federal railroad regulations specify testing employees for drugs or alcohol upon the occurrence of specified events like train wrecks or the personal injury of a worker.

Privilege against self-incrimination The right of an accused under the Fifth Amendment to refuse to testify or otherwise give evidence against himself or herself. See *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Schmerber v. California*, 384 U.S. 757 (1966); one of the constitutional rights that law enforcement officers must explain to a person who is in official custody prior to initiating interrogation.

Probable cause Where the facts and circumstances known to a person of reasonable caution would permit him or her to conclude that seizable property would be found in a particular place or that a particular person has committed a particular crime.

Probable cause only hearing A judicial procedure required when a person has been arrested without a warrant and without an indictment where the hearing determines only probable cause to hold the individual and must be held within forty-eight hours after arrest. Arrestee has no federal constitutional right to be present for the hearing.

Probable cause to arrest: The level of proof that a police officer must have to take a subject into custody lawfully; the level of proof that would permit a person of reasonable caution to form the belief that a particular person had/has committed or was committing an offense for which an arrest was permitted.

Probation Release of a convicted person by the judicial system without that person serving the sentence of incarceration; release prior to execution of sentence on condition that the convict obey the law, maintain employment, not drink alcohol, not consume recreational pharmaceuticals, or not gamble, among other possible conditions.

Protective sweep A cursory inspection of premises beyond the area permitted under a search warrant (or arrest warrant) for the purposes of discerning whether other persons might be present who might harm the officers or frustrate the search or arrest; a quick and limited search of the premises, incident to an arrest, conducted to protect the safety of police officers and others, which is narrowly confined to a cursory visual inspection of places in which a person might be hiding.

Public safety exception to *Miranda* Where an arrestee presents or appears to present an immediate danger to the safety of the arresting officer or other persons, the officer is permitted to interrogate the subject concerning the danger prior to offering the warnings required by *Miranda;* custodial interrogation is generally permitted when unresolved dangers to the public or officer continue to exist.

Rationale for bail The purposes for granting bail: It assists the defendant in planning a defense with his or her attorney, it allows

the defendant to freely search for and interview witnesses, and it prevents preconviction punishment and preserves the presumption of innocence while ensuring the defendant's appearance before a court as appropriate.

Rationale for double jeopardy The purposes for forbidding double jeopardy: This prevents the prosecution, with all the resources of the state, from continuing to retry a defendant until, through successive prosecutions, it wears down the defendant's will to oppose the government; a government should have one and only one chance to make its case or refrain from additional efforts toward one defendant.

Reasonable basis to suspect The standard of proof necessary for a police officer to initiate a brief stop of a person where there exists some question as to whether the individual is involved in criminal activity. If the suspicion extends to a fear that the subject may be armed and dangerous, a pat-down of the subject's outer garments is permissible. This standard will allow a brief motor vehicle stop where there is articulable reason to suspect that criminality may be present involving the motor vehicle or occupants.

Reasonable suspicion Virtually the same as probable cause in some contexts but may be a slightly lower level of proof or knowledge; may be used in the context of a *Terry v. Ohio*-type search in which the terminology may be phrased as "reasonable basis to suspect criminal activity," which would permit a police officer to initiate a brief detention, discussion, and perhaps a pat-down of a suspect. This standard of proof is used to justify searches of persons and backpacks of public school children.

Reduced expectation of privacy Juveniles: Children do not have the same Fourth Amendment rights as adults and can be searched by school officials on a showing of less than probable cause. Public school children, with parental consent, can be forced to submit to drug screens as a condition of engaging in after-school activities like football or the Latin club.

Requirement of unanimity Federal and state criminal cases using a twelve-person jury must be decided by unanimous jury verdicts.

Requirement to claim double jeopardy Defendant must allege and prove that the same sovereign is attempting to try him or her a second time for a crime that has already been adjudicated to a conclusion; defendant must show that the crime or crimes the prosecution wants to try for a second time do not have a separate element different from the first crime charged.

Reservation of right to appeal Where a defendant enters a plea of guilty but specifically does not give up all rights of appeal, such that he or she reserves the right to appeal one or more narrow legal issues as part of a plea bargain.

Right assertable against government Constitutional rights possessed by defendants that they may use to prevent evidence seized against their rights from being used by a government to prove guilt. Examples include alleged *Miranda* and self-incrimination violations, as well as the right to demand a jury trial.

Right to a grand jury indictment Absent waiver, all serious federal criminal prosecutions must be initiated by the use of a grand jury, but states are free to develop individual alternatives because the right to a grand jury indictment has never been applied to the states through the due process Clause of the Fourteenth Amendment.

Right to counsel A benefit given to all accused persons under the Sixth Amendment to the federal Constitution as well as a right granted by state constitutions. The right includes the furnishing by the government of free legal counsel to those accused individuals who cannot afford to hire attorneys.

Right to counsel Postarrest limitations: No general right to counsel exists following an arrest unless other procedures, like

interrogation, a postindictment lineup, or a postinformation lineup, occur.

Right to counsel Postindictment: A defendant has the right to counsel at all critical stages of the criminal justice process, including after an indictment has been returned by a grand jury.

Right to counsel Postinformation: A defendant has the right to counsel following the filing of an information against the defendant, since proceedings following the filing of an information are considered critical stages of the criminal process.

Right to remain silent A constitutional right guaranteed to persons under the Fifth Amendment that permits a person to refuse to assist the government in prosecuting a criminal case against that individual; the right to remain silent and not assist the government was applied to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964). a right guaranteed by the Fifth Amendment and reinforced by the case of *Miranda v. Arizona*, 384 U.S. 436 (1966), allowing a person in custody to refuse to speak with police about any substantive criminal matter.

Rule of inevitable discovery The exception to the exclusionary rule that allows the admission of evidence that has been illegally discovered under such circumstances when the evidence clearly would have been discovered by lawful means at a later time.

Scope of frisk The area on the person or in a place that may be searched under the rationale of *Terry v. Ohio* and its progeny. A frisk following a lawful stop allows an officer to pat down the *outer garments* of a subject with whom the officer is dealing in an effort to ascertain whether the subject is armed and may extend to any area of outer clothing under which weapons may reasonably be hidden.

Scope of search The places where law enforcement officials may lawfully look where an object of the search could reasonably have been hidden. Example: cocaine could be hidden almost anywhere, but a stolen 48-inch flat-panel television could not be found in a medicine chest above a sink in a bathroom.

Scope of search of a home The type and extent of a lawful search of a home that can be considered reasonable based on the size and type of property that is the object of a home search. Searching officers may search for an object in any home location where the object of the search could reasonably be hidden.

Scope of search of a motor vehicle The type and extent of a probable cause search that may be conducted of a motor vehicle when due consideration has been given to the object of the search. Officers may search anywhere inside a motor vehicle, including any containers, that could reasonably be the location of seizable property.

Search A governmental inspection, survey, or examination of the premises of a person's home, automobile, papers, person, or other area where private material may be stored.

Search incident to arrest A specialized type of search that requires only a lawful arrest of a person as its justification; a search that permits inquiry into areas under the immediate "dominion and control" of the arrestee, such as a purse or backpack and personal effects, but does not generally include a search of an entire house or automobile.

Secrecy of grand jury Purpose: A grand jury is not open for public scrutiny because there is no such constitutional requirement, and secrecy prevents targeted individuals from escaping or influencing witnesses or jurors while it protects those individuals who are never indicted.

Seizure The act by law enforcement officials of acquiring dominion and control over a person, property, or contraband.

Selective incorporation The process whereby the Supreme Court of the United States, on a

case-by-case basis, determined that various rights in the Bill of Rights should be incorporated into the due process clause of the Fourteenth Amendment.

Separate offense interrogation Where an arrestee has requested counsel following receipt of *Miranda* warnings, the law prohibits any additional police interrogation on any separate offense unrelated to the offense for which the person is in custody. "Once a suspect has invoked his right to counsel, any further questioning on the part of the police, whether about the same or a different offense and whether by the same or a different officer, may not occur unless the suspect has counsel present or the suspect reinitiates talks with the police." *Arizona v. Roberson*, 486 U.S.675, 687 (1988).

Serious criminal case For purposes of the Sixth Amendment, any offense that carries a maximum penalty of greater than six months in prison creates the right to jury trial for a defendant.

Silver platter doctrine Legal theory, no longer used, whereby a federal officer, who had illegally seized evidence in violation of the Fourth Amendment, could offer the evidence for use by a state official in a state prosecution.

Six-person jury The smaller trial jury that has been approved by the Supreme Court of the United States for state cases as not violating the Sixth Amendment right to a trial by jury so long as unanimity is maintained.

Sixth Amendment right to a speedy trial While not specifying any particular time frame, the Sixth Amendment, as interpreted, requires that an accused be tried within a reasonable time following arrest, indictment, or the filing of an information.

Specific performance In cases of plea bargains breached by the prosecution, the trial court has discretion to allow the defendant to completely withdraw the original plea and start the prosecution anew or to order that the prosecution exactly perform the duties under the plea bargain to which it had originally agreed.

Speedy trial The requirement under the Sixth Amendment, federal law, state law, and/or state constitution that a person accused of a crime be brought to trial within a specific time or within a reasonable time following the filing of an information, apprehension, or indictment. The remedy for a violation of the Sixth Amendment speedy trial right is prejudicial dismissal against the prosecution.

Speedy trial Factors to consider: The four-factors test evaluates the length of time, the reason for the delay, the defendant's assertion or nonassertion of the right, and prejudice to the defendant and the case.

Stale probable cause The rationale sufficient to search for an object may exist only for a short time, since some illegal activity depends upon movement of the object. When the probable cause becomes stale, the search for the object becomes unreasonable under the Fourth Amendment. Example: Drug dealers must move their product and sell it as part of the normal course of business, so that probable cause for a search at a particular time for a particular place may not exist several days later. Probable cause for arrest does not typically become stale, since the information pointing to a particular perpetrator does not often change with the passage of time.

Standing The legal position that an accused must hold in order to be able to litigate a motion to suppress evidence under the exclusionary rule of *Mapp v. Ohio* and the Fourth Amendment; the position of possessing a reasonable expectation of privacy under the Fourth Amendment. Example: one has standing in one's own home or motor vehicle, but a passenger in a vehicle may not have standing to contest the search of the vehicle.

Statutory right to a speedy trial Many states and the federal government have laws that help

enforce both the Sixth Amendment and state constitutional rights to speedy trials by specifying the time requirements necessary to meet the goal of having swift trials. These laws have the effect of moving criminal cases in danger of not meeting statutory time requirements to the top of the docket.

Stop and frisk The reasonable limited restriction on freedom of movement and the potential limited search of the outer garments permitted under the doctrine announced in *Terry v. Ohio*, 392 U.S. 1 (1968); limited detention or search permitted whenever an officer observes unusual conduct that leads the officer to suspect criminal activity, and the officer reasonably believes that the person with whom he or she is presently dealing may be armed and dangerous.

Stop and identify A rejected theory, related to the stop and frisk doctrine, that would allow police officers to stop anyone who seemed out of place or who seemed remotely suspicious and that would allow a police officer to force a subject to give a positive identification. No person who is merely abroad in the night or day can be required to carry identification.

Straight plea When a defendant pleads guilty to exactly the charges that the prosecutor has levied without any promises or consideration made by the prosecution.

Subpoena A lawful order issued by a court of competent jurisdiction commanding an individual to appear in court or another place under penalty of law for failure to comply; an order requiring a person to personally appear and bring particularly described items to court at a specified time is called a *subpoena duces tecum*.

Suggestiveness at lineup Where improper steering or undue influencing of eyewitnesses occurs during an in-person lineup, an in-person show-up, or a photographic lineup (array), a violation of due process has occurred that generally will require exclusion of the identification evidence.

Suspicionless public school search Schools may require that children, with parental consent, submit to drug screens and testing as a condition of playing sports or engaging in extracurricular activities.

Suspicionless workplace search A privately or publicly employed worker, holding a position where the safety of the public could be injured, may be required by a government to submit to a warrantless drug test or screen as a condition of continued employment. Probable cause or reasonable suspicion is not required to make this search reasonable for some occupations. Example: federal law or rules allow suspicionless drug screens for railroad workers and airline pilots.

Testimonial evidence Oral evidence offered from the witness stand or by deposition by a witness who has taken an oath to tell the truth and who is or has been generally subject to cross-examination.

Thermal imaging The picture produced when police subject a building to a scan with an infrared detector to measure the differences in the heat signature offered by particular parts of the building. The imaging machine converts infrared radiation into an image based on the relative warmth or coolness of the surface of the building. For example, on the screen of an infrared scanner, white indicates a relatively hot surface, gray colors demonstrate cooler temperatures, and black indicates a relatively cold surface

Time limitations on detention A person cannot be held in custody in the absence of a judicial or grand jury determination of probable cause longer than forty-eight hours, but the remedy for a person who has been held longer without judicial intervention is not automatic release. See *Riverside v. McLaughlin*, 500 U.S. 44 (1991). Also, under the stop and frisk rationale, a subject may be detained only for a brief time without the detention maturing into an illegal arrest unless probable cause emerges.

Totality of the circumstances test A test used to determine whether an informant has met the requirements necessary for a judge or police officer to be able to find probable cause for an arrest or search. See *Illinois v. Gates*, 462 U.S. 213 (1983) (Case 1.2). Also, a test used to determine whether a person has given a valid consent to search the person or an area controlled by the person that involves an analysis of the person's age and education, coerciveness of the circumstances, knowledge of the right to refuse consent, and other factors.

Transactional immunity The type of immunity given to a witness and potential defendant in which the government gives up its right to pursue criminal sanctions against the individual in exchange for testimony against other defendants; a type of immunity under which the defendant or target can never be prosecuted for crimes for which the immunity extends.

Trial by jury A federal and state constitutional right where members of the community are called to sit in judgment of the defendant to determine guilt or lack of guilt; a process of determining whether the prosecution has proven its case by having a body of community members numbering twelve or fewer, in some states, evaluate the evidence to determine whether guilt beyond a reasonable doubt exists. The Sixth Amendment right to a jury trial exists when the potential sentence is greater than six months custody.

Trial by the court Where the defendant elects to have the judge or a three-judge panel hear and decide the case in which the defendant has waived various legal rights, especially the Sixth Amendment right to a trial by jury

Two-pronged test The test to determine whether an informant has sufficient standing to permit the facts offered by the informant to equal probable cause for a search or arrest; under *Aguilar v. Texas*, 378 U.S. 108 (1964), the informant's story must contain sufficient facts that would equal probable cause, and there had to be sufficient reason to believe that the informant was telling the truth. The requirements of the two-pronged test were overruled by the Supreme Court in *Illinois v. Gates*, 462 U.S. 213 (1983).

Unexplained flight Where an individual takes immediate steps to place distance between the individual and a police officer upon observing the officer's presence where some additional factor is present. Under the teaching of *Illinois v. Wardlow*,528 U.S. 119 (2000), nervous, evasive behavior in a high-crime area coupled with flight upon sight of a police officer may be sufficient to meet the reasonable-basis-to-suspect standard for a stop and frisk under *Terry v. Ohio*.

Unlawful arrest An arrest for which probable cause does not exist; a warrantless arrest conducted within the home of the arrestee in the absence of exigent circumstances.

Unlawfully seized evidence Admissible: A grand jury may consider illegally seized evidence because the Fourth Amendment and the exclusionary rule possess very little application at a grand jury proceeding. Not admissible: Illegally seized evidence cannot be used for proof of guilt in petit trial.

Use immunity A guarantee offered by the prosecution to a prospective witness, typically at a grand jury proceeding and sometimes at trial for a prosecution witness, that the prosecution will not affirmatively use the information offered by the witness against the same witness; a type of immunity that is coextensive with the protections of the Fifth Amendment privilege against self-incrimination that still permits the government to use independently sourced evidence to prosecute the immunized person.

Vehicle forfeiture search A warrantless search having no limitations on its scope that does not require probable cause and that is conducted by law enforcement agents following the acquiring of custody of a vehicle that is subject to forfeiture under the laws of the jurisdiction.

No person possesses an expectation of privacy under the Fourth Amendment in a motor vehicle that is owned by a government or that is subject to forfeiture and has been forfeited.

Vicarious standing A generally unsuccessful legal theory whereby an individual who has not personally been the victim of a Fourth Amendment violation attempts to suppress evidence where the evidence is sought to be offered against that person or a third party.

Voir dire of jury An inquiry under the direction of the trial judge or the trial attorneys in which jurors are questioned concerning possible bias or interest in the case in which they are about to be seated.

Voir dire of witness An interrogation of a prospective witness, often an expert witness, concerning the witness's qualifications to serve as a witness or as an expert witness.

Voluntary confession Evidence offered without governmental duress or compulsion by a suspect or defendant that includes admissions containing all the elements necessary to prove guilt of the crime in question.

Waivable rights Legal entitlements, either statutory or constitutional or both, belonging to a defendant that an accused may knowingly and intelligently determine to relinquish as part of a plea bargain or a straight plea of guilt.

Waiver The decision by an accused to forgo some statutory or constitutional protection, which requires that the decision be based on knowledge and understanding of the right being relinquished. A decision not to obtain the benefits of the *Miranda* warnings and subsequent submission to interrogation constitutes a waiver of the right against self-incrimination. A waiver is the intentional abandonment of a known right or privilege.,

Waiver of privilege The decision of an accused not to assert a Fifth Amendment privilege against self-incrimination and to offer a free and voluntary confession to the crime alleged.

Waiver of right to indictment A federal defendant may decline to force the government to procure an indictment and, usually as part of a plea bargain, allow the government to file an information against the defendant.

Waiver of trial by jury Under the Sixth Amendment, the process under which a defendant may choose to have a criminal case decided by a judge rather than by a jury; the waiver must be done knowingly, intelligently, and with understanding of the rights being relinquished.

Warrant A legal order of a court directed to a law enforcement official to seize a particular person or property and return the individual or property to the court.

Warrant exception for vehicles Where probable cause to search a motor vehicle exists, the general rule allows an immediate warrantless search of the vehicle whose scope is regulated by the nature of the objects of the search.

Warrant requirement for house Police may neither warrantlessly search a place of residence nor warrantlessly arrest a resident inside a home. The home possesses the highest expectation of privacy under the Fourth Amendment and generally requires a warrant or some exception for law enforcement officials to breach its privacy

Warrant to arrest A court order based on probable cause issued by a neutral and detached judicial official directed to law enforcement agents ordering them to obtain official custody of a particularly described individual wherever the person can be found.

Weapons frisk of automobile A cursory and limited search of the interior of a motor vehicle, permitted when a person is stopped under a stop and frisk standard, that allows an officer to ascertain whether weapons are in close

proximity that could be used to frustrate the purpose of the brief stop. The officer must possess a reasonable belief based on specific and articulable facts that warrant an officer believing that the subject may be dangerous and that the subject could gain immediate control of weapons.

Writ of assistance Blanket warrant used by British officials that permitted searches of homes and effects of colonists in the absence of any individual suspicion; a blank search warrant that allowed British Crown officials to search private houses for personal items, personal documents and effects, and other evidence that could be used in court to convict the possessor.

Writ of certiorari The court order that indicates the Supreme Court of the United States will hear a case from a state appellate or state supreme court; the court order granted when four justices of the Supreme Court of the United States vote to hear a case; orders the lower court to deliver the record to the higher appellate court so that the appellate court may review it.

Writ of habeas corpus A common-law writ that survives to the present that allows a criminal defendant or convict to petition a court when the individual believes that he or she is being held in violation of the particular state constitution or the national constitution; a writ that will permit the person who is illegally held to be freed from custody or obtain a new trial if the applicant for the writ demonstrates that he or she has been held illegally in absence of due process of law.

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