

**QUICK  
STUDY  
LAW**

# CRIMINAL PROCEDURE

## SCOPE

### CONSTITUTIONAL RESTRAINTS ON INVESTIGATION STAGE

#### BILL OF RIGHTS

##### • 1ST 10 AMENDMENTS

1. Originally enacted for the purpose of limiting the Federal government exclusively, and not the States
2. **Pertinent Amendments**

- a. **4th** - Freedom from unreasonable searches and seizures
  - i. Applies to both searches and seizures of property and to arrests of persons
- b. **5th** - Freedom from self-incrimination (involuntary confessions); Federal Due Process Clause
- c. **6th** - Right to assistance of counsel; Right to a speedy trial
  - i. Right to a Speedy Trial applies directly to Federal prosecutions and applies to State prosecutions by way of the 14th Amendment's Due Process Clause

##### • 14TH AMENDMENT

1. Puts Due Process of Law limitations on States
  - a. No State "may deprive any person of life, liberty or property, without due process of law"
  - i. But police have no obligation to provide information on how to recover seized property [*City of West Covina v. Perkins*]
  - b. No liability in death of bystander in high-speed chase unless police action "shocks the conscience" [*County of Sacramento v. Lewis*]

#### INCORPORATION DEBATE

##### EXTENT TO WHICH THE 14TH AMENDMENT MAKES THE BILL OF RIGHTS APPLY TO THE STATES

1. Does the 14th Amendment apply the Bill of Rights to the States?
2. Are the States bound by Supreme Court decisions interpreting the first 10 Amendments?
3. **Current majority view - Selective Incorporation**
  - a. Not all rights in the Bill of Rights apply to the States, but only as particularly necessary to **fundamental fairness** [*Duncan v. LA*]
    - i. Right of access to courts does not extend to adequacy of legal research facilities [*Lewis v. Casey*]
    - b. Most provisions of Bill of Rights have been incorporated
      - i. The 4th Amendment Freedom from Unreasonable Searches and Seizures [*Mapp v. OH*]
      - ii. The 5th Amendment Privilege Against Self-Incrimination [*Malloy v. Hogan*]
      - iii. The 5th Amendment Guarantee Against Double Jeopardy [*Benton v. MD*]
      - (a) Does not include **civil forfeiture** [*U.S. v. Ursery*]
      - iv. The 6th Amendment Right to Counsel [*Gideon v. Wainwright*]
      - v. The 6th Amendment Right to a Speedy Trial [*Klopfer v. NC*]
      - vi. The 6th Amendment Right to Confront Witnesses [*Pointer v. TX*]
      - vii. The 6th Amendment Right to an Impartial Jury [*Duncan v. LA*]
      - (a) Does not extend to **petty offenses** [*Lewis v. U.S.*]
      - c. Recent Supreme Court cases interpreting clauses apply to States
        - i. State liberty interests protected by Due Process clause generally limited to freedom from restraint which imposes a typical and significant hardship on inmate in relation to ordinary prison life [*Wolff v. McDonnell*]
        - ii. Segregation for misconduct and refusal of presentation of witnesses at disciplinary hearing are not protected liberty interests [*Sandin v. Conner*]
      - d. Only 2 Bill of Rights guarantees have **not** been extended to the States
        - i. Right not to be subject to excessive bail
        - ii. Right to a grand jury indictment in felony cases
  4. **Minority view - Total Incorporation**
    - a. Effect of 14th Amendment is to make all Bill of Rights guarantees directly applicable to the States

## STATE AND FEDERAL STATUTES AND RULES SETS FORTH PROCEDURES FOR

### ADMINISTRATION OF CRIMINAL JUSTICE

1. These procedures **must not violate U.S. Constitution**
  - a. Example: Federal wiretapping statute cannot authorize conduct that is prohibited by 4th Amendment search and seizure guarantees
2. **Federal Rules of Criminal Procedure**
  - a. Applicable only to Federal crimes
3. **State Constitutions** - another source of criminal procedure
  - a. Selective Incorporation Doctrine requires State courts to apply nearly all of the guarantees of the Bill of Rights in State criminal trials
    - i. States are free to place additional criminal safeguards in their own State constitutions
    - ii. If a State constitution clause has the same guarantee as a Federal one, State courts are free to interpret more individual protection than the Federal guarantee

## OVERVIEW OF A

### CRIMINAL PROCEEDING

#### • PROBABLE CAUSE FOR ARREST

1. Law enforcement officer may arrest only where probable cause to believe one has committed a crime
  - a. Arrests can be made with or without a warrant

#### • POLICE STATION BOOKING

1. Suspect's file is opened (fingerprints, booking photos and pertinent information - date of birth, height, weight, etc.)

#### • FILING CHARGES

1. Prosecutor files a Complaint if there is enough evidence

#### • FIRST APPEARANCE

1. When Defendant is in Custody, after arrest, a magistrate or judge informs him/her within a reasonable period of time of:
  - a. The charges against him/her
  - b. The right to counsel
  - c. The bail amount
    - i. The bail amount is the amount of money the Defendant forfeits if he does not show up at subsequent court proceedings
  - d. Whether the magistrate finds probable cause to believe the suspect committed the crime
    - i. In some jurisdictions - probable cause for felony cases is determined at a Preliminary Hearing (live witnesses, prosecution and Defendant with counsel are present)

#### • INFORMATION OR INDICTMENT

1. **Information**
  - a. Prosecutor prepares the charging document or Information with the allegations of the crime
2. **Indictment**
  - a. Grand Jury decides whether an Indictment shall issue after hearing the prosecutor's evidence
    - i. Defendant charged with a Federal felony may only be tried pursuant to a Grand Jury Indictment

#### • ARRAIGNMENT

1. The Defendant pleads guilty, no contest (*nolo contendere*) or not guilty to the Information or Indictment

#### • PRETRIAL

1. **Speedy Trial**
  - a. Sixth Amendment right to a speedy trial applies to Federal prosecutions and to State prosecutions by the 14th Amendment's Due Process Clause
  - b. **Exception:** "good cause continuances" [*NY v. Hill*]
2. **Pretrial Motions**
  - a. **Motion to Suppress:** Admissibility of evidence sought to be introduced by the prosecution which the defense believes was illegally obtained is determined pretrial by a Motion to Suppress
    - i. Ex. Motion to Suppress Fruits of an Illegal Search or Seizure

## 4TH AMENDMENT

### RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE

#### • DEFINITION

1. Guarantees "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures...and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized"
2. Includes searches and seizures of property and arrests of persons

#### • LIMITATIONS

1. Limited to government conduct
2. Certain acts by private persons may be deemed "governmental"
  - a. Act as agent/instrument of government
  - b. Act due to government domination or coercion
  - c. Government participates too much in conduct

#### • WHAT IS A SEARCH?

1. **Old approach**
  - a. Trespassory invasion of person or tangible property [*Olmstead v. U.S.*]
    - i. Needed actual "physical invasion"
    - ii. Wiretapping from outside building - not a search because no physical invasion
    - iii. Did not include blood tests - did not "shock the conscience of the court," therefore not unreasonable search [*Schmerber v. CA*]

### SEARCH & SEIZURE CONTINUED ON NEXT PAGE

- ii. Ex. Motion to Suppress an Unmirandized Confession
- b. **Motion to Dismiss** the charges against the Defendant are generally heard before trial
  - i. Ex. Motion to Dismiss Based on Constitutional Overbreadth or Vagueness of the Statute

#### • PRETRIAL DISCOVERY

1. **Prosecution's duty to disclose** - includes documents, tangible objects, lists of witnesses the prosecution intends to call at trial
  - a. The Constitution's Due Process Clause requires the prosecution to disclose to the defense any **exculpatory** evidence within the prosecution's possession [*Brady v. MD*]
2. **Defendant's duty to disclose** - more restricted than prosecution's (includes advance notice of Alibi and Insanity defense)

#### • TRIAL

1. **Jury Trial** - The Federal and all the States give the Defendant the right to a jury trial if charged with a felony or a misdemeanor punishable by more than 6 months in jail
2. **Confrontation Clause**
  - a. The 6th Amendment gives the Defendant the right to be confronted with the witnesses against him/her
    - i. Applies to the States by way of the 14th Amendment
    - ii. Includes Defendant's right to be present at trial
  - b. **Compulsory Process:** Defendant has a right to have the court issue a Subpoena to Compel Testimony of witnesses with information pertinent to their defense
  - c. Defendant's right to cross-examine witnesses
3. Defendant's right to remain silent - 5th Amendment states that no person "shall be compelled in any criminal case to be a witness against himself"
  - a. Applies to States through the 14th Amendment's Due Process clause
    - i. Right of Defendant not to take the stand (including a jury instruction stating this right)
    - ii. Limits on prosecution's right not to comment on Defendant's silence

2. **Modern approach** - 2-prong test for when a reasonable expectation of privacy is violated [**Katz v. U.S.**]
- Actual expectation of privacy (subjective)
  - Expectation must be one that society is prepared to recognize as reasonable (objective)
    - Interpretation - knowing exposure to public (even in home or office) is not subject to 4th Amend. protection; that which individual seeks to keep private (even in public places) may be protected
    - Subjective desire for privacy often shown by taking steps to shield area, item, or activity from observation
    - Traveler's personal luggage protected [**Bond v. U.S.**]

c. **Routine Traffic Stop**

- Vehicle search absent probable cause or custodial arrest after issuing speeding ticket violates 4th Amendment rights [**Knowles v. IA**]

3. **Unreasonable expectation of privacy (not a search for 4th Amendment purposes)**

- Area cannot support privacy or type of information is not private
- Abandoned items** - Garbage left out for collection [**CA v. Greenwood**]
- Things left in "plain" or open view - no legitimate expectation of privacy
- Most observations from lawful or reasonable vantage points, including public roads or private property observable from public areas, or private areas to which public or police have been invited
- Most aerial overflights [**CA v. Ciraulo**]
- Most uses of devices to enhance senses (i.e. binoculars, flashlights, electronic beepers, drug sniffing dogs, contorted positions)
- Open Fields** beyond "curtilage" of home [**Oliver v. U.S.**]
  - Steps owner takes is irrelevant (i.e. signs, gates)
  - Curtilage still protected - Extent of curtilage [**U.S. v. Dunn**] - ("PINS")
    - Proximity of area to home
    - Whether area is inside fence around home
    - Nature & Uses to which area is put
    - Steps taken to protect area from observation
  - No such thing as "industrial curtilage" [**Dow v. U.S.**]
- Prison Cell** - no privacy expectation [**Hudson v. Palmer**]
- Contraband** - Yes/No Test [**U.S. v. Jacobson**]
  - If drug is in plain view, smell, etc., a field test is performed to see whether or not substance is contraband
  - Not a search because:
    - No legitimate expectation of privacy in whether or not something is contraband - information that something is contraband is not private information
    - Destroying a small amount of drug for testing purposes is a "seizure" - but not an unreasonable one
    - Caution:** If the contraband tested was obtained due to prior illegal search or seizure, the "fruits of the poisonous tree" doctrine will apply to the results of the test
- "Controlled Delivery" of previously (lawfully) opened package
  - Time short enough that there was no reasonable likelihood contents had changed [**IL v. Andreas**]
- Pen Register** (records of numbers called)
  - No justifiable expectation of privacy since phone company keeps records of numbers called [**Smith v. MD**]
- Re-opening Doctrine** - After private search, intrusion of privacy occurs only when government search exceeds the scope of the private search [**U.S. v. Jacobsen**]
  - 4th Amend. applies only to government action
- VIN#** - Police at traffic stop may reach into car to clear away anything obscuring vehicle identification number
  - No reasonable expectation of privacy in VIN# since required by law to be visible
- Abandoned property** - Generally, no reasonable expectation of privacy in houses, vehicles, or motel rooms that are abandoned
- Overnight Guest** - Generally, has a legitimate expectation of privacy in the house they are staying and police cannot make a warrantless search or arrest on premises [**MN v. Olsen**] but visitor present for short time with householder's consent has no protection [**MN v. Carter**]

• **SEIZURE**

- Property** - substantial interference with possessory interest (dominion and control)
  - Beepers** - Electronic device attached to car of suspect for purpose of trace [**U.S. v. Knotts**]
    - No seizure since it does not substantially interfere with possessory interest in car [**U.S. v. Karo**]
    - If monitored in private area, consider search analysis
  - Voluntary transfer through sale is not seizure [**MD v. Macon**]
  - Removal of mobile home is seizure [**Soldal v. Cook County**]
- Persons** - Reasonable person believes he is not free to leave or to terminate encounter
  - Seizure takes place when:
    - Physical force applies to body

## REASONABLENESS

• **SCOPE**

- If unreasonable, the 4th Amend. is violated
- Standards used depend on circumstances

• **PROBABLE CAUSE**

- Facts and circumstances sufficient to warrant a reasonable person to believe crime is more likely than not the proposed arrest or search is justified
  - Probable cause to arrest: need trustworthy evidence that
    - Suspect committed the violation
    - The violation has been committed
  - Probable cause to search particular premises need trustworthy evidence that:
    - Particular items searched for are connected with criminal activity
    - Items to be seized will be in place to be searched
- Reasonableness generally refers to quality of information on which police base decision to conduct search/arrest
  - Detention for traffic violation is reasonable [**Whren v. U.S.**]
- Less than "beyond a reasonable doubt"
  - Any trustworthy information can be considered - notwithstanding inadmissible evidence at trial
  - Validity of warrant based on facts as reasonably believed by police officer
- Standard: Totality of the Circumstances** [**IL v. Gates**]
  - Whether an informant's information creates probable cause is determined by "totality of the circumstances"
  - Totality of circumstances takes into account all circumstances
  - Replaces the more restrictive 2-prong **Aguilar/Spinelli** test in which
    - Informant must be reliable (reliability in past or corroboration of information) and
    - Informant's basis of knowledge must be reliable (i.e. personal knowledge is best)
  - After **Gates**, as long as a neutral magistrate can determine arrest or search is justified, based on informant's information and all other available facts, there is probable cause to arrest or search and warrant can issue
    - Effect: 2 prongs are treated as relevant considerations in the totality of the circumstances
    - Consequence: Strong showing on one prong can make up for lesser showing on other (i.e. particularly reliable informant with a failure to articulate basis of his knowledge is not a complete bar to probable cause finding)

• **SUSPICION**

- Officer can articulate a reasonable basis for suspicion
- More than hunch, but less than probable cause
- Standard: Totality of Circumstances**
- Usually requires individualized suspicion

• **HIGHER STANDARDS**

- Some cases, more than probable cause required
- Deadly force** to prevent escape of suspect:
  - Probable cause to arrest
  - Use of force is necessary to prevent escape
  - Suspect poses immediate threat
- Surgical Intrusion** requires:
  - Probable cause to search
  - Risk to subject and degree of intrusiveness must not outweigh need for evidence

- Person submits to asserted authority
- Shooting suspect to stop flight is a seizure [**TN v. Garner**]
- Seizure where suspect crashed into barricade set up by police to stop him [**Brower v. Inyo County**]
- No per-se rule that police seize passengers of bus by boarding and asking for permission to search
  - Fact question of whether reasonable person would believe he could ignore request and terminate encounter [**FL v. Bostick**]
  - Generally, talking with police is not seizure, demand by police is seizure
- Pursuit** by Police - No seizure until physical contact or submission to authority [**CA v. Hodari**]
  - Important because if chase is not seizure, anything suspect drops during chase is in open view and can be used as probable cause to arrest

• **EXCEPTIONS TO SEARCH WARRANT**

- Search Incident to Arrest**
  - Requirements:
    - Person must be arrested
    - Search must be reasonably contemporaneous with arrest, and
    - Search not to exceed body and "grab area" (area must be within suspect's "immediate control") [**Chimel v. CA**]

## NO WARRANT WITHOUT PROBABLE CAUSE

WARRANTS MUST PARTICULARLY DESCRIBE PLACE TO BE SEARCHED AND PERSONS OR PROPERTY TO BE SEIZED

• **SEARCH WARRANTS**

- Must be issued by a "magistrate" or judicial officer
  - Must be neutral magistrate; not connected to law enforcement; no pecuniary interest in the matter cannot actively participate in the search
- Affidavit:** Police officer must recite facts establishing probable cause on a written, signed affidavit
  - Information in affidavit must be recent enough to believe items still there
  - Under reasonable circumstance, warrant may be issued based upon phone or fax [**FRCP 40(c)(2)(A)**]
- Place to be searched** - so precise as to allow determination of location without officer's discretion
  - Based on facts as officer reasonably believed them to be (ex. when officers search apartment, which turns out to be duplex, the warrant is valid, even though overbroad, because there was no way to know this from the outside) [**MD v. Garrison**]
  - Search confined to an area specified in warrant and places where the items possibly might be concealed
- Property to be seized** - must be specifically identified in warrant, so no discretion of the officer
  - No "general warrants" ("any contraband" is too vague)
    - But note: "other fruits, instrumentalities, and evidence of crime" - held to refer to a particular crime and lot of property in the warrant, so not vague [**Andersen v. MD**]
    - "Illegal drugs" held not too vague
  - When 1st Amendment is involved (i.e. obscene materials), description of things to be seized must be very specific [**Marcus v. Search Warrants**]
  - Vehicle searches: When warrant is required for vehicle search, warrant should include license number or model, and name of owner [**Coolidge v. NH**]
- Manner in which search warrant is executed: Search must not be an "unreasonable one"
- Unannounced entry** when executing warrant allowed under exigent circumstances or threat of immediate destruction of evidence [**Ker v. CA**]
  - The possibility of physical danger to police (i.e. suspect has a gun) may justify unannounced entry
  - The fact that police do not knock or announce before entry is a factor to be considered when evaluating the "reasonableness" that the 4th Amendment requires [**Wilson v. AR**]
  - Disposable nature of drugs justifies reasonable suspicion [**Richards v. WI**]
  - Includes reasonable suspicion of danger [**U.S. v. Ramirez**]
- Search of other persons on premises - Cannot search persons unrelated to authorized scope of search [**Ybarra v. IL**]
  - Must have probable cause particular to that person, to search bystander or probable cause to believe he has items on his person named in the warrant or
  - Must have reasonable suspicion for a **Terry** frisk (belief that person is armed, etc.) or
  - Must have probable cause to arrest a bystander on premises and then police may conduct a search incident to arrest
- Plain view** - Seizure of unnamed items allows police to make warrantless seizure of evidence seen in "plain view" while on premises for lawful purpose
- Body Searches** - Whether a warrant is issued or not - must be reasonable [examples: stomach pumping, taking of blood, surgery]
  - Reasonableness determined by balancing test: "The individual interest in privacy and security are weighed against society's interest in conducting the procedure" [**Winston v. Lee**]
    - 2-hour surgery to remove bullet - Held substantial intrusion - society's need for evidence not compelling [**Winston v. Lee**]
    - Taking of blood from DUI suspect - not unreasonable [**Schmerber v. CA**]

• **ARREST WARRANTS**

- Generally not required for felony arrest in public place as long as probable cause exists [**U.S. v. Watson**]
  - Probable cause for arrest slightly different than for search (see "Reasonableness" section)
- Arrest in private home if no exigent circumstances - generally police may not enter to make warrantless arrest [**Payton v. NY**] and may not be accompanied by members of the media [**Wilson v. Layne** see, also **Hanlon v. Berger**]
  - If exigent circumstances and crime is a serious one, no warrant necessary (i.e. destruction of evidence; hot pursuit)
  - When **nonserious crime** - circumstances generally not exigent notwithstanding destruction of evidence or hot pursuit

- b. Reasons:
  - i. Officer's safety (weapons may be in reach)
  - ii. Prevents destruction of evidence
  - iii. Lesser expectation of privacy after arrest
- c. Note: With reasonable suspicion that dangerous persons on premises, cursory "protective sweep" can be made [MD v. Buie]
- Automobile Search Incident to Arrest** - Entire passenger compartment and contents of any containers may be searched when custodial arrest made of occupant [N.Y. v. Belton]
  - a. Trunk not included - only areas accessible without exiting car
  - b. Must have probable cause for the original arrest to do search incident to arrest
  - c. Do not confuse with automobile exception for exigency below
- Exigent Circumstances** - No warrant required when probable cause or actual emergency exists
  - a. Hot Pursuit - in pursuit of suspect police may:
    - i. Enter premises to search for him and
    - ii. Search for weapons which he might seize while still at large [Warden v. Hayden]
  - b. Destruction of evidence - Officers may do a more extensive search incident to arrest when they know contraband or evidence is "in the process of destruction" or that items were "about to be removed" from the jurisdiction [Vale v. LA]
  - c. Automobile Exception - Entire car may be searched without a warrant if probable cause exists and exigency created by car's mobility [Carroll v. U.S.] including personal belongings of passengers [WY v. Houghton]
    - i. Includes luggage and all places that "could possibly contain the object of the search" [U.S. v. Ross]
    - ii. Contemporaneousness not required - if driver arrested, car may be searched at station if probable cause exists [Chambers v. Maroney] and car may be seized from public place with probable cause to believe that car is forfeitable contraband [FL v. White]
    - iii. Includes Mobile Homes - reduced expectation of privacy due to mobility and use as a "licensed motor vehicle" [CA v. Carney]
    - iv. Contrast with search incident to arrest where only passenger compartment and any containers therein may be searched and must be contemporaneous with arrest
  - d. Inventory Searches of Cars - Police can conduct warrantless search of car legally impounded (ex. cars impounded for illegal parking - no probable cause needed and reasonable if standard)
    - i. Vehicle must be lawfully impounded
    - ii. Policy calls for inventory searches and must be on standard basis (cannot be discretionary) [SD v. Opperman]
  - iii. Scope
    - (a) As long as standard inventory policy, can even search closed containers in cars [CO v. Bertine]
    - (b) Includes cars stolen and recovered, and cars impounded when owner is arrested on entirely nonvehicle related charges
- e. Consent Searches: Police do not need a warrant or probable cause if they get consent
  - i. Must be voluntary
  - ii. Person must have authority or reasonably appear to have authority to consent
  - iii. Search must be within scope of consent
    - (a) Cannot be product of duress, coercion, express or implied
    - (b) But does not require a knowing waiver (police need not tell consentor he has right to refuse) [see OH v. Robinette]
- iv. Third-Party Consent
  - (a) "Assumption of the risk" [U.S. v. Matlock] - Co-inhabitants assume the risk that one of them may permit search of common area
    - (i) Look for control issues - cannot consent to search area roommate forbidden in
  - (b) Hotel clerk cannot consent to search of hotel room
  - (c) Landlord may not consent to search of tenant's room even if right to enter to clean
  - (d) Nonpaying guest - owner's consent generally binding but guest may not consent to search of owner's property except for areas where guest has access rights
- TERRY STOP - WARRANTLESS BRIEF DETENTION AND "STOP AND FRISK"**
  - i. Police may seize person briefly without probable cause as long as there is reasonable suspicion of criminal activity [Terry v. OH]
    - a. Stop must be reasonably brief under circumstances
      - i. 20 minutes held reasonable on facts [U.S. v. Sharpe]
    - ii. Must be "on the street" - bringing to police station requires probable cause [Dunaway v. NY]
      - Reasonable suspicion may arise when suspect flees at sight of police [IL v. Wardlow]
  - b. May not be seizure at all; seizure only when reasonable person would believe he was not free to leave [U.S. v. Mendenhall]
  - c. Police may frisk during Terry stop if reasonable belief suspect is armed
    - i. Limited to running hands over outside of clothing - if weapon felt, may retrieve it

- ii. Search limited to weapons - items which could not be weapons (i.e. contraband may not be examined unless the officer already has probable cause to believe object is a weapon)
- iii. "Plain touch" - Once frisk provides probable cause to believe contraband or other evidence while within a narrow weapons frisk, officer may expand the search or seizure to the evidence [MN v. Dickerson]
- iv. Officer must have reasonable belief suspect may be armed [Ybarra v. IL] - a reasonable belief suspect has contraband or other evidence is not enough for the initial frisk, and anonymous tip does not justify stop and frisk [FL v. J.L.]
- d. Terry Stop of Car - If police reasonably believe suspect may be armed, a brief seizure for investigation and weapons search of passenger compartment of car may be okay
  - i. Reasonable belief suspect is dangerous and can have immediate control of weapons in car and
  - ii. The search is confined to passenger compartment where weapons might be placed or hidden
    - (a) Cannot search trunk without probable cause
    - (b) Plain view while performing search; if they discover contraband or evidence of crime where weapon might have been evidence may be seized [MI v. Long]
  - iii. Includes driver and passengers [MD v. Wilson]
- REASONABLENESS OF SEIZURES**
  - 1. Arrest requires probable cause (sometimes warrant)
  - 2. Terry seizures require reasonable suspicion
  - 3. Seizure of property (moveable chattel) for duration longer than allowed by Terry requires probable cause but no warrant
  - 4. Vehicle Checkpoints - seizures
    - a. Limited nature of seizure and reduced expectation of privacy in vehicles
  - 5. Brief seizure for limited purpose
    - a. License/Registration check
    - b. DUI checkpoint
    - c. No suspicion required
    - d. Must stop all vehicles or every tenth or similar
    - i. Key is that uniformity eliminates officer discretion to single out individuals for scrutiny
  - 6. Substitute for suspicion
    - a. Seizure must be very brief and limited in scope
    - b. No search of person or vehicle permitted
    - c. Non-search investigative techniques permitted (drug sniffing dog at checkpoint)
  - 7. Boats
    - a. Brief stop of boats to check documents permitted by analogy to auto checkpoints
    - b. Boats can be stopped at random because impossible to set up "checkpoint"
    - c. If check provides reasonable suspicion or probable cause, searches and seizures permitted
- AD-HOC BALANCING**
  - 1. Permits full search for evidence without warrant so long as search is "reasonable"
  - 2. Distinguished from administrative search
    - a. Not part of limited regulatory scheme
  - 3. Distinguished from traditional warrant exceptions
    - a. Probable cause not required
    - b. Not based on asserted exigency
    - c. Applies to class of cases, not just one at issue
    - d. Permits full search (not lesser intrusion such as Terry frisk)
  - e. Not based on consent or elimination of privacy expectation
  - 4. Doctrine
    - a. Effect - when ad-hoc balancing is held to apply to class of searches, neither warrant nor probable cause is required
    - b. Search must be reasonable at its inception and in scope
  - 5. Relevant factors indicating likely application
    - a. Search performed by government officials who are not law enforcement officers
    - b. Government can articulate an important governmental interest other than interest in crime control
    - c. Interest would be frustrated by requiring a warrant and probable cause
  - 6. Applications
    - a. Gov't offices searched by work place supervisors [O'Connor v. Ortega]
      - i. Was reasonable in scope and justified at its inception by reasonable suspicion of work related misconduct or work related noninvestigatory need
    - b. Search of public school child's purse by administrator [NJ v. T.L.O.]
      - i. Justified by the nature of the school environment in loco parentis responsibility
      - ii. Random drug testing of student athletes is permissible as there exists a lesser privacy expectation [Vernonia School District v. Acton]
        - (a) Results are not shared with law enforcement and
        - (b) Testing conducted in unintrusive manner (i.e. urine test)

- c. Work place drug testing
  - i. "Reasonableness" is not always individual reasonable suspicion
    - (a) Drug testing of political candidate is not reasonable [Chandler v. Miller]
  - ii. Applications
    - (a) Safety sensitive occupation following particularly defined occurrences (accidents, safety rule violations, or with reasonable suspicion that employee under the influence) [Skinner v. Railway Labor Executives Ass'n]
    - (b) Pre-employment test for DEA drug interdiction of officers and employees carrying fire-arms [Nat'l Treas. Employees Union v. Von Raab]
- ADMINISTRATIVE SEARCHES**
  - 1. Warrant required in most cases
    - a. Examples - housing inspections, code inspections
    - b. Exceptions to warrant requirement
      - i. As condition of receiving certain gov't benefits [Wyman v. James]
      - ii. Heavily regulated industries
        - (a) Licensed liquor sellers [Colonnade v. U.S.]
        - (b) Licensed gun dealers [U.S. v. Biswell]
        - (c) Mines [Donovan v. Dewey]
        - (d) 3-part test: (1) Gov't interest must be substantial; (2) Search must be necessary to regulatory structure; (3) Regulatory structure must be clear as to scope of authorized search and adequately limit officer discretion
      - (e) State regulated junk yards [NY v. Burger]
  - 2. Probable cause said to be required, but standard not the same as in criminal cases
  - 3. Fire Fighting
    - a. Initial entry - no warrant: exigent circumstances to fight fire
      - i. Includes reasonable time to investigate cause
    - b. Subsequent entries for investigation require administrative warrant
    - c. Once probable cause is found indicating arson, investigation is criminal rather than administrative and regular warrant with Gates probable cause is needed
- BORDER SEARCHES**
  - 1. Both citizens and noncitizens have no 4th Amendment rights at border or its functional equivalent [Almeida-Sanchez v. U.S.]
  - 2. Part of national sovereignty - may be conducted even if no suspicion vehicle has illegal aliens or objects
    - a. Extend only to baggage and vehicle searches and personal searches which are not unduly intrusive
      - i. For more intrusive searches need stronger showing of reason to believe suspect is concealing smuggled goods
  - 3. Roving Patrols - inside U.S. border may stop a car for questioning of occupants if the officer reasonably suspects an immigration violation
    - a. There must be a "particularized and objective" basis for suspecting the driver or passenger has committed an immigration violation [U.S. v. Cortez]
      - i. Mexican appearance of the occupants alone does not create reasonable suspicion [U.S. v. Brignoni-Ponce]
    - b. Roving patrol may only conduct warrantless search with an exception to warrant requirement (i.e. consent or "automobile exception" [need probable cause])
  - 4. Fixed Checkpoints - automobiles may be stopped for questioning of occupants even without reasonable suspicion of immigration violation but must have probable cause or consent for search [U.S. v. Martinez-Fuerte]

## JUDICIAL DOCTRINES

### EXCLUSIONARY RULE

EVIDENCE OBTAINED BY VIOLATING DEFENDANT'S CONSTITUTIONAL RIGHTS MAY NOT BE INTRODUCED AT TRIAL TO PROVE DEFENDANT'S GUILT

- 1. Applies to 4th, 5th or 6th Amendment rights
- 2. Applicable to Federal cases [Weeks v. U.S.]
- 3. Applicable to States [Mapp v. OH]
- FACTORS FOR EXCLUSION OF EVIDENCE**
  - 1. Government conduct; 2. Search or Seizure;
  - 3. Unreasonable; 4. Standing to raise issue
- RATIONALE**
  - 1. Deterrence - the most recent analysis is that the sole reason for the doctrine is to deter the government (specifically, the police) from violating citizen's Constitutional rights
    - a. Take away motive to conduct unlawful search, interrogation, etc.
    - b. Exclusionary Rule does not apply to unlawful arrest due to computer error caused by court employees [AZ v. Evans]

## STANDING

- Defendant can use Exclusionary Rule to bar evidence obtained through violation of Defendant's own Constitutional rights
- New One-Step Rule**
  - Defendant must show search or seizure violated his "legitimate expectation of privacy" [*Rakas v. IL*]
  - Evidence against co-defendant can be admitted even though obtained through illegal wiretap of other co-defendant's conversation [*Alderman v. U.S.*]
- Shared Privacy**
  - Overnight guest has reasonable expectation of privacy [*Olsen*]
- Derivative and co-conspirator standing rejected
  - Merely having relationship to person having standing is not enough to have standing [*U.S. v. Padilla*]

## FRUIT OF THE POISONOUS TREE

- EVIDENCE ILLEGALLY OBTAINED MAY NOT BE USED TO PROVE GUILT** [*WONG SUN v. U.S.*]
- EXCLUDED EVIDENCE CAN BE USED FOR IMPEACHMENT OF DEFENDANT**
  - Defendant cannot use Exclusionary Rule as shield to lie on the stand [*U.S. v. Havens*]
  - Cannot use excluded evidence to impeach witnesses other than Defendant [*James v. IL*]
- GOV'T ILLEGALITY WILL NOT REQUIRE SUPPRESSION IT**
  - Independent Source Doctrine**
    - Evidence brought in if obtained from source independent of original illegality [*Murray v. U.S.*]
  - Inevitable Discovery Doctrine**
    - Evidence admitted if shown by "preponderance of the evidence" that police would have discovered it anyway without acting unconstitutionally [*Nix v. Williams*]
    - Ex. Christian burial case - police could show a search party would have found the body anyway
- Attenuation Doctrine**
  - Evidence obtained through constitutional violation where connection has been so "attenuated" as to purge the taint
    - Ex. Defendant released on own recognizance after illegal arrest, but returned days later to make confession; taint purged [*Wong Sun*]
  - Case by Case Basis - (Where Defendant in custody and making statements) - Factors:
    - Temporal proximity between illegal seizure and statement
    - Presence of intervening factors (giving *Miranda* warnings)
    - Flagrancy of illegality
- Limitations on the Exclusionary Rule**
  - Not applicable to Grand Juries
    - A grand jury witness may not refuse to answer questions because they are based on illegal evidence [*U.S. v. Calandra*]
  - Not applicable to civil proceedings
  - Not applicable to parole revocation hearings [*PA v. Scott*]
- Good Faith Exception**
  - Exclusionary Rule does not apply when police act in Good Faith Reliance on existing statutory law or ordinance (even if law is declared unconstitutional or changed by court decision [*IL v. Krull*]) or on case law later changed by another judicial opinion [*U.S. v. Peltier*] or on a defective search warrant [*U.S. v. Leon*]
  - Exceptions: Where officers will not have reasonable grounds to believe warrant was properly issued and so the Exclusionary Rule will still apply:
    - Affidavit on which warrant is based is so lacking in probable cause that no reasonable officer would rely on it
    - The magistrate has "wholly abandoned his judicial role"
    - The warrant is so deficient on its face that the officers executing it cannot presume it valid
    - Officer who sought warrant knows that the information is false or recklessly disregards its truth or falsity

Notice to students: This Chart should be used only as a quick reference guide to Majority Law. Due to its condensed format, it: 1) Does not include jurisdictional differences, and 2) Should not be relied upon as a substitute for more comprehensive legal studies!

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## 5TH AMENDMENT CONFESSIONS

### DUE PROCESS

#### INVOLUNTARY CONFESSION

- Violates Due Process and cannot be used for any purpose [*Spano v. NY*]
- Coercion must come from gov't
  - State action was missing where suspect motivated by inner "voices" - no violation of Due Process [*CO v. Connelly*]
- Harmless Error Test:** A conviction will not necessarily be overturned if government can show there was other overwhelming evidence of guilt [*AZ v. Fulminante*]

#### VOLUNTARINESS

- Totality of the circumstances used:
  - Age, b. Education, c. Mental Ability
  - Intoxication, e. Setting, f. Duration
- Confession to Federal agents admissible while being held solely on State charges [*U.S. v. Alvarez-Sanchez*]

#### SCOPE

- Miranda*: A person in custody (or significantly deprived of freedom by government) may refuse to answer incriminating questions.
- Normally right must be invoked or it is lost.
- When suspect is in custody and interrogated, situation is so inherently coercive that special procedures are needed to help suspect decide whether or not to invoke right to silence.

- If suspect is to talk without attorney's advice, knowing waiver is required
- Warnings must be given or no knowing waiver will be found

#### CONSTITUTIONAL RULE

- Congress may not supercede Supreme Court's decisions interpreting and applying Constitution [see 18 USC 3501]

\*Note: Discussion of Court's reasoning goes beyond scope of this chart.

#### MIRANDA WARNINGS:

- Right to remain silent
- Anything said can be used against suspect in court
- Right to presence of attorney
- Attorney will be provided without cost if suspect cannot afford one

#### CUSTODY

- Arrested or deprived of freedom of movement in any significant way [equivalent of arrest]
  - Terry* seizure does not invoke *Miranda* rule
- Test:** Whether reasonable person in suspect's position would believe he is in custody [*Berkemer v. McCarty*]
  - Issue of "custody" is mixed question of law and fact [*Thompson v. Keohane*]
- Officers' subjective undisclosed opinion does not bear upon question of custody [*Stansbury v. CA*]
- Place of Interrogation**
  - Police Station and Patrol Car** - more likely custodial (but not if individual voluntarily goes to police station) [*OR v. Mathiason*]
  - Street:** Look to whether a reasonable person in suspect's position would believe police suspect him/her of crime - then probably custodial
  - Traffic stops:** Normally not custodial unless a reasonable person in suspect's position believes he is not free to leave
    - Driver believes s/he is free after a ticket is issued

#### INTERROGATION

- Words or actions on part of police that police should know are reasonably likely to elicit incriminating response [*RI v. Innis*]
- Volunteered statements not protected by *Miranda*
- Public Safety Exception [*NY v. Quarles*]
  - Miranda* warnings not needed when police ask questions reasonably prompted by public safety
- Does not include non-testimonial communication
  - Can be asked to give fingerprints, appear in line-up, hand-writing, voice sample, and blood test [*Schmerber v. CA*]

#### MIRANDA RIGHTS MAY BE EXERCISED AT ANY TIME DURING QUESTIONING

- Two different rights - (1) not to be interrogated; (2) to have lawyer
- When silence invoked, interrogator must leave for significant period of time - later re-warning o.k. and suspect can waive
- Waiver must be knowing, intelligent and voluntary [*NC v. Butler*]
  - Burden is on Prosecution to show waiver - Presumption in favor of non-waiver
  - Waiver need not be in writing - can be oral - but silence never a waiver - could have been intimidated
  - Defendant need not know the exact crime he is suspected of to waive his right to silence

## 6TH AMENDMENT RIGHT TO COUNSEL

#### APPLICATION OF SIXTH AMENDMENT

- 6th Amend. right made applicable to the States by the 14th Amend. [*Gideon v. Wainwright*]
- 6th and 14th Amendments violated when trial judge enhances sentence by preponderance of evidence of additional "hate crime" facts [*Apprendi v. NJ*]
- Fact must be submitted to jury and proven beyond reasonable doubt
- 6th Amend. right applies at all critical stages of a prosecution, after formal proceedings have begun
  - Absolute right to counsel at any pre-trial confrontation after initiation of adversarial criminal prosecution [*U.S. v. Wade*]
  - Line-ups and Identifications**
    - Any arranged identification procedure without presence of counsel must be excluded at trial (unless waived)
  - No extension to line-ups before the institution of formal proceedings [*Kirby v. IL*]
    - Preliminary hearing; (ii) Indictment; (iii) Information; (iv) Arraignment; (v) Formal charge
- Stages at which right to counsel applies**
  - Post Charge line-ups
  - Custodial police interrogation [*Miranda*]
  - Post Indictment interrogation whether custodial or not [*Massiah v. U.S.*]
- Arraignment
- Misdemeanor trials when imprisonment is actually imposed
- Juvenile delinquency proceedings in which institutional commitment is a possibility [*In Re Gault*]
- Felony Trials [*Gideon v. Wainwright*]
- Guilty Pleas and Sentencing
- Appeals as a matter of right [*Douglas v. CA see, also, Roe v. Ortega*] but no right to self-representation on appeal [*Martinez v. Ct. of Appeal of CA*], additionally, counsel must file brief stating reasons where appeal may be frivolous [*Smith v. Robbins*]
- Stages at which Right to Counsel does not apply**
  - Photo ID's** - Witness viewing photo or video of accused for identification purposes [*U.S. v. Ash*] - but the way photo ID is done can violate due process
    - Size - Defendant's photo may have been largest
    - Color - Black & White except for Defendant's photo
    - Placement - Defendant's photo most prominent
    - Race, sex, age, etc. of others
  - Pre-Charge line-ups** (investigative) [*Kirby v. IL*]
  - Taking of handwriting, fingerprints, or voice exemplar [*Gilbert v. CA*], or blood samples [*Schmerber v. IL*]
  - Preliminary Hearings to determine probable cause to detain [*Gerstein v. Pugh*]
  - Discretionary appeals [*Ross v. Moffitt*]
  - Post-Conviction proceeding (ex. habeas corpus) [*PA v. Finley*]
- 6th Amendment - Use of undercover agents never causes 5th Amendment *Miranda* violation but may lead to 6th Amendment violation; any statement "deliberately elicited" at or after initiation of adversarial judicial proceedings without counsel cannot be used at trial [*Massiah v. U.S.*]
- Suspect need not be in custody for *Massiah* to apply
- Suspect need not know questioner is working with police
- "Deliberate Elicitation" is more than mere passive listening [*Kuhlmann v. Wilson*]
  - Gives police more leeway than 5th Amendment standard "reasonably likely to elicit incriminating response"
  - Bugged jail cell not "deliberately eliciting" but if set up with false friend - it probably is
- Due Process violated when identification is:**
  - Unnecessarily suggestive
  - Substantial likelihood of irreparable misidentification
    - Judged by totality of the circumstances
      - Immediate need due to dying witness mitigated one person line-up [*Stovall v. Denno*]

#### "BRIGHT LINE"

- Once suspect asserts right to counsel, police may not question him again without supplying him with counsel, unless suspect initiates further communication, then waives after re-warning [*Edwards v. AZ*]
- Ambiguous request for counsel does not count [*Davis v. U.S.*]

#### LIMITATIONS

- Miranda* requirements do not apply to witness testifying before a grand jury
  - But a witness summoned before a grand jury may refuse to answer (after being sworn) on the grounds it may incriminate him
- EFFECT OF MIRANDA VIOLATION**
  - Evidence obtained in violation of *Miranda* is inadmissible substantively at trial as part Prosecution's case in chief
  - Prosecution may use a confession obtained in violation of *Miranda* to impeach Defendant's testimony if he takes the stand at trial [*Harris v. NY*]

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