**CRIMINAL PROCEDURE**

**Big Five:** *Mapp***,** *Katz***,** *Miranda***,** *Terry***, &** *Gideon*

**Powell v. Alabama (1932)** - is the first modern criminal procedure

* Takeaway: right to counsel is absolute; seen as a restraint on federal government. Previously, the S.Ct. had seen that the 14th Amendment limited: “you can’t do this.” After *Powell*, Due process also has affirmative content, requiring courts to do something to protect defendants.

**Palko v. Connecticut p. 27 -** Plaintiff indicted for murder, found guilty of 2nd degree murder, and sentenced to life. Connecticut appealed, took evidence out, retried him, and he was convicted of 1st degree and sentenced to death.

At the federal level, this would violate Double Jeopardy, but protection from double jeopardy is not a fundamental right, and was not incorporated into the 14th Amendment. Sentence upheld. The central proposition is that “due process of law requires only that criminal trials be fundamentally fair.”

**Adamson v. California - p. 29 -**Defendant did not testify in trial and the prosecutor used it against him (violation of self-incrimination 5th Amendment). The Court said that the State may choose to control the trial however it thought the most efficient administration of criminal justice.

-*Blacks Dissent:* Argued for complete and absolute application of the Bill of Rights into the 14th Amendment.

**Duncan v. Louisiana (1968)- p. 37 -** Plaintiff was charged with battery and requested a jury trial. State law said jury trials were only available for charges involving capital punishment or imprisonment with hard labor. Louisiana said that holding the fourteenth amendment to assure a right to a jury trial would cast doubt on the integrity of every trial conducted without a jury.

In a 7-to-2 decision, the Court held that the Sixth Amendment guarantee of trial by jury in criminal cases was "fundamental to the American scheme of justice," and that the states were obligated under the Fourteenth Amendment to provide such trials. Petty crimes, defined as those punishable by no more than six months in prison and a $500 fine, were not subject to the jury trial provision.

**Twining** - “The Due Process Clause (14th Amendment) is treated as prescribing no specific and clearly ascertainable constitutional command that judges must obey in interpreting the constitution, but rather as leaving judges free to decide at any particular time whether a particular rule or judicial formulation embodies an ‘immutable principle of free government’ or is ‘implicit in the concept of ordered liberty’ or whether certain conduct ‘shocks the judge’s conscience’ or runs counter to some other similar, undefined and undefinable standard.” p.41

**Great Incorporation Debate**

**Fundamental Fairness-** If it is fundamental for justice, you get the right, you don’t get the right just because its in the bill of rights. So technically it doesn’t even need to be listed in the Bill of Rights, because if it is “fundamental” it is included in the 14th Amendment. Under this approach, none of the bill of rights are incorporated, it just recognizes rights that are akin to the rights in the Bill of Rights.

 **Pro:** it allows the constitution to be a living document and respond to society and the times; no constitutional straightjacket, more discretion to judges.

 **Con:** It gives a lot of discretion to judges allowing them to call things how they see it. Not a uniform sense of justice.

**Total Incorporation-** Due process incorporates all of the bill of rights. This is what Justice Black argues in the *Adamson* dissent.

 **Pro**: predictable, efficient, cabins judicial discretion, shows original intent (privileges and immunities were supposed to be extended to states after all)

 **Con**: a straight jacket for the states, limits rights and ability to make decisions, some states might not have agreed and ratified the amendment if this was its true intent. Terms/meaning 5th and 14th amendment.

**Selective Incorporation- Identify under fundamental fairness; apply under total incorporation.** A combination of the two. The only rights that are incorporated are those that the Supreme Court deems to be incorporated by fundamental fairness, which includes some bill of rights. Similar to total incorporation, because its only taking fundamental rights from the bill of rights. Then, the state court applies that right in the same way it would in the federal court. Under the fundamental fairness approach, you don’t mimic the federal court, you just ask whether it is fair and fundamental.

**Post-Script -** In the 1960s, SCOTUS incorporated almost all of the Bill of Rights into the 14th Amendment, footnote A on page 37 lists them. What this does is make a massive shift of power from the states to the federal government. **The 14th amendment still contains independent potency, which means it can have some protection that’s not even in the Bill of Rights.**

1968 is the last year of the Criminal Procedure Revolution. The “revolution” was a massive shift of power from states (in re: criminal law) to the federal government by way of incorporation of certain areas of the Bill of Rights. Once a right is incorporated, it is incorporated to the fullest extent. There is also an independent potency in the due process clause to further enforce the federal government’s conceptions of fairness in the criminal arena against the states. They didn’t want the 14th amendment to be redundant, hence the “independent potency.”

**The lone exception to incorporation of the bill of rights to the fullest extent is found on page 47, footnote B, saying the 6th amendment (jury trial) requires unanimity in the federal court, but not in state court.**

Exclusionary Rule of the 4th Amendment Reads:

**“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 probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”**

 -says nothing about how it is to be enforced.

What is the remedy for a violation of the 14th Amendment? The constitution doesn’t say.

**Exclusionary Rule (bare bones)** – when the police violate your right, you take away whatever it is that the police got from you.

**Wolf v. Colorado (1949) p. 63 -** The 14th Amendment does not forbid the admission of evidence obtained by an unreasonable search.

As of this case, the exclusionary act does not apply against the states unless the state enforces it on its own. The due process clause includes the 4th amendment, but does not enforce the exclusionary rule. The court counts states and other English speaking territories to decide if it is perceived as fundamentally fair before determining that the States can determine it themselves.

**Rochin (1952) p.34 footnote A** - Police picking heroin out of someone’s puke was not admissible evidence. It was not kept out because of the 4th Amendment, but the independent potency of the Due Process Clause on the opinion that it “**shocked the conscience**.”

**Irvine v. California (1954) p.35 footnote A –** Cops make a key to man’s house and bug his bedroom and continue to break in and move the bug around. Ultimately ends up in Supreme Court under *Rochin* (shocks the conscience) because of the absurdity. SCOTUS affirms the conviction, distinguishing that *Rochin* was about the defendant’s body.

Justice Warren was so shit pissed that he tried to get the California DA to prosecute the police. Although the case was affirmed, it shifted the opinion of the Court.

Mapp v. Ohio **(1964) p.65 -** Police arrive at woman’s house after hearing a tip that there was someone present that was a suspect in a recent bombing. The cops knocked, but Ms. Mapp called her attorney and said they couldn’t come in without a warrant. The cops came back with **chinese takeout menu** as a warrant, and forced their way in. They turned the house over and charged her for possession of obscenities. Goes to SCOTUS as an unreasonable search/seizure.

Held: By allowing the state to use this evidence, it serves to encourage the disobedience to the Federal Constitution which it is bound to uphold. This is not a fundamentally fair issue, it’s the first selective incorporation case. The Court says the majority of the states follow this now. There is no deterrence to keep cops from violating the law, because there is no remedy for the people being violated against and that is why the court changes their opinion on the 4th Amendment incorporation. The Supreme Court is more interested in making these decisions than waiting for the states to move things along at their own pace.

**Is the exclusionary rule constitutionally required? And what do they say about this in** *Mapp***?**

Yes, it is required like the 4th Amendment is required, saying “We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.” P. 67 highlighted.

 **Backdrop:** *Monroe* (decided the same session as *Mapp*) – thirteen police officers broke through two doors of the Monroe apt, woke the couple and forced them with gun point to sit in the living room, grabbed the children, beat Mr. Monroe and some of the kids, calling them niggers, etc. The Supreme Court is seeing this stuff in the wake of *Brown v. Board* and they feel that they need to step in.

**United States v. Leon (1984) p. 71 -** “Leon Good Faith” - Modifies the 4th Amendment exclusionary rule as not to bar the use of the prosecution’s case in chief with evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to have been unsupported by probable cause.

**rationale:** the exclusionary rule is meant to deter police misconduct, not punish errors of judges and magistrates. There is no evidence to support a finding that judges/magistrates intentionally subvert the 4th amendment. **In addition, there is no incentive for judges to issue warrants that they think will violate the 4th amendment,** they are the neutral fact finders and have no stake in the outcome of a particular criminal prosecution.

**STANDARD:** Objectively reasonable reliance on a subsequently invalidated search warrant.

 **Footnote 20, p. 74:** Talks about the “objective standard” but its really a “reasonable mistake standard.” If you rely on a warrant, and a reasonable officer would have relied on that warrant, and its later determined that it isn’t a good warrant it will be upheld. If there is bad faith (i.e. a renegade magistrate), this standard will not be used.

 **Footnote 23:** Nails down the holding of the case. If the warrant is facially deficient it will be considered invalid – i.e. the warrant must particularize the location where the warrant applies. If it is so obvious that there is no probable cause, you would not be able to get Leon good faith. Also, the police must execute the warrant properly in order to get the good faith.

Leon - There is no constitutional authority, but the lower courts are following the rule.

 The Exclusionary Rule is not a Right, it is a Remedy.

**Footnote E, page 76:** The court says no exclusionary rule when the police officer reasonably relies on a statute that ultimately is determined as invalid. No exclusion when the warrant is granted based on a computer error.

**Black Letter Law:** there is no exclusionary rule outside of the criminal context (not available in civil suits, § 1983 – allows you to sue a police officer in a civil suit for violating your rights, deportation, etc). Even within the criminal context, no exclusionary rule outside the criminal trial (i.e. grand jury, bail hearings, preliminary trial, etc.) The only place it applies is at the “guilt or innocence” trial. No exclusionary rule in parole revocation hearings.

**If the defendant blurts out something about the evidence that has been excluded, he brings it in, forfeiting the exclusionary rule-remedy.**

**Exceptions to the Exclusionary Rule**

1. **Inevitable Discovery** - (Standard - **Preponderance of the Evidence**) Even if the search was illegal, if the police were going to find it anyway the evidence comes in. *Christian Burial Ground* - man confesses to where he buried his victim about an hour before the search party would have found her. Courts are unwilling to exclude this kind of evidence (*Nicks v. Williams*).
2. I**ndependent Source Doctrine** - If you can articulate the fact that whatever you found was not a fruit of the poisonous tree. There is an illegal search, but the police find something else that is independent to the violation (like say, a stoner walks into the room with a bag of weed out not knowing the cops are in the house).
3. A**ttenuated Source Doctrine -** (*Hudson*) like proximate cause. There is too much in between the violation and the admissible evidence. The court will consider the fragrancy of the initial violation, whether there are any intervening factors (free will), and the length of the causal chain. If you have to ask a ton of questions about it, its probably attenuated.

**Hudson v. Michigan (2006) p.81** - Police execute a warrant by knocking on a door and only wait a few seconds before entering. Hudson moves to suppress his drugs and weapon arguing the premature entry (not waiting until he opened the door) violated his 4th Amendment Rights.

Deterrence of forcing the police to wait is not enough to justify a rule against “knock and announce.” You would not have enough time to hide the contraband anyway.

Court uses “attenuated connection doctrine” which doesn’t make nearly as much sense as “inevitable discovery,” but alas.

**Herring v. United States (2009) p.94** - Cop sees guy who is a known criminal and asks the clerk to check for outstanding warrants. She finds one from an adjacent county so the cop pulls him over, arrests him, and finds meth and a pistol. Turns out the warrant was outdated and he should not have been pulled over.

Court holds that there was no intentional act to violate his rights, and that the marginal benefits produced by suppressing the evidence cannot justify the costs of exclusion. If the database problem was more widespread, it would have been considered more in the decision.

**Devils Advocate:** Suppressing the evidence would have deterred the police from keeping outdated records.

**Davis v. United States** - "Searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." If the statute has been overturned but a police officer is not aware of it, it will be considered a good-faith exception. Adds another good faith exception to the exclusionary remedy of the 4th Amendment.

**Application of the 4th Amendment**

**Threshold Question:** Analytically, you can’t have an illegal search or seizure without a search and seizure to begin with. Was there a search or seizure? Then you ask whether it was unreasonable.

 - Did you have a reasonable expectation of privacy?

**Protected Areas and Interests**

**Katz v. United States** *(1967) p.100:* Held that electronic eavesdropping is governed by the Fourth Amendment; the Court decided a search could occur without a physical intrusion into a constitutionally protected area.

**Harlan’s Concurrence:** The person should have exhibited an actual “subjective” expectation of privacy, and the expectation should be one that society is prepared to recognize as “reasonable.”

**Overrules the Property Rights Approach**

**Overrules:** *Olmstead* (1928) which said surveillance without trespass fell outside the ambit of the constitution (property rights approach). If you physically trespassed, it was unconstitutional… so under the older, *Olmstead* approach a wiretap wouldn’t be unconstitutional in *Katz* because there was no physical trespass (since the wiretap was outside of the phone booth).

 *Clinton v. Virginia* – the government uses a little microphone that is secured to the wall with a thumbtack to listen in on people. The thumbtack went in a quarter of an inch into the wall, and was considered a violation, because any physical violation was violation (they should have used tape instead).

**Switches to a “Privacy Rights” Approach**

**California v. Greenwood (1988) p.104** - Investigator gets a tip that Greenwood was selling drugs so he gets the local trash company to pick up his bags and let him inspect them. The bags were placed on the curb for pick up. The trash had evidence indicative of drug use, and he used it to get a warrant.

The Court held that the respondents did not reasonably have an expectation of privacy in their garbage and neither does society. In addition, most states that we have looked at allow warrantless searches of garbage discarded in public areas.

“Police cannot be reasonably expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public.”

*Note: For the purposes of a 4th amendment issue, agency principles apply. When the government gets a private citizen to do something, they act as a proxy for the government, so the 4th amendment would apply.*

**Florida v. Riley (1989) p.108** - Police Helicopter flew over Riley’s house and saw marijuana growing from 400 feet in the air and was enough to obtain a search warrant. If one member of the public can witness something, then it defeats a reasonable expectation of privacy. The circumstances of this case (an expensive helicopter hovering over Riley’s residence 400 feet in the air) is not one an average member of the public could have been put into, but the court reasons that any member could legally have flown over and witnessed the marijuana.

**Backdrop to** *Florida v. Riley*

*Oliver v. US (1984)* **–** no reasonable expectation of privacy in open fields, even if the police trespass to get there. In *Oliver* the police had to bypass a locked gate and a no trespassing sign. No reasonable expectation of trespass, because people trespass.

*California v. Ciraolo* (1986) – the police got a private plane and flew over defendants backyard at 1000 feet. The backyard is considered curtilage to the home, which is given heightened protection. The defendant had a greenhouse with marijuana in it, but there was no search and seizure because there was no reasonable expectation of privacy (even though there were large fences around the greenhouse).

*US v. Dunn* (1987) – Combines the previous two cases. The police trespass onto land, climb over two fences and bypass a no trespassing sign, they look into a barn from an open field (the barn door is slightly opened) and they see a manufacturing plant for drugs. They use that information to get a warrant, and the Supreme Court says no search and seizure, saying the defendant did nothing to protect against trespassers.

*Bond v. United States- 529 U.S. 334 – footnote, p. 108.* “Physical invasive inspection is simply more intrusive than purely visual inspection… When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handeled. He does not expect other passengers will feel it in an exploratory manner. Therefore the agent’s physical manipulation of petitioner’s bag violated the Fourth Amendment.”

*United States v. Place* – dog sniffs are not searches and seizures, smells are not protected. A sniff is not intrusive and thus is not constitutionally protected.

**United States v. Karo (1984) p.111** - In *United States v. Knotts*, 460 U.S. 276, the Court held that the warrantless monitoring of an electronic tracking device (beeper) inside a container of chemicals did not violate the 4th Amendment when it revealed no information that could not have been obtained through visual surveillance. They had enough probable cause to get a warrant, so no exclusionary rule.

The can in which the beeper was placed belonged at the time to the DEA, and the respondents then had no expectation of privacy in it.

**A seizure of property occurs when “there is some meaningful interference with an individual’s possessory interests in that property.” p.112 REASONABLE INTERFERENCE.**

No expectation of privacy when a police department records a pen registry (recording the outgoing numbers that you dial). They justify it by saying that if you share that information with the phone company, you are sharing it with the police as well.

**Kyllo v. United States (2001) p.115** - Agent tipped off that Kyllo was growing marijuana in his triplex. He used a thermal imager to scan the triplex and detect infrared radiation from the lightbulbs used to grow the marijuana. The results were enough to get a search warrant and the agent found over 100 plants.

Technology has changed the scope of the 4th Amendment, but Scalia says the line between the entrance to a home must be very bright and clear. The original intent of the 4th Amendment would not allow this intrusion.

**Standard for technology use:** Whether it is in use by the general public (not whether it is available to the public, but whether it is in use, and more commonplace).

This might eventually make the standard *Katz* made obsolete as technology continues to get even more complex. Maybe we will revert to the property approach?

**United States v. White (1971) p.120** - A government informant wore a radio transmitter and engaged in four conversations with White allowing the police to overhear incriminating remarks regarding his involvement in drug trafficking. Court of Appeals read *Katz* as prohibiting testimony from the electronic devices, but SCOTUS turned to *Hoffa v. United States.* Based on this principle, **the law should not protect a person from being recorded if they do not have the protection from the agent himself.**  This is distinguished from *Katz* because the conversation was overheard, it was not being told to the particular agents taping the conversation.

**Hoffa v. United States** - No matter how much you trust a colleague, your expectations of that trust are not protected by the 4th Amendment when you invite him onto your property and tell him incriminating information, which he then goes and tells the police.

The “4th Amendment affords no protection to a wrongdoers misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”

Important Fucking Principles to Take from these Prior Cases:

1. The extent to which something is exposed to the public. If the public can do it, or see it, so can the police. Even if the public can just conceivable get into an area or see something, so can the police without violating your 4th Amendment Right to privacy.
2. Invasiveness is a factor to be considered in the police action. Think *Bond* (police feeling the suitcase which was held to be too invasive). Smelling a scent for instance, is not invasive.
3. Open Fields Doctrine --> the court has very little respect for open fields. Also look at the distinction between houses and cars. Court has held it was ok to trespass on a man’s property and put cameras in the woods to catch him hunting endangered ducks because of the “open field doctrine.”Cars are on public roads, they have windows that you can peer into, and they aren’t mentioned in the Fourth Amendment.
4. Technology - whether it is used by the public depends on whether it will be able to be used by the police (not whether it was available, but more so how commonplace it is).

**STANDING**

A qualifier for bringing a 4th Amendment violation. You cannot claim the violation unless it was **your reasonable expectation of privacy**. 4th Amendment rights are personal only you can assert 4th Amendment rights, or they have to search a place that **you** have a reasonable expectation of privacy. The person asserting the claim has to be the victim.

TWO COMPONENTS:

1. Whether the proponent of a particular legal right has alleged “injury in fact,” and
2. whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties.

Suppression is not a remedy, it is merely a deterrence for preventing 4th Amendment violations.

Standing is not a deterrence. It just asks whether the search and seizure violated the rights of a criminal defendant asserting a 4th Amendment right.

**Derivative Standing: (does not exist)** say there are two people in the car and the police search it. The driver has a reasonable expectation of privacy regarding their stuff in the trunk. But say the cops search the trunk and find drugs, guns, etc without probable cause. The evidence will be thrown out against the driver because he had a reasonable expectation, but the evidence could still be used against the passenger because he did not have an expectation. Derivative standing would allow the passenger to have standing against the violation, but SCOTUS shut that argument down. This is why we “sever” cases. We split them up and prosecute the passenger separately.

**Rakas v. Illinois 439 U.S. 128 (1987)** - Police stopped a car suspected in a robbery. The owner was driving, and the petitioners were passengers. The cops found a a box of shells and a sawed off shotgun in the car. The passengers tried to suppress the evidence but the trial court said they had no standing since they did not own the car. Plaintiff’s argument fails because they could assert neither a property or a possessory interest in the automobile, not an interest in the property seized. They did have standing to contest the seizure, but they did not because the police had good reason to stop the vehicle. **Distinguished from** *Jones.* **However**, if it was an unconstitutional seizure, the plaintiff’s could have suppressed everything.

 Plaintiffs tried to assert **Target Theory Standing -** would permit a defendant to assert that a violation of the 4th Amendment rights of a third party entitled them to have evidence suppressed at their trial. Says that the person or persons who the search was directed at should be given standing.

The Court does not think that there is enough justification to extend the exclusionary rule to third parties when weighing the social benefits and costs.

**Similarly...**

**Jones v. United States -** Jone’s girlfriend is out of the house and he is hanging out there. He has standing because he is legitimately on the premises. In *Rakas*, the court re-characterized *Jones*, saying that it was more than legitimacy, because he had a key, he had clothes there, etc… and he had a reasonable expectation of privacy.

What if the defendant in *Jones* doesn’t borrow his girlfriend’s car, what if he steals it? When you steal a car, you have complete custody and control, but you do not have a reasonable expectation of privacy that society is ready to accept (footnote 9 in *Rakas*).

**Rawlings v. Kentucky 448 U.S. 98 (1980)** - Police pull up to a college house and Rawlings gives his girlfriend (of two days) 1000 hits of acid and asks her to put them in her purse. They make everyone stick around until they get a warrant, unless they consent to a search, in which case they can leave. Girlfriend empties out purse and Rawlings claims the LSD.

The search was unconstitutional (they didn’t have a warrant), but even so, the purse was not Rawlings, so he couldn’t assert a 4th Amendment violation. Rawlings even said that he didn’t have a reasonable expectation of privacy. Can not claim a fruit of the poisonous tree violation.

**Attenuated Circumstances Doctrine -** Rawlings couldn’t say that since the initial holding was a constitutional violation that the search should be thrown out, because the proximate cause-chain is too long.

Intervening Circumstances - Free Will - Rawlings took responsibility for the drugs on his own accord.

**To take something, the police must have probable cause to believe that the thing they are taking is the fruit or instrumentality of the true crime (plain view doctrine). The criminal nature of the item must be readily apparent.**

**Ybarra v. Illinois** – the police have this warrant to go in and search a tavern. When they show up to execute the warrant, they do pat downs on all the people in the tavern. They said probable cause to search a tavern does not give you probable cause to search and seize the people in the tavern.

**Minnesota v. Olsen (1990)** - Overnight guests have a reasonable expectation of privacy in someone else’s house, at least in regards to the room they are staying in. It’s like a home away from home. Applies to a hotel room as well.

**Minnesota v. Carter**

 **(1998)** *-* People fly in to package some cocaine and pay the people they stay with in an ounce of cocaine. Someone walks by and sees them doing some lines, calls the cops, and the police verify it. Police wait until the suspects came out of the house and put the stuff in the Cadillac. You don’t need a warrant to stop a car, but you do to go into a house. Probable cause for the stop is that they looked into a window and saw the coke being packaged… was that a search? They looked into the house without a warrant. Was there a reasonable expectation of privacy? Probably not under “plain view.” And even if there is a reasonable expectation of privacy, can the guests claim it? The court says the guests have no standing to challenge the search and seizure.

**What is the Fourth Amendment?**

1. **Reasonable Clause**
2. **Warrant Clause**

**If you want to see what a reasonable search and seizure is, go to the warrant clause. The Supreme Court has read the warrant clause loosely.**

**What is Probable Cause?**

A reasonable ground for belief of guilt and belief of guilt must be **particularized** to the person to be searched or seized. You can’t just freeze a room, you have to have particularized cause for each individual.

**Footnote 13, p.138 –** Probable cause requires only a **probability or substantial chance** of criminal activity, not an actual showing of such activity.

Its not some gut feeling, it has to have a reasonable ground for belief and guilt. It must be particularized. Has to be a particular person, or place. Probable cause to search is the same as probable cause to seize. There is a reason why you only have 8-12 hours or something to use a search warrant.

PROBABLE CAUSE

**Spinelli v. United States (1969) p.128** - Police observe Spinelli over a period of a few days and get an arrest warrant based on their observations and a tip from a confidential informant. Court uses *Aguilar* to assess the validity of the warrant. Court determines the tip which led to the warrant, although corroborated to an extent, was not sufficient to provide the basis for a finding of probable cause.

**Two Part Test: Magistrate must**

1. **be informed of the reasons and basis of knowledge that the informant should be trusted, is reliable and credible; and**
2. **has to be given facts/underlying circumstances relied on by the person providing the information.**

This information provided to a magistrate will allow the magistrate to make an independent evaluation of the probable cause that a crime has been or will be committed.

**Aguilar v. Texas** - search warrant was obtained based on an affidavit of police officers who swore that they received reliable information from a credible person and believed narcotics were being illegally stored on the described premises. Hearsay is enough to get probable cause in some situations, but in this case:

1. the application failed to set forth the underlying circumstances that could enable a magistrate to independently judge the validity of the informant’s conclusion where the drugs were; and
2. the officers did not attempt to support or claim that the source was credible or reliable.

**Illinois v. Gates (1983) p .131** - **essentially overturns the two-pronged** *Spinelli* **test.** Police received an **anonymous** **tip** about a couple smuggling drugs, observed their operation in action, and got a warrant. After searching the car and house, they found tons of marijuana and weapons.

Justice Rehnquist argued that an informant's veracity, reliability, and basis of knowledge are important in determining probable cause, but that those issues are intertwined and should not be rigidly applied. He argued that the "totality-of-the-circumstances" approach to probable cause was the correct one to glean from Spinelli, and that the law enforcement officials who obtained a warrant abided by it in this case.

**Gives great deference to a magistrate’s determination of probable cause by reviewing courts. No de novo review. p.135**

“...the traditional standard for review of an issuing magistrate’s probable cause determination has been that so long as the magistrate had a ‘substantial basis for concluding’ that a search would uncover evidence of wrongdoing, the 4th Amendment requires no more.”

**relies on Draper v. United States** - A tip from a reliable informant, which is corroborated by predicting facts unknowable to a stranger, gives rise to probable cause. In this case the informant gave information telling of the outfit that Draper would wear, which train he was getting on, what time, etc.

**Maryland v. Pringle (2003) p.146** - “The substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that the belief of guilt must be particularized with respect to the person to be searched or seized.”

* a car passenger--unlike the unwitting tavern patron in *Ybarra*--will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing.
* In **Di Re,** the Court said “any inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person.” In this case no one took the blame, so everyone was a suspect, and the police officer had probable cause.

**SEARCH WARRANTS**

**Maryland v. Garrison (1987) p. 148** - Baltimore Police issued a warrant to search McWebb and “the premises known as 2036 Park Avenue Third Floor Apartment.” When the warrant was being executed, they reasonably believed that there was only one apartment on the third floor as described in the warrant. Before the police realized they were in Garrison’s Apartment, they found contraband.

Issue was whether the warrant and seizure violated the particularity requirement in the Warrant Clause of the 4th Amendment (purpose being to prevent **general searches).**

**Test:** the validity of the warrant must be assessed on the basis of information that the officers disclosed, or had a duty to discover and disclose to the issuing magistrate. Under **Hill v. California** - the validity of the search of respondent’s apartment pursuant to a warrant authorizing the search of the entire third floor depended on whether the officer’s failure to realize the overbreadth of the warrant was objectively understandable and reasonable.

**Unlike** *Leon-Good Faith* **because both parties acted in good faith.**

**BLACK LETTER RULE:** Even if a search warrant would be technically defective because it is overbroad, if the error is based on information that the police gave the magistrate and the information is reasonable, and the magistrate acted reasonably, the warrant is valid.

Issues with Warrants:

1. Timing Issues - probable cause to search does not last forever. The 4th amendment imposes (albeit broad) constraints. Some state statutes take care of how long you have to impose a warrant. In Virginia you have ten days, but in Henrico you only have 48 hours.
2. Mode of Execution - *Richards* - The 4th Amendment incorporates the common law rule that before you enter with a warrant you have to knock and announce your identity (citing *Wilson*). There are cases where it is reasonable to forgo the knock and announce (and there really isn’t a deterrent not to). *see also Hudson v. Michigan*.

**Groh v. Ramirez footnote a, p.149** - If an affidavit is incorporated into the warrant, it will meet the particularity requirement of the warrant. If the warrant and the affidavit are stapled together, and they contain different information, the warrant will be facially overbroad and there is no *Leon-Good Faith*. Smart magistrates incorporate affidavits into warrants.

**Kentucky v. King** - Police are looking for someone and see him enter an apartment building. They follow him (isn’t quite a chase scenario either), and lose him as he goes up the stairs because he enters an apartment--they don’t see which one. The cops smell marijuana outside an apartment door and said “Police.” They here bustling and moving around and enter the apt and find drugs. The suspect was not in that apartment.

Cops did NOT have probable cause to make a forcible entry, but when they heard moving around (scuffling), they have probable cause to believe the drugs/contraband are being destroyed. If King had just sat there and not moved around, the cops would not have been able to come in, but moving around aroused suspicion.

**BLACK LETTER:**

*Reasonableness restrictions on the scope of the search – the scope of the search is defined by the object of the search and the places it could be concealed, i.e. if the cops are looking for a TV, they can’t look in your pocket. Anything else they find along the way is in “plain view” and is fair game.*

*A search is where you have a reasonable expectation of privacy, and a warrant allows you to intrude on that privacy. Your expectation of privacy is overcome by the warrant. What do you have to be able to do to seize an item? The incriminating nature of it has to be readily apparent, or if you had some kind of inside information you could have probable cause.*

**Richards v. Wisconsin (1997) p.154** - Police requested a warrant to enter a hotel room and asked that it allow “no knock” entry. The magistrate gave them a warrant but omitted the “no knock” part. A cop disguised as a maintenance man knocked on the door and Richards cracked it open. When he realized there were cops outside, he shut the door and the cops rammed it open. They caught him with drugs.

Richards tried to suppress the cocaine by saying the cops failed to knock and announce. Wisconsin wants a blanket exception to the rule.

SCOTUS looks to **Wilson v. Arkansas** that says “under circumstances presenting a threat of physical violence, or where police officers have a reason to believe that evidence would likely be destroyed if advance notice were given” the ‘knock and announce’ rule could give way.

**RULE**: In order to justify a “no knock” entry, the police must have reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.

REASONABLE SUSPICION is a much lesser standard than PROBABLE CAUSE.

-**How long you have before you can ram open the door** depends on the size of the house (hotel rooms = a few seconds; mansions = a few minutes (although see note b. p.157- **says there is no reason to give the proprietor of a mansion a longer wait than the resident of an apartment or bungalow because prudent drug dealers keep their drugs near sinks/toilets -** *Banks*)).

 In Fact--> The Court unanimously held that 15 to 20 seconds was a reasonable period for police to wait before entering by force when they were investigating drug charges because waiting any longer was likely to result in the destruction of evidence. Justice David Souter, writing for the court, stated that "while we agree... that this call is a close one, we think that after 15 to 20 seconds without a response, police could fairly suspect that cocaine would be gone if they were reticent any longer."

**Hatfield** - a police officer knocks but doesn’t announce when the defendant is in a hallway room and just says “come on in.” Defendant says the cop violated the knock and announce, but Court holds that knock and announce only applies to **Forcible Entry**. Cops can get lucky if you tell them they can come in.

**WARRANTLESS ARREST AND**

**SEARCH OF PERSONS**

**United States v. Watson (1976) p.158** - A reliable informant told a federal inspector that Watson had supplied him with a stolen credit card and agreed to get him more. At the meeting, the informant signaled the inspector when he saw Watson had the cards and he was arrested without a warrant.

Court says that government officers are allowed to make arrests without a warrant for both misdemeanors and felonies committed in the presence of the officer or when there is probable cause to do so.

**Promptness Requirement of Gerstein p.159 footnote a** - If you make a warrantless arrest, a magistrate must make a determination that there was probable cause within 48 hours of the arrest -- regardless of whether or not it is a weekend or holiday.

**United States v. Robinson (1973) p. 163** - Officer pulled over Robinson b/c he suspected he was driving with a revoked license. He placed him under arrest and instructed that he was going to pat him down. He pulled out a cigarette pack in his shirt and found heroin.

Justification for Search Incident to Arrest: to disarm the suspect in order to take him into custody and also to preserve evidence on his person for later use at trial.

A search incident to arrest is not only an exception to the warrant requirement of the 4th amendment, but is also a “reasonable” search under the 4th amendment.

This general exception has historically been formulated into 2 distinct propositions:

1. a search may be made of the person of the arrestee by virtue of the lawful arrest.
2. a search may be made of the area within the control of the arrestee. When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape.

**You can seize things if the incriminating nature is apparent.** In this case, feeling and seeing the cigarette pack is not enough to open the pack, but since it was search incident to arrest, it was upheld. Also plays into inevitable discovery --> there would have been an inventory search back at the station.

**When there are exigent circumstances, i.e.** *Cupp v. Murphy***, footnote b, p. 166- you can seize evidence prior to an arrest. You just need some probable cause.** In this case a man had blood on his fingernails and the police wanted to preserve the evidence since he was trying to wipe it off.

* **Knowles v. Iowa** – you do not get a search incident to arrest if you issue a summons. You have to arrest someone to get search incident to arrest. There must be a custodial arrest. Also, you don’t need to handcuff someone to arrest them, although;
* The search area can change if you have hand cuffs on, so there might be an incentive for a cop not to put hand cuffs on because it would decrease the area that is in the arrestees immediate control. The circumstances might vary (is there a locker? Is it locked? –couldn’t get into it).

**PRETEXTUAL STOP - Stereotype**

**Whren v. United States (1996) p.171** - plain clothes police officers were patrolling and saw a pathfinder with temporary tags on with youthful passengers acting suspicious in a high drug area. Car made a turn without a signal and sped off. Police followed it, pulled up next to it and told them to put the car in park after identifying themselves as cops. He saw in plain view that there were two plastic bags of crack cocaine in the Whren’s hands. Petitioners were arrested and argue that the search and seizure was illegal.

The unanimous Court held that as long as officers have a reasonable cause to believe that a traffic violation occurred, they may stop any vehicle.

Regardless of pretext for pulling someone over, the arrest will not be made invalid. And that a “lawful post arrest search of the person would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches.”

**Rule:** In a conventional civil traffic stop, the Fourth Amendment is met by the traditional common-law rule that probable cause (or reasonable articulate suspicion) justifies a search and seizure.

**Was there a stop?**  Yes, when the cop told the guy to turn off his engine.

TWO OBJECTIVE REASONS FOR PULLING SOMEONE OVER:

1. probable cause (*Whren*) - completely objective, context doesn’t matter
2. reasonable articulable suspicion of criminal activity (*Terry*)

**Atwater v. City of Lago Vista (2001) p.176** - Woman gets pulled over in her truck for violating a Texas law for not wearing a seatbelt, punishable by $25-50 fine. The offense warrants a citation rather than arrest, but Ms. Atwater was arrested (and humiliated) for violating the law.

The Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine. "If 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," wrote Justice Souter for the Court.

**You can get arrested for violating any law.**

**REINFORCING WHREN --> Virginia v. Moore (2008) footnote a p.180** - Moore was arrested for driving on a suspended license which warrants a citation and a summons to appear in court. The Police instead arrested Moore and read him his Miranda Rights. They asked for consent, and received it to search his hotel room where they found a lot of cocaine.

The search incident arrest violated a VA state law, but was it unconstitutional? SCOTUS says it was not unconstitutional in a unanimous opinion.

Moral of the story - having a dangling object in your car can get you pulled over, arrested, and your car impounded where a dog sniffs it and finds drugs and you go to jail. Its all admissible.

**Tennessee v. Garner (1985) p.182** - cops get a call from someone saying there is a break in next door. Cops arrive and see a suspect fleeing in the backyard about to climb a fence. Cop tells him to stop, he doesn’t, and cop shoots him (kills him by shooting him in the back of the head).

SCOTUS said that killing Garner was an unreasonable seizure. The reasonableness of a search and seizure has to be determined looking at the manner of the search and how it is carried out.

If an officer has probable cause to believe that the suspect poses the threat of serious bodily harm, either to a fellow officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. When the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.

**WARRANTLESS SEIZURE AND SEARCH OF THE HOME**

**Payton v. New York (1980) p. 189** -police suspect Payton of murdering a gas station attendant and go to his house thinking he was there (without a warrant). The cops acted under a NY law that allowed cops to enter a house to make a felony arrest without a warrant. They found incriminating evidence connecting Payton to the murder, and Payton moved to suppress it. The cops did not lack probable cause to believe that Payton was home when they entered, but it is a basic principle of the 4th Amendment that searches and seizures in a home, without a warrant are presumptively unreasonable.

 John Paul Stevens: **The Fourth Amendment, as applied to the states by the Fourteenth Amendment, "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest."** Warrantless arrests and searches went to the core of the Fourth Amendment's protection of privacy in a citizen's dwelling. This protection was too important to be violated on the basis of a police officer's on-the-spot decision regarding probable cause. In the absence of special circumstances, a search of a residence is permissible only after a finding of probable cause by a neutral magistrate issuing a search warrant.

**Steagold v. United States footnote b p.191** -In the absence of exigent circumstances, we have consistently held that such judicially untested determinations are not reliable enough to justify an entry into a person’s home to arrest him without a warrant, or a search of a home for objects in the absence of a search warrant.”

* 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.**
* The Fourth and Fourteenth Amendments of the United States Constitution (”Constitution”) prohibit warrantless entries for searches of homes, absent exigent circumstances, even when there is probable cause.

**Santana** *-*  when you are standing right there in the doorway, you are exposing yourself to the public and are able to be arrested, because an officer does not have to actually enter the home to get you.

Paytonsays you may not cross the threshold, even if you can see through a screen door.

You don’t need a warrant to get into a business. A business does not carry the sanctity of a home.

**EXCEPTIONS:**

* **Community Care/Emergency Doctrine:** if the police hear someone screaming, they do not need a warrant to enter the home. They don’t even need probable cause; they are acting like a 9/11 responder. Once they enter the home, anything they see in plain view is fair game. *See* **Brigham City v. Stewart** – footnote a, p. 200 – police come in for community care doctrine and find stuff through plain view doctrine.
* **Exigent Circumstances Doctrine:** You do not need a warrant, but you do require probable cause. The difference is that there may be exigent circumstances (time constraints, etc.) that makes you have to enter a home without going through the proper channels for a warrant. ex. hot pursuit, danger to police officer, destruction of evidence. **note -** its ok for the police to play a role in creating exigent circumstances, i.e. if you do a lot of shuffling as a response to their presence they can enter (*Kentucky v. King*)

**Where does the home begin?** The threshold is the entrance to an individual’s house.

**United States v. Montana** - if you are standing in the doorway, you are enough in public to have it treated as though you are in public and can be arrested without a warrant. If there is a screen door, that runs into *Payton*, because you have to cross the threshold to get into the house, and that requires some kind of warrant or exigent circumstances.

Even though you don’t have a reasonable expectation of privacy (protection from a search) when you are standing in a window, the police still need a warrant.

**Chimel v. California (1969) p.194** -Man steals a bunch of coins, cops come to his house with an arrest warrant but he isn’t home. They search around the house and look through drawers, etc. and find coins.

A search for a person can extend into areas in possession of the defendant or under the defendant’s control. This search was unreasonable because the defendant could not fit into an underwear drawer.

Even if you have probable cause to search in someone’s home, you need a search warrant. The one exception is with a **Buie Sweep**.

**Maryland v. Buie footnote a p.196** -you can’t justify looking in a drawer, but you can look in closets, etc. without any justification. To go any further you need to have articulable facts which, taken together with the rational inferences from those facts would warrant a reasonably prudent officer into believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. **You cannot do a sweep if there is no arrest, although some lower courts have allowed it.** **A Buie Sweep has to be effectuated as a search incident to arrest.**

Anything that is seen in plain-view is fair game.

**Louisiana v. Vale (1970) p. 199** - Cops had arrest warrant for man and arrested him outside of his house after he was witnessed making a drug deal. The cops then searched his home and found narcotics as a “search incident to arrest.” SCOTUS says it was an invalid search because the warrant was to arrest him, not to search his home, and the arrest was made outside of this home.

**Segura v. United States (1984) footnote b(1) p.201** - *Segura* says that when you arrest someone in a home and want to search it (when you do not have a search warrant) you figure out a way to hold the status quo while you get a warrant. You don’t let anyone move and you wait until you get the warrant. SCOTUS says its OK to seize a house while you get a search warrant. They seized the house in *Segura* for nineteen hours and the court said that was okay.

**Illinois v. McArthur (2001) footnote 2 p.201** - woman is removing her affects from a trailer while police keep the peace, and as she leaves she says her husband keeps weed under the couch. Cops hold the man in custody outside the trailer while another cop goes and gets a warrant. Court held it was not unreasonable. **Factors explaining decision on page 202.**

**WARRANTLESS SEIZURE AND SEARCH OF VEHICLES AND EFFECTS**

**California v. Carney (1985) p.203** - Cop watched Carney approach a youth and bring him back to his motor home parked in a nearby lot and closed the blinds. The agent received **uncorroborated information** that the same motor home was being used by someone exchanging marijuana for sex. After the kid left, the police stopped him and he told them that it was a sex for drugs operation. Kid went back, cops got Carney to step out of the vehicle, they entered, saw drugs and scales and arrested him. They did not have a warrant or consent.

**Exception to needing a warrant called “The Automobile Exception**” set out in **Carroll v. United States** - holding that privacy interests in an automobile are constitutionally protected, but that the ready mobility of an automobile justifies a lesser degree of protection of those interests.

* **“Besides the element of mobility,** less rigorous warrant requirements govern because the expectation of privacy with respect to one’s automobile is significantly less than that relating to one’s home of office.”
* Subject to regulations of other vehicles. It is treated like a car—its not hooked up to utilities like one in a motor home park. It was also parked in a public parking lot.
* There is a compelling government need for regulation, and with such, inspection of vehicles. Therefore the privacy interest is not as important as in a home.
* The standard is the ready mobility of the vehicle. **What makes an automobile mobile? Footnote 3 on page 206.**
* **Two Justifications that drive the exception –** if the car is readily mobile and the fact that it is held to a bunch of regulations. Does it have a license plate or recent inspection sticker, is it on blocks, etc.
* A footlocker has a greater expectation of privacy than an automobile, **United States v. Chadwick** – dissent, p.206.

**BACKGROUND PRIOR TO GANT:**

**New York v. Belton (1981)** - Supreme Court recognizes the search incident to arrest doctrine in the context of an automobile. In that context, the grabbing area under *Chimel*, is the entire passenger area of the car (not the glove compartment box if its locked—split of authority when it is unlocked). The court interprets the grabbing area to being the entire passenger area, but factually that is much more than a realistic grabbing area. So under *Chimel* and *Belton* the entire grabbing is the area under the control of the person who’s vehicle is being searched.

**Thornton v. United States (2004)** - when the police searched Thornton, he was already out of his car. The police said he was a recent occupant. The court said it doesn’t really matter if you are in the car or if you had just gotten out of the car. The court justified this as a protective search, but Scalia called bullshit in his concurrence:

 “If Belton searches are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested. This more general sort of evidence-gathering search is not without antecedent. For example, in United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950), we upheld a search of the suspect's place of business after he was arrested there. We did not restrict the officers' search authority to “the area into which [the] arrestee might reach in order to grab a weapon or evidentiary ite[m],” \*\*2136 Chimel, 395 U.S., at 763, 89 S.Ct. 2034, and we did not justify the search as a means to prevent concealment or destruction of evidence.1 Rather, we relied on a more general interest in gathering evidence relevant to the crime for which the suspect had been arrested.

Scalia just cares about the evidence. Remember in *Robinson* (cigarette box with heroin) the court said you could open containers.

**Arizona v. Gant (2009) p.207** - After Gant was arrested for driving under a suspended license, he was handcuffed and locked in the back of a police cruiser. Cops searched his car and found cocaine in pocket of his jacket in the back seat. Gant could not have accessed weapons at this time, so the Arizona State Court held that it was an unlawful search incident to arrest.

The search area defined by *Chimel* is “the arrestee’s person and the area within his immediate control—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” The scope of a search incident to arrest is supposed to be commensurate with its purposes of protecting arresting officers and safeguarding any evidence.

**Under Search Incident to Arrest:** “Police may search a vehicle incident to a recent occupants arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”

**This conflicts a bit with probable cause, because probable cause would basically supersede search incident to arrest, but it shouldn’t matter anyway because you can impound the car and search it. Right?**

**Scalia’s Dissent -** He argued that the majority improperly overruled its precedent in *New York v. Belton* which held that "when a policeman has made a lawful arrest… he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."

**California v. Acevedo (1991) p.215** - cops watched a man pick up a package from UPS that had marijuana in it. They followed him to his apartment and watched as two hours later Acevedo walked out carrying a paper brown bag about the size of one of the packages of marijuana. He placed it in his trunk, and drove off.

Look at **United States v. Ross** that held a warrantless search of an automobile under *Carroll* doctrine could include searches of a container or package found inside the car when such a search was supported by probable cause.

This case helps the court conclude that police do not need to obtain a warrant to open a bag/sack/briefcase in a moveable vehicle simply because they lack probable cause to search the entire vehicle.

* Just because the cops had probable cause to search the paper bag, does not mean they could have lawfully searched the rest of the car. The search only applies to areas where they have probable cause to search.
* Overturns *Chadwick* - in which you needed a warrant to search a briefcase even if it was in a car.
* Also overturns *Arkansas v. Sanders* - very similar to *Chadwick*

**Rule to Date:** If you are searching a car, you don’t need a warrant. The automobile exception to the warrant requirement stands, although you still need probable cause to search the vehicle if you want to search more than just the bag. However, the bag might give the police probable cause to search the rest of the vehicle.

New anomaly: if you walk down the street with something you need a warrant to search the briefcase, but once you put it in a car it is fair game to be searched without a warrant.

**Wyoming v. Houghton (1999) p.223** - cop stopped car for speeding and a faulty brake light. There were three people in the front seat, the driver and two girls. The cop noticed a hypodermic needle in the shirt pocket of the driver. Driver admitted it was for drugs. Houghton (a passenger) was searched and denied some of the drugs in her purse were hers. She tried to get the evidence suppressed but the court held the cops had probable cause to search the entire car, including her purse.

 **CASES used:**

 **United States v. Ross (1982)** – “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.” It applies broadly to all containers within a car, without qualification as to ownership.

 **United States v. Di Re.** - customs officials in the founding era of the country were allowed to examine packages and containers without a showing of individualized probable cause for each one.

 **Zurcher v. Stanford Daily** - “The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought.”

**Colorado v. Bertine (1987) p. 230** - Police officer performed a routine inventory search **before** the vehicle was towed to an impoundment lot. Cop found drugs. Bertine moved to suppress.

There is no warrant requirement under the 4th Amendment to search a vehicle under routine inventory search. **Inventory Searches are Exception to Warrant in 4th Amendment.**

 The Supreme Court held that inventory searches were reasonable under the Fourth Amendment of the Constitution. The Supreme Court noted that there were several policy reasons that would support the searches, namely to protect the owner’s property as well as to guard the police from not only accusations of lost property, but also to guard against any physical danger from anything in the vehicle.

 **The Supreme Court notes that the inventory searches should be in good faith, and that there was a standard procedure that was followed.** However, as the dissenting opinion indicated, “standard procedure” is a vague term that encompassed, in their opinion, too much. The majority counters that the police should not be required to have the best procedure possible, just a reasonable one.

**You don’t have to show good faith, but if you show bad faith it will invalidate the inventory search. Same thing applies for administrative searches, because they don’t rely on probable cause.**

**STOP AND FRISK**

* Two things that drive the decisions of the court are the larger sociopolitical factions/trends & the composition of the court.
* *Terry* came in the wake of the “Long Hot Summer of 1968.”
* lots of riots leaving a lot of people dead.
* Cops were abusing their powers in the ghetto and people were pissed the fuck off.

**BACKGROUND**

**Camara v. Municipal Court (1967)** - At least some 4th Amendment activity should be judged under a balancing test, that is, by “balancing the need to search against the invasion which the search entails.” **Sets up the stage for** *Terry v. Ohio***.** Up until now, the only way to search someone was with **probable cause** or search incident to arrest, which came as a result of an arrest (and you need **probable cause** to arrest someone).

Before *Terry* the cops would arrest people without probable cause to remove them from a scene. People were arrested not for prosecution, but for public policy.

**Reasonable Articulable Suspicion**

**Terry v. Ohio (1968) p.234** - a plain clothes detective became suspicious of two men standing on a corner eyeing a store and conversing. They kept walking up to the store and looking in the window about a dozen times. The detective confronted the men. The men mumbled, and the detective spun Terry around and pat him down. He felt a hand gun, which he removed, and charged him with carrying a concealed weapon. (**see class notes on how the court** *could* **have decided this case.)**

The issue was whether the detective was able to seize a person and subject him to a limited search for weapons without probable cause for an arrest.

**Test:**

Balancing the need to search or seize against the invasion which the search entails. And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.

 The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Due weight must be given to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Notes:

* **Michigan v. Long footnote b, p.241** - extends the self-protective search principle of *Terry* to search of a car.
* **Pennsylvania v. Mimms** & **Maryland v. Wilson** - Without any showing that a person may be armed, a police officer may request that a person lawfully stopped in their car must step out of their vehicle in order to “diminish the possibility, otherwise, substantial, that the driver can make unobserved movements.” **This applies to passengers as well as drivers.**
* A *Terry* Stop is the same as an investigative detention. It is not an arrest, it’s a seizure. It is an objective standard, like in Whren, where the intent of the police officer does not matter.
* You need reasonable articulable suspicion for a stop, but in order to frisk a person, you need reasonable articulable suspicion that the suspect is armed and dangerous.
* **U.S. v. Henley** - tells us that *Terry* applies to past crimes as well as present crimes
* Anything the cops find in the process of a *Terry* pat down is fair game as long as they have justification to be there.
* Containers found on a *Terry* stop generally are not fair game. So if you have an altoids container and that is all the cop finds, he cannot open it without probable cause.

**What is a Seizure?** p. 237 footnote 16 - “Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘**seizure**’ has occurred.”

**Florida v. J.L. (2000) p.243** - an anonymous caller tipped off the police that a young black man wearing a plaid shirt was carrying a gun at a bus stop. The cops arrived on the scene and had no reason to suspect that J.L. had a gun other than the anonymous tip. They ordered him to lean up against the bus stop, frisked him, and seized a gun.

**Rule:** An anonymous tip, without more, is not sufficient to justify a police officer’s stop and frisk of that person.

There are situations when an anonymous tip, corroborated exhibits “sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop.”

Knowledge about someones future movements indicates some familiarity with the persons affairs (i.e. in *White*, the informant predicted the kind of car the woman would get into, where she was headed, etc.--but even *White* was considered a close case).

EXCEPTION:

* **Virginia v. Harris** - traffic stops are less invasive than stopping a person on the street (according to SCOTUS), so tips that someone is driving drunk is enough to stop a vehicle. footnote a, p. 245. NOT APPLICABLE IN VIRGINIA - police officers must confirm drunk driving through erratic behavior, etc.
* The key is predictive information. In the present case, the police had no way to determine whether the tip was reliable.
* **Sliding Scale** - If the informant said there was a bomb, the cops would be justified to search the person. The deterrence of calling in a fake bomb threat is the possibility of going to prison.
* Use *Spinelli*/*Gates* to determine credibility of informant and the information given.

**Illinois v. Wardlow (2000) p.246** - Wardlow saw a police car drive by while he was in a heavy drug trafficking area. He fled, and the police followed. They patted him down and found a .38 handgun and arrested him.

* “The determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.”
* **Florida v. Royer** – if an officer, without reasonable suspicion or probable cause approaches an individual, the individual has a right to ignore the police and go about his business. Any refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure. *But* unprovoked flight, by its very nature, is not “going about one’s business.”
* Unprovoked flight from a high drug area is enough to give reasonable articulable suspicion to the police. You can walk away, but you can’t run.

**Florida v. Royer (1983) p.249** - Royer purchased on 1-way ticket from Miami to NYC. Cops performed a *Terry* stop and questioned him continually until they retrieved his bags without his permission, caused him to miss his flight, and opened his bags--finding marijuana. When the police moved Royer from the main area to the back room, it was unreasonable (pulling his luggage and making him miss his plane). It was a de facto arrest. The court held that this seizure was more restrictive than a *Terry* stop, and so it would have required probable cause, and because there was no probable cause, there is a 4th Amendment violation. Probable cause didn’t come until they found the drugs.

* Scope of a warrantless search must be confined to the scope that is justified --case by case analysis
* interrogation must be of a reasonable duration.
* **United States v. Sharpe (1985) p.251 footnote b.** - Police do not have to use the least restrictive means necessary, they just need to be **reasonable.**
* **Even though he let them open his bags, it was the fruit of the poisonous tree, because the seizure was unreasonable under** *Terry***.**
* When a reasonable person would think that they could not get up and leave, they are seized.
* **Hiibel v. Sixth Judicial District (2004) footnote c, p.243** - Court upheld a state statute that says the police can stop someone and make them identify themselves. The 4th Amendment doesn’t require you answer any questions, but you have to “Stop and Identify” under the statute.

 **United States v. Drayton (2002) p.256** - two guys are riding in a greyhound bus in Tallahassee when the police board it as part of a routine interdiction effort. It was hot outside and these two kids had puffy coats on (filled with cocaine). The cops ask if they can pat them down and they say yes (even though they had every right to say no). They get arrested and try to suppress the evidence by saying the cops should have made them aware of their right now to be searched.

* the interesting thing is these kids thought they were seized, and if they were seized it was an illegal seizure because there was no articulable suspicion to do a *Terry* stop.
* The Supreme Court says “the proper inquiry is whether a reasonable person would feel free to decline the officers’ requests to otherwise terminate the encounter.”
* The court looks at the totality of the circumstances: were they blocking the exit to the bus, did they tell you whether you could leave, etc. basically whatever you think is reasonable under the circumstances.
* The police cannot use your refusal to find individualized suspicion

**Two Ways to Seize Someone**

1. **Show of Authority -** *Drayton*says that the show of authority must be strong enough to show that a reasonable person could not have refused the search. **California v. Hodari D (1991) footnote a, p.258** - The defendant said he was seized by show of authority. The court said it was necessary, but not sufficient. If he had submitted to the seizure, it would have been unlawful. The fact that he threw the coke before the seizure kind of screwed him. There is no fruit of the poisonous tree because he threw the coke before he was seized, and after he thew it, it gave the police probable cause for a lawful arrest.
2. **By Physical Force - Sacramento v. Lewis** - the physical force has to be individualized. Intent matters; if the police do not intend to effectuate the search, it does not count.

**Brendlin v. California (2007) p.262** - Brendlin was in a car that was stopped for having expired tags. He happened to have a warrant out for his arrest and possessed drugs. He was arrested and they found the drugs. He claimed it was an unlawful search and seizure of his person. California argued that Brendlin had not been seized as a mere passenger by virtue of the vehicle being stopped.

The Court held that Brendlin would have reasonably believed himself to be intentionally detained and subject to the authority of the police. Thus, he was justified in asserting his Fourth Amendment protection against unreasonable seizure. The Court noted that its ruling would not extend to more incidental restrictions on freedom of movement, such as when motorists are forced to slow down or stop because other vehicles are being detained.

* *Arizona v. Johnson* – police officers pulled over a car and one of the cops frisked a passenger in the back seat because he was wearing gang clothing and admitted to serving some time in prison. She found a gun at his waist, and the Supreme Court held that it was lawful under reasonable articulable suspicion a la *Terry*.
* *Maryland v. Wilson* – during a lawful traffic stop, a cop may order a passenger out of a vehicle as a precautionary measure, without reasonable articulable suspicion that the passenger poses a safety risk.
* The intent under the Fourth Amendment is the “intent that has been conveyed to the person confronted.” It’s a subjective standard from the person who has been seized.

**United States v. Place (1983) p.265** - Place caught the suspicions of drug agents at the airport and they questioned him. The officers at the destination airport were tipped off that he was coming their way. The agents met him, and seized his bags without his consent. Ninety minutes after the seizure, dogs sniffed the bags and signaled there were drugs. Initially, the conviction was overturned on the ground that it exceeded the allotted time allowed in *Terry*.

* SCOTUS extends a *Terry* stop to a bag. So a police officer has more power than a magistrate could give you, because the magistrate couldn’t give them the authority to search the bag—they only have the ability to give them a warrant with probable cause.
* Place’s evidence was suppressed because the amount of time his bag was seized was longer than what a *Terry* stop would allow – but its not just the time, it’s the circumstances. The police did not tell Place where his bags were going, or the length of time they might be gone for. **The NY drug officers should have had a dog ready--then the evidence wouldn’t have been suppressed.**
* **Montoya v. Hernandez** - the police said you could keep someone for a long time depending on the circumstances (she was a drug mule, and they held her for 16 hours until she passed a bowel). That’s the longest someone has been held under a *Terry* stop. The question is what is reasonable? You look at the totality of the circumstances and look at what you are trying to find.
* *Terry Stops:* Must be justified in its inception (*Terry* stop established by reasonable articulable suspicion) and scope (can’t be too long or too far). In *Place* the scope was too broad.

LESSER INTRUSIONS: Inspections and Regulatory Searches

**Samson v. California (2006) p.270** - Samson was on parole and walking down the street with a woman and child. A dick police officer saw him and made him wait while he checked to see if he had a warrant out for his arrest. He didn’t but the cop searched him anyway because the state law said anyone on parole could be searched by an officer at any time for any reason. He found meth on Samson and back to prison he went.

Using a **Totality of the Circumstances** determination, the Court found that the search was reasonable within the 4th Amendment because Place did not have a reasonable expectation of privacy because he was on parole at the time of the effectuated seizure and subsequent search.

* **United States v. Knights** - required a probationer to submit his person, place of residence, effects, etc to search anytime without a warrant, or reasonable cause. “Probation is on a continuum of possible punishments ranging from solitary confinement in a maximum security prison to a few hours of community service.”
* Court determined by assessing, on 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.
* Probationary searches are necessary for the promotion of legitimate governmental interests. The government wants to integrate prisoners back into society and at the same time combat recidivism.

**Board of Education v. Earls (2002)** - Students at Tecumseh School District had to consent to urinalysis testing for drugs in order to participate in **any extracurricular activities**. Two students brought suit.

The Court held that, because the policy reasonably serves the School District's important interest in detecting and preventing drug use among its students, it is constitutional. The Court reasoned that the Board of Education's general regulation of extracurricular activities diminished the expectation of privacy among students and that the Board's method of obtaining urine samples and maintaining test results was minimally intrusive on the students' limited privacy interest. "Within the limits of the Fourth Amendment, local school boards must assess the desirability of drug testing schoolchildren.

* A search or seizure can be reasonable as long as there are standardized procedures
* **U.S. v. Lidster** - in the roadblock context, a search is reasonable as long as the police are using standardized procedures
* **United States v. Acton** - balancing test looking at urinalysis of student athletes and whether it is reasonable. They said athletes have a low expectation of privacy because they are in locker rooms getting naked all the time. There is also a special need because there was a particularized problem where all the drug users in the school were the athletes. In response, the court upheld the policy that they would drug test the athletes in this particular school.

Schneckloth v. Bustamonte (1973) p.278 - Man was pulled over for busted tail lights. Driver did not have identification, and the police officer asked if he could search the car. Guy said yes, and even helped the search. Cop found wadded up stolen checks in the back seat and the guy was charged. Issue was whether he really gave the officer consent.

The question of whether a consent to search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances.

Three Issues:

1. Voluntariness (*schneckloth*) – do the police have to tell you that you do not have to consent? No, they don’t. (continued ability to allow the police to capitalize on the innocence of citizens) After you are given your license back, you are free to go in a police stop. If you stay that’s voluntary.
2. Scope of Consent – You can revoke consent at any time up until the police find something and then the police will have probable cause and don’t need your consent anymore. The scope of consent is reasonableness. What would a reasonable person think they are consenting to? If a cop asks to look for stolen refrigerators, and they find some weed in a drawer in a cabinet – that would be outside the scope of the consent to search for refrigerators. Refusal to consent does not give probable cause, but there is a 4th Circuit case that said the “manner of the refusal to consent” could be used as a factor to consider probable cause.”
3. The Authority to Consent – you don’t have to have actual authority, you just need parent authority. As long as the police thought that you had the authority to consent (even though you didn’t have the authority), they still get consent.

**Georgia v. Randolph (2006) p. 285** - police respond to a domestic dispute and the wife says that the husband has drugs in the house. The husband says that the police can not come in, but the wife tells him to. The cop goes in and finds some cocaine residue on a straw. The wife then withdrew her consent. They took the evidence and couple to the police station, got a warrant, and seized drugs. Husband moved to suppress as products of a warrantless search of the house unauthorized by his wife’s consent over his express refusal.

* Supreme Court held that when two co-occupants are present and one consents to a search while the other refuses, the search is not constitutional.
* Objecting cohabitant can reject consent to search. Lower courts have been ripping this case to shreds. *Georgia v. Randolph* did not say that you have to get consent from everyone, it just says if they object you have to abide.
* The person who gives you consent doesn’t even need to be the owner of the house.
* children can give consent up to an extent, see page 287.
* the mere act of an objecting cohabitant can create an exigency which justifies immediate action on the police’s party--a fairly perceived need to act on the spot to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement.

THE RIGHT TO COUNSEL

**6th Amendment -** deals with your rights at trial.

“In all criminal prosecutions, the accused shall enjoy the right ... of assistance of counsel for his defense.”

**TWO ISSUES:**

1. Scope of the right to the assistance of counsel - when does it apply? The 6th Amendment says all “criminal prosecutions” but case law doesn’t reflect that.
2. What is the minimum requirement for effective counsel under the amendment.

*Powell v. Alabama* is the foundational case for what effective counsel is (Scottsboro case). Powell deals with both. The next big case is *Betts v. Brady*.

**Betts v. Brady (1942) p.315** - Man was charged with robbery, requested counsel, and was denied. Represents the special circumstances test. From about 1950 on, every case the Court gets it finds special circumstances to be present (the trend leading towards the incorporation of the 6th amendment).

* Black’s Dissent - the 6th Amendment should be incorporated into the 14th Amendment.

**Gideon v. Wainwright (1963) p. 318** - Landmark case that gives anyone charged with a felony the right to an attorney under the 6th Amendment, as incorporated through the 14th Amendment.

* **Illinois v. Griffin** - provided indigents with a copy of the court transcript because they couldn’t afford it. It only makes sense that if they couldn’t afford a transcript, they would need an attorney to help them understand what it meant.
* **Douglas v. California** - provided the right of counsel on an appeal. This was decided before *Gideon*, so they held onto it until a case like *Gideon* came along and released them together.
* Still only applies to felony charges, leaving indigents with criminal misdemeanor charges without lawyers.
* *Gideon* was codifying a practice that had been happening since *Betts v. Brady*, by saying that felonies in essence are special circumstances.

**Alabama v. Shelton (2002) p.320** - Court decides that Shelton was deprived of his 6th Amendment right because he was not afforded an attorney and received a suspended sentence.

* **Arsinger v. Hamlin** - You get an attorney if you are going to get jail time.
* **Scott v. Illinois** - You do not get an attorney if you could get jail time, you get an attorney if you will get jail time. The court, as a practical matter, will give you an attorney if they believe you might get jail time. If they don’t think you will get jail time, but its possible, a judge will stamp it and say you will not get an attorney, because you will not get jail time (or a suspended sentence). If you get your right to attorney taken, you basically get off almost free.

**Rothgery v. Gillespie County (2008) p.326** - Court held that a criminal defendant's initial appearance before a judge marks the beginning of the proceedings against him and triggers the defendant's Sixth Amendment right to counsel whether or not a prosecutor is aware of or involved in that appearance. This right to counsel applies whenever a defendant learns of the charges against him and has his liberty subject to restriction.

* Essentially, as soon as the government has committed itself to prosecute the sixth amendment attaches itself. It attaches at the initial appearance before a judicial officer.

**Douglas v. California (1963) p.333** - Court decides that indigents are entitled to assistance of counsel in a first appeal of right. Only applies to the first appeal, the right does not attach itself to all the other discretionary appeals.

**Ross v. Moffitt (1974) p.337** - Defendant is not entitled to an attorney on discretionary appeals because he/she has already been protected by an attorney at the initial state level.

**Halbert v. Michigan (2005) footnote b, p.341** - Court held that the due process and equal protection clauses required Michigan to provide counsel for defendants who wanted to appeal to the state appellate court. The Court reasoned that if indigent defendants convicted on their pleas did not have counsel to guide them through Michigan's complex appellate process, their right to appeal would not be meaningful. **Follows** *Douglas* **over** *Ross***.**

**INEFFECTIVE ASSISTANCE OF COUNSEL**

**6th Amendment**

Where has counsel been found to be ineffective?

* Where they have slept through court
* used cocaine during court
* Where counsel has stated on the day of the trial that he/she was not aware of any law on the subject

Where has counsel been found not to be ineffective?

* where they have consumed a lot of alcohol during trial, even getting a DUI on the way to court
* A real estate attorney has been allowed to try a death penalty case
* Where there was no closing argument, no interviewing witnesses, and no experts on trial

**Strickland v. Washington (1984) p. 746** - Man committed a lot of crimes and turned himself in. He gave a lengthy statement to the police implicating himself before he spoke with his appointed attorney. The defendant waived a lot of his rights against the attorney’s wishes, confessing to two murders. The court found that the aggravating factors outweighed the mitigating ones, and sentenced him to death. He claimed “ineffective assistance of counsel.”

For ineffective assistance, SCOTUS held:

1. counsel’s performance must be deficient (**defendant must demonstrate that counsel's representation fell below an "objective standard of reasonableness”); and**
2. the deficient performance must have prejudiced the defense so as to deprive the defendant of a fair trial (**defendant must show that there is a "reasonable probability" that,** *but for* **counsel's unprofessional errors, the result would have been different)**.

Always ask for a pre-sentence report (PSR) before sentencing. A lot of people don’t think of ineffective assistance of counsel at sentencing, but it does apply (*Strickland* is a landmark 6th amendment case and it deals with sentencing). If you have the right to counsel at trial, you also have it at sentencing.

**“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”**

* **Lockhart v. Fretwell footnote d, p.753**– the attorney did not know the law that would have favored the defendant, but on appeal, that law changed and did not favor him anymore. The Court held that the defendant was not entitled to the windfall. The court held that the defendant met both prongs of the *Strickland* test, but since the law changed, he was screwed.
* There is a strong presumption that the attorney has competence, and when determining this, the court will be highly deferential.
* **Burger v. Kemp** – same thing as *Strickland*, but the attorney offers absolutely no mitigating evidence at the capital sentencing hearing. But the defendant was a minor at the time, he had no adult criminal record, his IQ was only 82, he was exceptionally unhappy as a child (lived in a dog crate). Anyone of those things could have saved him from death. The court said it was strategy and held it was not ineffective assistance of counsel.
* **Kimmelmon v. Morrison** – Defense attorney mistakenly believes that he is entitled automatic discovery. Because he doesn’t ask, he doesn’t know about certain evidence (that’s in his favor), and as it turns out there was a valid fourth amendment claim because he didn’t do the discovery and have the facts. The Court said that was ineffective assistance of counsel.
* You can make an ineffective assistance of counsel plea even if you plead guilty. If you got the maximum sentence instead of the minimum however, the court won’t hear your case.

**Rompilla v. Beard (2005) p. 758** - Rompilla was indicted for murder and other offenses and the Commonwealth Attorney gave the public defenders notice that he was going to ask for the Death Penalty. The jury found him guilty, and the prosecution offered aggravating factors to justify the death penalty. The defense attorney didn’t think he had any good mitigating factors to go on, but there was a file available to him which showed the tormented childhood and mental handicaps that Rompilla had, and the attorney never opened it.

* In *Strickland*, the attorney felt hopeless but the court said it was strategy. In *Rompilla*, the attorney does a lot more than the attorney in *Strickland*, but the court still says ineffective assistance of counsel because he did not look.

**Florida v. Nixon (2004) p.770** -This case concerns the defense counsel’s strategy to concede at the guilt stage of the trial that the defendant was indeed guilty, and to focus on the penalty stage and cause for sparing his life.

The attorney cannot decide for the client whether or not to plead guilty or to ask for a jury trial… they can help them make that decision, but its for the defendant to make. However, an attorney can make a strategic decision and that is permissible… the client can fire you if they don’t like it. In this case, the strategy was very close to conceding guilt, but the Supreme Court lets it go in as strategy.

* “Defense counsel undoubtedly has a duty to discuss potential strategies with the defendant.” *Strickland*.

**Sears v. Upton (2010) not in book** - Cant show outcome would have been different (theory of prejudice) because the case was too strong.

The court says that just because you had a reasonable theory of the case, doesn’t mean you performed up to par. A reasonable theory in mitigation might be ok, but if you investigated better you would have had a better theory.

So even in *Strickland* where the attorney had a bad strategy, it was enough. But in *Sears*, even having a reasonable strategy might not be enough. The Court said that the attorney failed the “performance” prong because he didn’t investigate well enough.

* **Faretta v. California** – the right to counsel includes the right to not have counsel and to represent yourself. However, you cannot claim ineffective assistance of counsel if you choose to represent yourself.
* **Anders Brief** – Is when your client wants you to make a point of appeal, and you know it’s a loser point of appeal. If you don’t make the appeal, you have given ineffective assistance of counsel (even though you know it is a losing argument). You have to make the point for them, its their constitutional right. This is an “Anders brief” where you write down the points of appeal and make the best argument that you can, but then you need to say why it is not a sound legal argument.

**Always cite Strickland and use the prongs, and then look at the newer cases to see how the law has shifted. It has become a little looser (except maybe in Texas?) since so many innocent people have been locked up and put to death.**

**POLICE INTERROGATION AND CONFESSIONS**

**Right to Grand Jury is not applied through the 14th Amendment.**

**Ashcroft v. Tennessee (1944) p.345** - Police grabbed Ashcroft after his wife was killed and took him downtown. They interrogated him non-stop (with a five minute break) for 36 hours in a small room with a table and a light on him.

The Court says that the confession was reliable, but it was involuntary. It was a coerced confession. No court would permit a prosecutor to do what happened here. Custody and examination of a prisoner for 36 hours is “inherently coercive.”

There isn’t really a strong line drawn, it’s a *Totality of the Circumstances* determination. By the end of the 1960s the court has a multi-factored thirty part test to determine coercion. Everything is probative, but nothing is dispositive.

There is a problem with the voluntariness test, because all confessions are coerced in some sense. No one truly volunteers to confess. There is going to be compulsion, but how much is OK?

Court applies the **Voluntariness Standard.**

* **Watts v. Indiana** - Use of a confession obtained by relentless police interrogation is a deemed involuntary and thus a violation of the due process clause of the Fourteenth Amendment.
* There must be a government actor involved, because the right is to protect you against the government, not your neighbor.
* **Colorado v. Connelly footnote a, p.344** - man who was mentally ill was told he had to confess or commit suicide (by the voice of god). He really was factually guilty and murdered someone, but he told the police through coercion (that GOD coerced him into coming clean). He thought God told him to tell the police, but it didn’t apply because God is not a government agent.
* **Brown v. Mississippi** *- First Coerced Confession Case* **-** case where the black farmer was hung, and then let down and had rope marks around his neck in court. The sheriff got on the stand and said he beat him, but not too much for a negro. The Mississippi court affirmed the case, and the US Supreme Court said that’s bullshit and adopts a test. – *fundamental fairness standard by which we judge these cases.* This case establishes a voluntariness standard that is within the fundamental fairness.
* When the confession is thrown out there is an automatic reversal unless the state can show the error was harmless beyond a reasonable doubt. If this is shown, it will stand.
* **Spano v. New York** - Once a person is formally charged by indictment or information his/her constitutional right to counsel has formally begun—at least the right to assistance of counsel she herself has retained. This is the area of the proceedings where having an attorney is the most helpful for guilty parties (because if they make an admission, they’re screwed).
* **Croaker v. California (1958)** - last voluntary case that the Supreme Court takes in this 5-4 decision. No due process violation where the police ignore the defendant’s request for counsel because the defendant was otherwise intelligent and in law school, because he knew his rights. The court leaned on the personal characteristics of the defendant. The Court said he should have known that he didn’t need to talk.

**Massiah v. United States (1964) p.352** - Massiah was indicted on narcotics charges and pled not guilty. He was released on bond and met with his codefendant in a car. The car was being bugged by the codefendant, and the police were listening in on the conversation. The police convicted Massiah on the basis of the incriminating statements overheard with the transmitter.

Federal agents deliberately elicited incriminating words from Massiah after his right to an attorney (6th Amendment) had attached. He was more seriously imposed upon than even a prisoner in jail because he did not know he was under interrogation in the car.

The reason why this is a violation is because the information was elicited after Massiah had been arraigned.The government cannot “deliberately elicit incriminating information” from a defendant without an attorney.

The right to counsel doesn’t mean much if the defendant has already talked. You should be afforded counsel when you need it most.

**Escobedo v. Illinois (1964) p.356** - Plaintiff’s brother-in-law was fatally shot and he was brought in for questioning. He made no statement and was released the following day pursuant a writ of habeas corpus by his counsel. Ten days later, he and his accomplice were indicted for the murder, but his accomplice said Escobedo fired the fatal shots. The police set the two together where accomplice confronted him saying he might as well admit it. Escobedo just responded, “I’m sorry but I would like to have advice from my lawyer.” Escobedo never saw his attorney and was charged and convicted of murder.

The Court held that **where the investigation is no longer a general inquiry, but has begun to focus on a particular suspect, and that suspect is taken into custody and interrogated without counsel or being told he has the right to remain silent, the accused has been denied his 6th Amendment right to the assistance of counsel.**

* This was a voluntary confession – the dissent even says that. The defendant knew his rights, and there was no allegation of overreaching in this case except for the fact that the police denied Escobedo the right to see his attorney (violating the 6th Amendment).
* Massiah does not apply because Escobedo has not yet been arraigned. The court says that where the investigation is no longer a general inquiry, but has begun to **focus** on a particular suspect, and that suspect is taken into custody and interrogated without counsel (and he had to have an attorney and been denied assistance from the attorney) or being told he has the right to remain silent, the accused has been denied his 6th Amendment right to the assistance of counsel.
* The courts read this very narrowly, all the factors must be met. If you do not have an attorney at this point you are screwed, because the court does not appoint an attorney at interrogations. *Gideon* never made it that far.

**MIRANDA & THE 5th AMENDMENT**

**Because custodial interrogation is inherently coercive, you must give a** *Miranda* **warning.**

**You do not have Miranda Rights unless:**

1. **You are in custody**
2. **You are being interrogated**

**Cruel Trilemma** - accused were forced to chose between committing perjury (if they lied under oath to protect themselves), harsh punishment for contempt of court (if they refused to answer), or betraying their "natural" duty of self-preservation (if they told the truth to honor their oath).

* **Black Letter Points:** If the defendant asserts a right to silence, or the right to an attorney, the questioning must stop. If the questioning continues, Miranda violation. Or if you are in custody and you don’t get a Miranda warning prior to questions, that is a violation.
* Mosly - You can come back later and re approach the person in custody, but you must give them another *Miranda* warning (if they had asserted the right to silence).
* If a person asks for an attorney and he talks with the attorney, it doesn’t mean the cops can re-approach after the attorney leaves. It is like a cloak.
* Voluntary Standard - Totality of the Circumstances - still exists, so even after *Miranda* you can bring a claim of involuntariness, but if you were given a warning and decided to talk, it will be incredibly difficult to beat a case.

It is called the 5th Amendment Right to an Attorney, or the Miranda Right to an Attorney. Its a buffer to help you assert your rights, although most criminals do not have attorneys present in interrogation and waive their right to remain silent.

**Miranda v. Arizona (1966) p.362** - The Court held that prosecutors could not use statements stemming from custodial interrogation of defendants unless they demonstrated the use of procedural safeguards "effective to secure the privilege against self- incrimination." The Court noted that "the modern practice of in-custody interrogation is psychologically rather than physically oriented" and that "the blood of the accused is not the only hallmark of an unconstitutional inquisition." The Court specifically outlined the necessary aspects of police warnings to suspects, including warnings of the right to remain silent and the right to have counsel present during interrogations.

* Court says you have to read the *Miranda* rights. Even if you arrest a judge or a cop who knows about *Miranda*, you still have to read the rights regardless of prior knowledge.
* **Harris v. New York (1971) p. 381** - statements made in violation of Miranda cannot be used for the prosecution’s case in chief, but can be used if the defendant takes the stand to impeach them. Exception to Miranda.
* **Mincey v.** Arizona **-** If the statement being used to impeach is truly involuntary, it cannot be used even to impeach.
* Miranda does not apply to *Terry* stops, you have to be in custody, or the formal equivalent of custody.
* **Standard:** would a reasonable person think they were under arrest? page 386
* **Berkever v. McCarty p.381** - the roadside questioning of a motorist detained pursuant a traffic stop is quite different from station house investigation and thus should not be considered custodial interrogation.
* **California v. Beheler p.382** - if a suspect goes to the station house on his own or voluntarily agrees to accompany police to that site, even police station questioning designed to produce incriminating statements may not be custodial interrogation.

What Constitutes Interrogation?

**J.D.B. v. North Carolina (2010) not in book** - A 13 year old was interrogated in a school conference room about a possible burglary that he was suspected of. He appealed his conviction and said that he was not read his miranda rights. The Supreme Court said “the youth was in custody when he was interrogated.” "It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis.

**STANDARD FOR FUNCTIONAL EQUIVALENT OF AN INTERROGATION**

**Rhode Island v. Innis (1980) p.390** - Innis was arrested and was being driven to the station house. He was read his Miranda Rights and requested to speak with an attorney. During the drive, three cops started talking about the gun used in the crime and how special needs/handicapped children might find it and hurt themselves. Innis felt compelled to tell them where the gun was, and it was used against him.

Miranda safeguards come into play whenever there is express questioning or its functional equivalent, noting that the term "interrogation" under Miranda included "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 subject." The Court then found that the officers' conversation did not qualify as words or actions that they should have known were reasonably likely to elicit such a response from Innis.

* “… Words or actions that the police should know is reasonably likely to elicit an incriminating response” is the functional equivalent to an interrogation. If the person is an eggshell plaintiff, the police may be off the hook, because how could they have known that he was susceptible to talk.
* When you invoke your *Miranda* rights, the questioning needs to stop. If the cops stop questioning him, and the defendant who has invoked his rights decides to start talking, there is no violation. If he begins to speak because of coercion – it would be a fruit of the poisonous tree violation.
* The courts equate coercion in custodial control with coercion in the good old-fashioned involuntary context.

6th Amendment interrogation – police cannot deliberately elicit an incriminating response.

5th Amendment *Miranda* – police cannot use words or actions that they should know would be reasonably likely to elicit an incriminating response.

**Illinois v. Perkins (1990) p. 395** - While Perkins was in jail, he freely confessed to murdering someone while an undercover police officer was standing next to him. There was no coercion.

You can have custodial interrogation and still not have a *Miranda* violation if you don’t know you are talking to the police, because you do not have custodial coercion.

* **Takeaway:** *Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement.
* **Hoffa v. United States** - placing an undercover cop near a suspect in order to gather incriminating information was permissible under the 5th amendment.
* Same as the 4th Amendment, a person working as an agent for the police is not the police.

**Berghuis v. Thompkins (2010) p. 398** - Man is suspected for murder and is being questioned by the police. He remains silent for 2 hours and 45 minutes. He says he invoked his right by not saying anything for a sufficient time period, so the interrogation should have ceased.

The court says that he must invoke his right “unambiguously.” Thompkins **implicitly** waived his right to remain silent. **In sum**, a suspect who has received and understands *Miranda* rights and has not invoked them, waives the right to remain silent by making an un-coerced statement to the police.

* Right to counsel must be asserted unambiguously and unequivocally. Too much of a burden on society for a police officer to have to stop the interrogation because a suspect remains silent at the first sign of questioning.
* The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions.
* Any waiver, express or implied, may be contradicted by an invocation at any time.
* If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease.
* **United States v. Davis** - defendant, amidst questioning says “maybe I should talk with a lawyer.” He confesses and comes to regret not having an attorney. Court says “ *A suspect must unambiguously request counsel and articulate his request in a way that a reasonable officer would understand that the person wanted an attorney.“*
* **Commonwealth v. Hilliard** - VA LAW - stresses how clear you need to be when invoking the right to an attorney, but if you have already confessed that confession is fair game.
* Burden for waiver is very small after **Berghuis**, doesn’t need to be in writing.

**Maryland v. Shatzer (2010) p.407** - Shatzer was in prison serving a sentence for an unrelated crime when a detective tried to question him about allegations of sexually assaulting his own son. Shatzer invoked his right to counsel, and the detective ended the meeting. Two years later, another detective obtained more information and had another meeting with Shatzer. At this point he signed a written waiver of his Miranda rights. After 30 minutes, he made an incriminating statement.

* **Edwards v. Arizona (1981) p.382** - when a suspect asserts his right to counsel (as opposed to the right to remain silent), the police *cannot* re-approach. **Shatzer** added to this saying that the law remained, but that if the custodial suspect has experienced a 14-day break in *Miranda* custody between the first and second attempts at interrogation, the “government” may re-approach.
* Judicial rules (as opposed to rules prescribed by the constitution) only apply where the benefits outweigh the costs.

**6th Amendment Case -->**

**Montejo v. Louisiana (2009) p.416** - (Overturns *Michigan v. Jackson*) - The Court held in Michigan v. Jackson that the 6th Amendment protection cloak of an attorney was not triggered unless and until the defendant requests a lawyer or otherwise asserts his right. In Louisiana, attorneys are appointed, and Montejo stood mute when his was appointed. The Louisiana Supreme Court said unless he affirmatively accepted counsel, he did not yet assert his right.

* When a court appoints counsel for an indigent defendant in the absence of any request on his part, there is no basis for a presumption that any subsequent waiver of the right to counsel will be involuntary. *Jackson* and
* *Edwards* are meant to prevent police from badgering defendants into changing their minds about their rights, but a defendant who never asked for counsel has not yet made up his mind in the first instance.

**This is confusing, but here is the analysis:**

The 5th Amendment right to counsel attaches upon invocation (when the suspect requests an attorney). The 6th Amendment right attaches when adversarial proceedings begin, i.e. at the arraignment, etc. The presumption in *Jackson* tried to analogize the 5th Amendment right against self-incrimination through *Edwards* to the 6th Amendment right to counsel, not allowing the police to interrogate after the right was attached. In this case, Montejo did no assert his 5th Amendment right (he was mute at court and never mentioned it after), so he relied on his 6th Amendment right which attaches at his arraignment. The Court said that the police may reinitiate interrogation after his Miranda rights were read, but if he had asserted his 5th Amendment right to counsel and the adversarial proceedings had begun, the Police could not reinitiate questioning without counsel present and waiver (under *Edwards v. Arizona*), or unless the Defendant initiates the conversation and the police get a waiver.

**PUBLIC SAFETY EXCEPTION:**

**New York v. Quarles (1984) p.424** - Cop enters a supermarket and spots a suspect in a rape case. He frisks Quarles and hand cuffs him (de facto arrest). He notices an empty shoulder holster, and asks where his gun is. Quarles responds and they retrieve the gun.

The suspect says he was under arrest and being interrogated when the police asked him where his gun was, and that the evidence should be suppressed because he had not been read his miranda rights.

* This is not a constitutional violation because *Miranda* is a judicially constructed law and the court can morph it depending on policy concerns. The issue is that they cannot impose *Miranda* on the states if it is not constitutionally required, so this poses some problems.
* **Does not depend on the motivation of the police officers involved.** Things such as public safety, their own safety, and perhaps finding incriminating evidence. *Innis* would have been covered under the “public safety” exception (shotgun near the school for the handicapped kids).
* **Oregon v. Elstad** - police go to guys home with a warrant, but don’t tell him they have one. They ask him if he’s involved in a crime and he says yes. They place him under arrest, take him downtown, read his miranda rights, and he confesses. The police concede a Miranda violation, saying that he was under arrest when he said he was involved (they had a warrant). Defendant didn’t realize that they couldn’t use the first confession, and argues that the second confession was fruit of the first poisonous confession. It says the same thing *Quarles* says--Miranda is judicially created, and is not protected by “fruit of the poisonous tree” doctrine.
* **Elstad** - “A suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.” footnote 1, p.433
* Fruit of the Poisonous Tree is only available for constitutional violations.

**Moran v. Burbine (1986) p.438** - Man gets taken downtown for murder charge and is being interrogated by the police. His sister meanwhile has secured him an attorney and is trying to get them in touch. The man doesn’t try to call his sister or an attorney, and confesses, unbeknownst to him that an attorney was available.

* Events occurring outside the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.
* **Distinguished** from **Escobedo** because in that case Escobedo knew he had an attorney and wanted to speak with him. In this case, he didn’t know he had an attorney, and did not invoke his right to have one or speak with him.

**Dickerson v. United States (2000) p.447** - Court held that Miranda governs the admissibility of statements made during custodial interrogation in both state and federal courts. "Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture," wrote Rehnquist. "Miranda announced a constitutional rule that Congress may not supersede legislatively.

* Settles Miranda as a constitutionally based decision which cannot be overturned by Congress.

**United States v. Patane (2004) p.429** - Man was arrested outside his home and handcuffed. The police officer began to read him his rights but was interrupted by Patane, saying he knew his rights. No further Miranda warnings were read. He then told the cops he had a glock in his house, and the cops went in and got it.

* Supreme Court overturns: Fruit of the poisonous tree with Miranda is limited only to statements. Any physical evidence is admissible. (So with a violation, the statement is out but the physical evidence derived from the statement is in)

**Missouri v. Seibert (2004) p.432** - It was police policy not to give suspects Miranda warnings until after they have made incriminating statements. Then, they give a Warning and use the previous statements and get them to acknowledge them.

Undermining Miranda is unconstitutional, at least in this application.

* **Rule:** No fruit of the tree for Miranda unless there is purposeful action by the police, like in this case.
* The court’s plurality basically uses a totality of the circumstances but it’s more like fruit of the poisonous tree – or attenuated circumstances doctrine.

**LIKELY TO BE ASKED ABOUT ON THE EXAM BECAUSE IT DOESN’T MAKE MUCH DOCTRINAL SENSE:**

**Patane** and **Seibert** are both at odds with **Dickerson**, because in **Dickerson**, the Court said that Miranda was a constitutional rule, and that was in 2000. In **Seibert** (2004), the Court refuses to extend the “fruit of the poisonous tree” doctrine to Miranda, unless there is bad faith. In **Patane**, the Court allows physical evidence to come in under the “fruit of the poisonous tree” but will not allow the statements, following **Quarles** and **Elstad**.

**Chavez v. Martinez (2003) p.455** - Questioned Chavez in the hospital and got incriminating statements from him (although they never charged him with anything). He says its bad enough that they shot him, but then he was interrogated. The Supreme Court says there is no violation because the police never used the statements in trial. Miranda is about using statements against you in trial.

**Brewer v. Williams (1977) p.463** - Man kidnaps and murders a girl after escaping a mental hospital. Cops are transporting him to Des Moines, and at this time he has two attorneys that have told him not to speak with anyone, and the police agreed to comply. On the drive they start talking about giving the dead girl a proper christian burial, and the man confesses to where he put her body.

* 6th Amendment right had attached. Court said they couldn’t deliberately illicit incriminating responses from the defendant. Just like the 5th Amendment though, the defendant could have waived the right.
* The Court said that if the Christian burial speech is deliberately illiciting incriminating statements, then it’s a violation of the 6th amendment. If it is not illiciting statements, its as though they were just driving and he started talking. The right is ultimately his to waive the right. The Court said he didn’t waive his right because his actions were in reaction to the Christian burial speech.
* *Miranda* – he was in custody. Physical evidence comes in under *Miranda* (*Patane –* the gun was admissible). The statements should not come in (under *Miranda*, but the body comes in).
* Although the State lost this case, the man was still convicted under the doctrine of **Inevitable Discovery** -- cops were walking in a chain across the field where the girl was buried and would have been discovered in about an hour.

**Kuhlman v. Wilson (1986) p.472** - Informant was supposed to sit in the jail cell and listen to Wilson and figure out who the people that committed a burglary/murder were.

* **Massiah** - government cannot elicit incriminating responses. Here, the informant just observed.
* Kind of like Illinois v. Perkins, but implicating the 6th Amendment instead of the 5th.
* In **United States v. Henry**, the Court found a 6th Amendment violation for the same kind of offense, except the informant actively engaged the suspect and developed a relationship of trust and confidence. Here, the informant was passive.

**Retroactivity Doctrine -** basically talking about how the Court decides cases that are inconsistent and incompatible with older cases, and refuse to talk about them, leaving them to be “weird” by themselves. Comes up a lot in Criminal Procedure and Lain mentioned it the first day of class.