



# Homeland Security

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**FEDERAL LAW ENFORCEMENT  
TRAINING CENTERS  
OFFICE OF CHIEF COUNSEL  
GLYNCO, GEORGIA**

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# **LEGAL DIVISION REFERENCE BOOK**

**2019**



## **Foreword to the 2019 Edition**

The Legal Division Reference Book is the culmination of almost forty years of dedicated efforts of many members of the Office of Chief Counsel's Legal Division at the Federal Law Enforcement Training Centers. The reader will find brief descriptions of the facts, issues and holdings of important Supreme Court cases concerning many Fourth, Fifth and Sixth Amendment issues, as well as several others. There is also an Additional Resources section which includes useful materials for your studies. Additionally, I invite all to visit the Legal Division's website at:

**[www.fletc.gov/legal-resources](http://www.fletc.gov/legal-resources)**

This website contains other resources to keep law enforcement officers updated on the ever changing law enforcement legal landscape, such as:

The Informer – a monthly review of significant Supreme Court and Federal Courts of Appeals cases of interest to law enforcement. A free subscription is offered to The Informer by going to the web site listed above and clicking on the “Subscribe to The Informer” link.

Webinars – monthly presentations presented gratis from members of the Legal Division staff on an assortment of topics. Dates and topics can be found at [www.fletc.gov](http://www.fletc.gov) under Programs & Notices and as advertised in The Informer.

Case Digests – compilations of all of the cases reported in The Informer during the current year as well as previous years, arranged by federal judicial circuit and subject matter.

PodCasts – covering the Fourth, Fifth, and Sixth Amendments as well as many other issues of interest to law enforcement officers. These 7-10 minute presentations can be accessed through a computer or downloaded to an MP3 player.

The site also contains articles, training programs, FAQs, and downloads.

Brad Lawrence  
Chief, Legal Division  
May 2019

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## **How to Use this Book**

The Legal Division Handbook relies essentially on the Supreme Court cases that have developed Fourth, Fifth and Sixth Amendment law. Crucial principles of the law are embedded in the Handbook text with frequent cites to the pertinent cases. This Reference Book provides an opportunity to gain further insight, clarity and understanding of the law by setting out the facts, issues, holding, and rationales of those significant decisions. The cases are listed by subject in the Table of Contents and by name in the Index in the back of this book.

This Reference Book is also helpful in preparing for legal examinations. The facts of each case can mimic the material that make up multiple choice test questions. The issue in each case brief can serve as a test question. Students may attempt to answer the question posed in the issue before reading the Supreme Court's answer and rationale as a means of testing knowledge gained from course work and the Handbook. For additional practice test questions, visit:

**<https://www.fletc.gov/complete-practice-exam-set-pdf>**

Specific guidance and policies from the Department of Justice and Department of Homeland Security is arranged for quick reference on issues such as: Use of Race, Legal Ethics, Consensual Monitoring, Use of Deadly Force, the Public Safety Exception, Discovery in Criminal Cases, Use, Preservation and Disclosure of eCommunications in Federal Criminal Cases, Electronic Recording of Statements, Use of Cell-Site Simulator Technology, Interviewing Government Employees, Procedure for Conducting Photo Arrays, Human Trafficking Indicators, and Limited English Proficiency Resource.

## Table of Contents

|   |           |
|---|-----------|
| <b>I. THE FOURTH AMENDMENT: WHAT IS A SEARCH? .....</b> | <b>1</b>  |
| <i>Olmstead v. United States</i> .....                  | 1         |
| <i>Katz v. United States</i> .....                      | 2         |
| <i>United States v. Jones</i> .....                     | 3         |
| <b>A. Applies to Government Activities Only .....</b>   | <b>4</b>  |
| <i>New Jersey v. T.L.O.</i> .....                       | 4         |
| <i>Coolidge v. New Hampshire</i> .....                  | 5         |
| <i>Gouled v. United States</i> .....                    | 6         |
| <b>B. Reasonable Expectation of Privacy .....</b>       | <b>6</b>  |
| <i>California v. Ciraolo</i> .....                      | 6         |
| <i>Dow Chemical Co. v. United States</i> .....          | 7         |
| <i>Florida v. Riley</i> .....                           | 8         |
| <i>United States v. Chadwick</i> .....                  | 9         |
| <i>Illinois v. Andreas</i> .....                        | 10        |
| <i>United States v. Karo</i> .....                      | 11        |
| <i>Cardwell v. Lewis</i> .....                          | 13        |
| <i>Kyllo v. United States</i> .....                     | 14        |
| <i>Hoffa v. United States</i> .....                     | 15        |
| <i>Minnesota v. Olson</i> .....                         | 16        |
| <i>Minnesota v. Carter</i> .....                        | 17        |
| <i>O'Connor v. Ortega</i> .....                         | 18        |
| <i>City of Ontario v. Quon</i> .....                    | 20        |
| <i>Hudson v. Palmer</i> .....                           | 21        |
| <i>Maryland v. Macon</i> .....                          | 22        |
| <i>New York v. Class</i> .....                          | 23        |
| <i>Bond v. United States</i> .....                      | 24        |
| <i>United States v. Place</i> .....                     | 25        |
| <b>1. Open Fields .....</b>                             | <b>27</b> |
| <i>Hester v. United States</i> .....                    | 27        |
| <i>Oliver v. United States</i> .....                    | 28        |
| <i>United States v. Dunn</i> .....                      | 28        |
| <b>2. Abandoned Property .....</b>                      | <b>30</b> |
| <i>California v. Greenwood</i> .....                    | 30        |
| <i>Abel v. United States</i> .....                      | 31        |
| <b>3. Foreign Searches .....</b>                        | <b>31</b> |
| <i>United States v. Verdugo-Urquidez</i> .....          | 31        |
| <b>4. Private Intrusions .....</b>                      | <b>33</b> |
| <i>United States v. Jacobsen</i> .....                  | 33        |
| <i>Walter v. United States</i> .....                    | 34        |
| <b>5. Third Party Control .....</b>                     | <b>35</b> |
| <i>United States v. Miller</i> .....                    | 35        |

|   |           |
|---|-----------|
| <i>Smith v. Maryland</i> .....                            | 36        |
| <b>II. THE FOURTH AMENDMENT: WHAT IS A SEIZURE? .....</b> | <b>37</b> |
| <i>California v. Hodari</i> .....                         | 37        |
| <i>Brower v. Inyo County</i> .....                        | 38        |
| <i>Michigan v. Chesternut</i> .....                       | 38        |
| <i>Brendlin v. California</i> .....                       | 39        |
| <i>Florida v. Bostick</i> .....                           | 40        |
| <i>United States v. Drayton</i> .....                     | 41        |
| <i>Soldal v. Cook County</i> .....                        | 43        |
| <b>A. Arrests .....</b>                                   | <b>44</b> |
| <i>Atwater v. City of Lago Vista</i> .....                | 44        |
| <b>1. Premises .....</b>                                  | <b>45</b> |
| <i>Payton v. New York</i> .....                           | 45        |
| <i>New York v. Harris</i> .....                           | 46        |
| <i>Kirk v. Louisiana</i> .....                            | 47        |
| <b>2. Third Party Premises.....</b>                       | <b>48</b> |
| <i>Steagald v. United States</i> .....                    | 48        |
| <i>Pembaur v. Cincinnati</i> .....                        | 49        |
| <b>3. Arrest Warrants.....</b>                            | <b>50</b> |
| <i>Whiteley v. Warden</i> .....                           | 50        |
| <i>United States v. Watson</i> .....                      | 51        |
| <i>Maryland v. Buie</i> .....                             | 53        |
| <b>B. Stops .....</b>                                     | <b>55</b> |
| <b>1. Generally.....</b>                                  | <b>55</b> |
| <i>Terry v. Ohio</i> .....                                | 55        |
| <i>Davis v. Mississippi</i> .....                         | 57        |
| <i>Florida v. Royer</i> .....                             | 58        |
| <b>2. Terry Stops / Traffic Stops .....</b>               | <b>59</b> |
| <i>Delaware v. Prouse</i> .....                           | 59        |
| <i>United States v. Sharpe</i> .....                      | 60        |
| <i>Heien v. North Carolina</i> .....                      | 61        |
| <i>Rodriguez v. United States</i> .....                   | 62        |
| <i>Illinois v. Caballes</i> .....                         | 64        |
| <i>Pennsylvania v. Mimms</i> .....                        | 65        |
| <i>Maryland v. Wilson</i> .....                           | 66        |
| <i>United States v. Hensley</i> .....                     | 67        |
| <i>Hayes v. Florida</i> .....                             | 68        |
| <b>3. Stops at the Border .....</b>                       | <b>69</b> |
| <i>United States v. Montoya de Hernandez</i> .....        | 69        |
| <i>Almeida-Sanchez v. United States</i> .....             | 72        |
| <i>United States v. Martinez-Fuerte</i> .....             | 73        |
| <i>United States v. Brignoni-Ponce</i> .....              | 74        |

|             |   |            |
|-------------|---|------------|
| <b>III.</b> | <b>LEVELS OF SUSPICION .....</b>                | <b>75</b>  |
| <b>A.</b>   | <b>Probable Cause.....</b>                      | <b>75</b>  |
|             | <i>Ornelas v. United States.....</i>            | <i>75</i>  |
|             | <i>Henry v. United States .....</i>             | <i>76</i>  |
|             | <i>Draper v. United States .....</i>            | <i>77</i>  |
|             | <i>Sibron v. New York.....</i>                  | <i>78</i>  |
|             | <i>Peters v. New York.....</i>                  | <i>79</i>  |
|             | <i>Maryland v. Pringle .....</i>                | <i>80</i>  |
|             | <i>Florida v. Harris.....</i>                   | <i>81</i>  |
| <b>B.</b>   | <b>Reasonable Suspicion .....</b>               | <b>82</b>  |
|             | <i>Adams v. Williams.....</i>                   | <i>82</i>  |
|             | <i>Brown v. Texas .....</i>                     | <i>83</i>  |
|             | <i>United States v. Sokolow.....</i>            | <i>85</i>  |
|             | <i>Alabama v. White .....</i>                   | <i>86</i>  |
|             | <i>Florida v. J. L. ....</i>                    | <i>87</i>  |
|             | <i>Navarette v. California.....</i>             | <i>88</i>  |
|             | <i>Illinois v. Wardlow.....</i>                 | <i>90</i>  |
|             | <i>United States v. Arvizu.....</i>             | <i>90</i>  |
| <b>IV.</b>  | <b>SEARCH WARRANTS .....</b>                    | <b>92</b>  |
| <b>A.</b>   | <b>Probable Cause.....</b>                      | <b>92</b>  |
| <b>1.</b>   | <b>Required .....</b>                           | <b>92</b>  |
|             | <i>Byars v. United States.....</i>              | <i>92</i>  |
|             | <i>Winston v. Lee .....</i>                     | <i>93</i>  |
| <b>2.</b>   | <b>Establishing P.C. in the Affidavit .....</b> | <b>94</b>  |
|             | <i>United States v. Ventresca .....</i>         | <i>94</i>  |
|             | <i>Aguilar v. Texas .....</i>                   | <i>95</i>  |
|             | <i>Spinelli v. United States .....</i>          | <i>96</i>  |
|             | <i>Illinois v. Gates .....</i>                  | <i>97</i>  |
|             | <i>United States v. Harris.....</i>             | <i>98</i>  |
|             | <i>United States v. Grubbs .....</i>            | <i>100</i> |
| <b>3.</b>   | <b>Neutral and Detached Magistrate .....</b>    | <b>101</b> |
|             | <i>Connelly v. Georgia .....</i>                | <i>101</i> |
|             | <i>Lo-Ji Sales, Inc. v. New York.....</i>       | <i>102</i> |
| <b>4.</b>   | <b>With Particularity .....</b>                 | <b>103</b> |
|             | <i>Andresen v. Maryland.....</i>                | <i>103</i> |
|             | <i>Stanford v. Texas.....</i>                   | <i>104</i> |
|             | <i>Groh v. Ramirez .....</i>                    | <i>105</i> |
|             | <i>Messerschmidt v. Millender.....</i>          | <i>106</i> |
|             | <i>Maryland v. Garrison .....</i>               | <i>108</i> |
|             | <i>Steele v. United States.....</i>             | <i>109</i> |

|           |  |            |
|-----------|--|------------|
| <b>B.</b> | <b>Serving the Warrant.....</b>                      | <b>110</b> |
| 1.        | <b>Knock and Announce (18 U.S.C. § 3109).....</b>    | <b>110</b> |
|           | <i>Sabbath v. United States</i> .....                | 110        |
|           | <i>Wilson v. Arkansas</i> .....                      | 111        |
|           | <i>Hudson v. Michigan</i> .....                      | 112        |
|           | <i>Richards v. Wisconsin</i> .....                   | 113        |
|           | <i>United States v. Ramirez</i> .....                | 113        |
|           | <i>United States v. Banks</i> .....                  | 114        |
| 2.        | <b>Persons at the Premises.....</b>                  | <b>116</b> |
|           | <i>Michigan v. Summers</i> .....                     | 116        |
|           | <i>Muehler v. Mena</i> .....                         | 117        |
|           | <i>Bailey v. United States</i> .....                 | 118        |
|           | <i>Los Angeles County v. Rettele</i> .....           | 119        |
|           | <i>Ybarra v. Illinois</i> .....                      | 121        |
|           | <i>Illinois v. McArthur</i> .....                    | 122        |
| 3.        | <b>Associated Issues.....</b>                        | <b>123</b> |
|           | <i>United States v. Van Leeuwen</i> .....            | 123        |
|           | <i>Segura v. United States</i> .....                 | 124        |
|           | <i>Sgro v. United States</i> .....                   | 126        |
|           | <i>Gooding v. United States</i> .....                | 127        |
|           | <i>Dalia v. United States</i> .....                  | 128        |
|           | <i>Franks v. Delaware</i> .....                      | 129        |
|           | <i>Wilson v. Layne</i> .....                         | 129        |
|           | <i>Hanlon v. Berger</i> .....                        | 130        |
| <b>V.</b> | <b>SEARCH WARRANT EXCEPTIONS - P.C. NEEDED .....</b> | <b>131</b> |
| <b>A.</b> | <b>Plain View.....</b>                               | <b>131</b> |
|           | <i>Horton v. California</i> .....                    | 131        |
|           | <i>Arizona v. Hicks</i> .....                        | 132        |
|           | <i>Texas v. Brown</i> .....                          | 133        |
| <b>B.</b> | <b>Mobile Conveyance.....</b>                        | <b>135</b> |
|           | <i>Carroll v. United States</i> .....                | 135        |
|           | <i>Chambers v. Maroney</i> .....                     | 136        |
|           | <i>United States v. Ross</i> .....                   | 137        |
|           | <i>Michigan v. Thomas</i> .....                      | 138        |
|           | <i>Florida v. Myers</i> .....                        | 139        |
|           | <i>United States v. Johns</i> .....                  | 140        |
|           | <i>Pennsylvania v. Labron</i> .....                  | 140        |
|           | <i>Maryland v. Dyson</i> .....                       | 141        |
|           | <i>California v. Carney</i> .....                    | 142        |
|           | <i>California v. Acevedo</i> .....                   | 143        |
|           | <i>Wyoming v. Houghton</i> .....                     | 145        |
| <b>C.</b> | <b>Destruction of Evidence.....</b>                  | <b>146</b> |
|           | <i>Kentucky v. King</i> .....                        | 146        |
|           | <i>Cupp v. Murphy</i> .....                          | 147        |
|           | <i>Schmerber v. California</i> .....                 | 149        |



|            |   |            |
|------------|---|------------|
|            | <i>Missouri v. McNeely</i> .....  | 150        |
| <b>D.</b>  | <b>Hot Pursuit</b> .....  | <b>151</b> |
|            | <i>Warden v. Hayden</i> .....   | 151        |
|            | <i>Welsh v. Wisconsin</i> .....   | 152        |
|            | <i>United States v. Santana</i> .....                                       | 154        |
| <b>E.</b>  | <b>Emergency Scenes</b> .....   | <b>155</b> |
|            | <i>Michigan v. Tyler</i> .....  | 155        |
|            | <i>Michigan v. Clifford</i> .....   | 156        |
|            | <i>Mincey v. Arizona</i> .....  | 158        |
|            | <i>Thompson v. Louisiana</i> .....  | 159        |
|            | <i>Flippo v. West Virginia</i> .....  | 160        |
|            | <i>Brigham City v. Stuart</i> .....   | 161        |
|            | <i>Michigan v. Fisher</i> .....   | 162        |
|            | <i>Ryburn v. Huff</i> .....   | 163        |
| <b>VI.</b> | <b>SEARCH WARRANT EXCEPTIONS - P.C. NOT NEEDED</b> ...                      | <b>165</b> |
| <b>A.</b>  | <b>Frisks</b> .....   | <b>165</b> |
|            | <i>Arizona v. Johnson</i> .....   | 165        |
|            | <i>Michigan v. Long</i> .....   | 166        |
|            | <i>Minnesota v. Dickerson</i> .....   | 167        |
| <b>B.</b>  | <b>Searches Incident to Arrest</b> .....                                    | <b>168</b> |
|            | <i>United States v. Chadwick</i> .....                                      | 168        |
| <b>1.</b>  | <b>Premises</b> .....   | <b>169</b> |
|            | <i>Go-Bart Importing Co. v. United States</i> .....                         | 169        |
|            | <i>Chimel v. California</i> .....   | 170        |
|            | <i>Agnello v. United States</i> .....                                       | 171        |
|            | <i>Shipley v. California</i> .....  | 172        |
|            | <i>Vale v. Louisiana</i> .....  | 173        |
| <b>2.</b>  | <b>Persons</b> .....  | <b>174</b> |
|            | <i>United States v. Robinson</i> .....                                      | 174        |
|            | <i>United States v. Edwards</i> .....                                       | 175        |
|            | <i>Virginia v. Moore</i> .....  | 176        |
|            | <i>Florence v. County of Burlington</i> .....                               | 177        |
|            | <i>Maryland v. King</i> .....   | 178        |
| <b>3.</b>  | <b>Cell Phones</b> .....  | <b>179</b> |
|            | <i>Riley v. California (consolidated with United States v. Wurie)</i> ..... | 179        |
| <b>4.</b>  | <b>Vehicles</b> .....   | <b>181</b> |
|            | <i>Arizona v. Gant</i> .....  | 181        |
|            | <i>New York v. Belton</i> .....   | 182        |
|            | <i>Preston v. United States</i> .....                                       | 184        |
|            | <i>Thornton v. United States</i> .....                                      | 185        |
|            | <i>Knowles v. Iowa</i> .....  | 186        |

|   |            |
|---|------------|
| <b>5. Compelled Breath / Blood Tests (DUI)</b> .....          | <b>187</b> |
| <i>Birchfield v. North Dakota</i> .....                       | 187        |
| <b>C. Consent</b> .....                                       | <b>189</b> |
| <i>United States v. Mendenhall</i> .....                      | 189        |
| <i>Schneckloth v. Bustamonte</i> .....                        | 190        |
| <i>Ohio v. Robinette</i> .....                                | 191        |
| <i>Frazier v. Cupp</i> .....                                  | 192        |
| <i>Georgia v. Randolph</i> .....                              | 193        |
| <i>Fernandez v. California</i> .....                          | 194        |
| <i>United States v. Matlock</i> .....                         | 195        |
| <i>Chapman v. United States</i> .....                         | 196        |
| <i>Stoner v. California</i> .....                             | 197        |
| <i>Illinois v. Rodriguez</i> .....                            | 198        |
| <i>Bumper v. North Carolina</i> .....                         | 199        |
| <i>Lewis v. United States</i> .....                           | 200        |
| <i>Florida v. Jimeno</i> .....                                | 201        |
| <i>Florida v. Jardines</i> .....                              | 202        |
| <b>D. Inventories</b> .....                                   | <b>203</b> |
| <i>South Dakota v. Opperman</i> .....                         | 203        |
| <i>Harris v. United States</i> .....                          | 204        |
| <i>Colorado v. Bertine</i> .....                              | 205        |
| <i>Cooper v. California</i> .....                             | 206        |
| <i>Illinois v. Lafayette</i> .....                            | 207        |
| <i>Florida v. Wells</i> .....                                 | 208        |
| <b>E. Inspections</b> .....                                   | <b>209</b> |
| <b>1. Structures</b> .....                                    | <b>209</b> |
| <i>See v. City of Seattle</i> .....                           | 209        |
| <i>Camara v. Municipal Court</i> .....                        | 210        |
| <i>Marshall v. Barlow’s Inc.</i> .....                        | 211        |
| <i>Donovan v. Dewey</i> .....                                 | 212        |
| <i>New York v. Burger</i> .....                               | 214        |
| <i>United States v. Biswell</i> .....                         | 216        |
| <i>City of Los Angeles v. Patel</i> .....                     | 216        |
| <b>2. Vehicles</b> .....                                      | <b>218</b> |
| <i>Michigan v. Sitz</i> .....                                 | 218        |
| <i>City of Indianapolis v. Edmond</i> .....                   | 220        |
| <i>Illinois v. Lidster</i> .....                              | 221        |
| <b>3. Parolees</b> .....                                      | <b>222</b> |
| <i>United States v. Knights</i> .....                         | 222        |
| <i>Samson v. California</i> .....                             | 223        |
| <b>4. Special Needs of the Government</b> .....               | <b>224</b> |
| <i>Skinner v. Railway Labor Executives’ Association</i> ..... | 224        |
| <i>National Treasury Employees Union v. Von Raab</i> .....    | 226        |
| <i>Ferguson v. City of Charleston</i> .....                   | 227        |
| <i>Vernonia School District v. Acton</i> .....                | 229        |

|   |            |
|---|------------|
| <i>Board of Education v. Earls</i> .....              | 230        |
| <i>Chandler v. Miller</i> .....                       | 231        |
| <i>Wyman v. James</i> .....                           | 232        |
| <b>5. Border Inspections .....</b>                    | <b>233</b> |
| <i>United States v. Ramsey</i> .....                  | 233        |
| <i>United States v. Flores-Montano</i> .....          | 234        |
| <i>Abel v. United States</i> .....                    | 235        |
| <b>VII. FOURTH AMENDMENT - EXCLUSIONARY RULE.....</b> | <b>236</b> |
| <b>A. Origins.....</b>                                | <b>236</b> |
| <i>Weeks v. United States</i> .....                   | 236        |
| <i>Elkins v. United States</i> .....                  | 237        |
| <i>Mapp v. Ohio</i> .....                             | 238        |
| <b>B. Fruit of the Poisonous Tree .....</b>           | <b>239</b> |
| <i>Silverthorne Lumber Co. v. United States</i> ..... | 239        |
| <i>Nardone v. United States</i> .....                 | 240        |
| <i>United States v. Ceccolini</i> .....               | 240        |
| <i>United States v. Crews</i> .....                   | 241        |
| <i>Trupiano v. United States</i> .....                | 243        |
| <b>C. Exceptions .....</b>                            | <b>243</b> |
| <b>1. No Standing to Object .....</b>                 | <b>243</b> |
| <i>Rawlings v. Kentucky</i> .....                     | 243        |
| <i>Rakas v. Illinois</i> .....                        | 244        |
| <i>Wong Sun v. United States</i> .....                | 245        |
| <i>United States v. Salvucci, Jr.</i> .....           | 246        |
| <i>United States v. Payner</i> .....                  | 247        |
| <i>United States v. Padilla</i> .....                 | 248        |
| <i>Alderman v. United States</i> .....                | 249        |
| <i>Mancusi v. DeForte</i> .....                       | 250        |
| <b>2. Good Faith Exception .....</b>                  | <b>251</b> |
| <i>United States v. Leon</i> .....                    | 251        |
| <i>Massachusetts v. Sheppard</i> .....                | 252        |
| <i>Arizona v. Evans</i> .....                         | 253        |
| <i>Herring v. United States</i> .....                 | 254        |
| <i>Davis v. United States</i> .....                   | 255        |
| <i>Illinois v. Krull</i> .....                        | 256        |
| <b>3. Impeachment Purposes .....</b>                  | <b>257</b> |
| <i>Walder v. United States</i> .....                  | 257        |
| <i>United States v. Havens</i> .....                  | 258        |
| <i>James v. Illinois</i> .....                        | 259        |
| <b>4. Independent Source .....</b>                    | <b>261</b> |
| <i>Murray v. United States</i> .....                  | 261        |

|              |  |            |
|--------------|--|------------|
| 5.           | <b>Inevitable Discovery</b> .....                                | <b>262</b> |
|              | <i>Nix v. Williams</i> .....                                     | 262        |
| 6.           | <b>Attenuation</b> .....   | <b>263</b> |
|              | <i>Utah v. Strieff</i> .....                                     | 263        |
| 7.           | <b>Other Hearings</b> .....                                      | <b>265</b> |
|              | <i>United States v. Calandra</i> .....                           | 265        |
|              | <i>Pennsylvania Board of Probation and Parole v. Scott</i> ..... | 266        |
| <b>VIII.</b> | <b>RELATED SEARCH AND SEIZURE ISSUES</b> .....                   | <b>267</b> |
| <b>A.</b>    | <b>Officer’s Intent</b> .....                                    | <b>267</b> |
|              | <i>Whren v. United States</i> .....                              | 267        |
|              | <i>Devenpeck v. Alford</i> .....                                 | 268        |
|              | <i>Arkansas v. Sullivan</i> .....                                | 269        |
| <b>B.</b>    | <b>Other Issues</b> .....  | <b>270</b> |
|              | <i>G. M. Leasing Corp. v. United States</i> .....                | 270        |
|              | <i>Florida v. White</i> .....                                    | 271        |
|              | <i>Kolender v. Lawson</i> .....                                  | 272        |
|              | <i>Hübel v. Sixth Judicial District Court</i> .....              | 273        |
|              | <i>Gerstein v. Pugh</i> .....                                    | 274        |
|              | <i>Zurcher v. Stanford Daily</i> .....                           | 275        |
|              | <i>A Quantity of Copies of Books v. Kansas</i> .....             | 276        |
| <b>IX.</b>   | <b>THE FIFTH AMENDMENT</b> .....                                 | <b>278</b> |
| <b>A.</b>    | <b>Introductory Issues</b> .....                                 | <b>278</b> |
|              | <i>Malloy v. Hogan</i> .....                                     | 278        |
|              | <i>Corley v. United States</i> .....                             | 278        |
|              | <i>Brogan v. United States</i> .....                             | 280        |
|              | <i>Mitchell v. United States</i> .....                           | 280        |
| <b>B.</b>    | <b>Fourth Amendment Violations</b> .....                         | <b>282</b> |
|              | <i>Dunaway v. New York</i> .....                                 | 282        |
|              | <i>New York v. Harris</i> .....                                  | 283        |
|              | <i>Brown v. Illinois</i> .....                                   | 284        |
|              | <i>Taylor v. Alabama</i> .....                                   | 286        |
|              | <i>Kaupp v. Texas</i> .....                                      | 287        |
| <b>C.</b>    | <b>Due Process</b> .....   | <b>288</b> |
|              | <i>Foster v. California</i> .....                                | 288        |
|              | <i>Stovall v. Denno</i> .....                                    | 289        |
|              | <i>Neil v. Biggers</i> .....                                     | 291        |
|              | <i>Perry v. New Hampshire</i> .....                              | 292        |
|              | <i>Simmons v. United States</i> .....                            | 293        |
|              | <i>Manson v. Brathwaite</i> .....                                | 294        |
| <b>D.</b>    | <b>Testimonial Evidence</b> .....                                | <b>295</b> |
|              | <i>Schmerber v. California</i> .....                             | 295        |

|   |            |
|---|------------|
| <i>United States v. Dionisio</i> .....                                  | 296        |
| <i>United States v. Mara</i> .....                                      | 297        |
| <b>1. Compelled</b> .....   | <b>298</b> |
| <i>Brown v. Mississippi</i> .....                                       | 298        |
| <i>Andresen v. Maryland</i> .....                                       | 299        |
| <i>United States v. Doe</i> .....                                       | 300        |
| <i>United States v. Hubbell</i> .....                                   | 301        |
| <i>United States v. Balsys</i> .....                                    | 303        |
| <b>2. Holder of the Privilege</b> .....                                 | <b>304</b> |
| <i>Braswell v. United States</i> .....                                  | 304        |
| <i>Couch v. United States</i> .....                                     | 305        |
| <i>Doe v. United States</i> .....                                       | 305        |
| <i>Fisher v. United States</i> .....                                    | 306        |
| <i>Bellis v. United States</i> .....                                    | 308        |
| <b>E. Voluntary</b> .....   | <b>309</b> |
| <i>Rogers v. Richmond</i> .....   | 309        |
| <i>Lynumn v. Illinois</i> .....   | 310        |
| <i>Colorado v. Connelly</i> .....                                       | 311        |
| <i>Arizona v. Fulminante</i> .....                                      | 312        |
| <i>Beecher v. Alabama</i> .....   | 313        |
| <i>Haynes v. Washington</i> .....                                       | 314        |
| <i>Townsend v. Sain</i> .....   | 314        |
| <i>Lego v. Twomey</i> .....   | 315        |
| <i>Spano v. New York</i> .....  | 316        |
| <b>F. Immunity</b> .....  | <b>317</b> |
| <i>Murphy et. al. v. Waterfront Commission of New York Harbor</i> ..... | 317        |
| <i>Kastigar v. United States</i> .....                                  | 318        |
| <i>Ohio v. Reiner</i> .....   | 320        |
| <b>G. Custodial Interrogation - <u>Miranda</u></b> .....                | <b>321</b> |
| <i>Miranda v. Arizona</i> .....   | 321        |
| <i>Dickerson v. United States</i> .....                                 | 322        |
| <i>Florida v. Powell</i> .....  | 323        |
| <b>1. Police</b> .....  | <b>324</b> |
| <i>Illinois v. Perkins</i> .....  | 324        |
| <i>Arizona v. Mauro</i> .....   | 325        |
| <b>2. Custody</b> .....   | <b>326</b> |
| <i>Berkemer v. McCarty</i> .....  | 326        |
| <i>Pennsylvania v. Bruder</i> .....                                     | 327        |
| <i>Oregon v. Mathiason</i> .....  | 328        |
| <i>Beckwith v. United States</i> .....                                  | 329        |
| <i>Orozco v. Texas</i> .....  | 331        |
| <i>Mathis v. United States</i> .....                                    | 332        |
| <i>Howes v. Fields</i> .....  | 333        |
| <i>Stansbury v. California</i> .....                                    | 335        |
| <i>California v. Beheler</i> .....                                      | 336        |
| <i>Thompson v. Keohane</i> .....  | 337        |

|   |            |
|---|------------|
| <i>Yarborough v. Alvarado</i> .....       | 338        |
| <i>J. D. B. v. North Carolina</i> .....   | 339        |
| <b>3. Interrogation.....</b>              | <b>340</b> |
| <i>Rhode Island v. Innis</i> .....        | 340        |
| <i>Pennsylvania v. Muniz</i> .....        | 341        |
| <b>4. Right to Silence .....</b>          | <b>343</b> |
| <i>Salinas v. Texas</i> .....             | 343        |
| <i>Berghuis v. Thompkins</i> .....        | 344        |
| <i>Jenkins v. Anderson</i> .....          | 345        |
| <i>Fletcher v. Weir</i> .....             | 346        |
| <i>United States v. Hale</i> .....        | 347        |
| <i>Doyle v. Ohio</i> .....                | 348        |
| <i>Michigan v. Mosley</i> .....           | 349        |
| <b>5. Right to Counsel .....</b>          | <b>350</b> |
| <i>Edwards v. Arizona</i> .....           | 350        |
| <i>Arizona v. Roberson</i> .....          | 351        |
| <i>Minnick v. Mississippi</i> .....       | 352        |
| <i>Maryland v. Shatzer</i> .....          | 353        |
| <i>Davis v. United States</i> .....       | 355        |
| <i>Smith v. Illinois</i> .....            | 356        |
| <i>McNeil v. Wisconsin</i> .....          | 357        |
| <i>Oregon v. Bradshaw</i> .....           | 359        |
| <b>6. Waiver .....</b>                    | <b>360</b> |
| <i>Colorado v. Spring</i> .....           | 360        |
| <i>Connecticut v. Barrett</i> .....       | 361        |
| <i>California v. Prysock</i> .....        | 362        |
| <i>Duckworth v. Eagan</i> .....           | 363        |
| <i>North Carolina v. Butler</i> .....     | 364        |
| <i>Oregon v. Elstad</i> .....             | 365        |
| <i>Missouri v. Seibert</i> , .....        | 367        |
| <i>Bobby v. Dixon</i> .....               | 368        |
| <i>Michigan v. Tucker</i> .....           | 369        |
| <i>United States v. Patane</i> .....      | 370        |
| <i>Chavez v. Martinez</i> .....           | 371        |
| <i>Moran v. Burbine</i> .....             | 372        |
| <b>7. Government Employees .....</b>      | <b>374</b> |
| <i>Gardner v. Broderick</i> .....         | 374        |
| <i>Garrity v. New Jersey</i> .....        | 375        |
| <i>Kalkines v. United States</i> .....    | 376        |
| <i>Lefkowitz v. Turley</i> .....          | 377        |
| <i>LaChance v. Erickson</i> .....         | 378        |
| <i>NASA v. FLRA</i> .....                 | 379        |
| <b>8. <u>Miranda</u> Exceptions .....</b> | <b>380</b> |
| <i>Harris v. New York</i> .....           | 380        |
| <i>New York v. Quarles</i> .....          | 381        |

|            |  |            |
|------------|--|------------|
| <b>X.</b>  | <b>SIXTH AMENDMENT RIGHT TO COUNSEL .....</b>                                    | <b>383</b> |
| <b>A.</b>  | <b>Attachment of Right .....</b>   | <b>383</b> |
|            | <i>Kirby v. Illinois</i> .....   | 383        |
|            | <i>Montejo v. Louisiana</i> .....  | 383        |
|            | <i>Rothgery v. Gillespie County</i> .....  | 384        |
|            | <i>United States v. Gouveia</i> .....  | 385        |
| <b>B.</b>  | <b>Critical Stages .....</b>   | <b>386</b> |
| <b>1.</b>  | <b>Questioning.....</b>  | <b>386</b> |
|            | <i>Brewer v. Williams</i> .....  | 386        |
|            | <i>Patterson v. Illinois</i> .....   | 388        |
|            | <i>United States v. Henry</i> .....  | 390        |
|            | <i>Kuhlmann v. Wilson</i> .....  | 391        |
|            | <i>Fellers v. United States</i> .....  | 392        |
| <b>2.</b>  | <b>Lineups .....</b>   | <b>393</b> |
|            | <i>Gilbert v. California</i> .....   | 393        |
|            | <i>United States v. Wade</i> .....   | 394        |
| <b>C.</b>  | <b>Right to Counsel.....</b>   | <b>394</b> |
|            | <i>Massiah v. United States</i> .....  | 394        |
| <b>D.</b>  | <b>Crime Specific .....</b>  | <b>396</b> |
|            | <i>Maine v. Moulton</i> .....  | 396        |
|            | <i>Texas v. Cobb</i> .....   | 397        |
| <b>E.</b>  | <b>Confrontation Clause .....</b>  | <b>398</b> |
|            | <i>Melendez-Diaz v. Massachusetts</i> .....                                      | 398        |
|            | <i>Bullcoming v. New Mexico</i> .....  | 399        |
|            | <i>Michigan v. Bryant</i> .....  | 400        |
|            | <i>Hardy v. Cross</i> .....  | 401        |
| <b>XI.</b> | <b>ADDITIONAL CASES OF INTEREST.....</b>   | <b>403</b> |
| <b>A.</b>  | <b>Use of Force.....</b>   | <b>403</b> |
|            | <i>Graham v. Connor</i> .....  | 403        |
|            | <i>Tennessee v. Garner</i> .....   | 405        |
|            | <i>Scott v. Harris</i> .....   | 407        |
|            | <i>Plumhoff v. Rickard</i> .....   | 409        |
|            | <i>City &amp; Cnty. of San Francisco v. Sheehan</i> .....                        | 411        |
|            | <i>Mullenix v. Luna</i> .....  | 413        |
|            | <i>Kinglsey v. Hendrickson</i> .....   | 414        |
| <b>B.</b>  | <b>Civil Liability .....</b>   | <b>417</b> |
|            | <i>Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics</i> ... | 417        |
|            | <i>County Of Sacramento v. Lewis</i> .....                                       | 418        |
|            | <i>Malley v. Briggs</i> .....  | 420        |
|            | <i>Saucier v. Katz</i> .....   | 421        |
|            | <i>Reichle v. Howards</i> .....  | 423        |

|              |   |            |
|--------------|---|------------|
|              | <i>Wood v. Moss</i> .....   | 424        |
|              | <i>Millbrook v. United States</i> .....   | 426        |
| <b>C.</b>    | <b><u>Brady Material</u></b> .....  | <b>428</b> |
|              | <i>Brady v. Maryland</i> .....  | 428        |
|              | <i>Banks v. Dretke</i> .....  | 429        |
|              | <i>Giglio v. United States</i> .....  | 430        |
|              | <i>Smith v. Cain</i> .....  | 431        |
| <b>XII.</b>  | <b>OTHER CASES</b> .....  | <b>432</b> |
|              | <i>Riverside v. McLaughlin</i> .....  | 432        |
|              | <i>Sanchez-Llamas v. Oregon</i> .....   | 433        |
|              | <i>Snyder v. Phelps</i> .....   | 434        |
|              | <i>Smith v. United States</i> .....   | 435        |
| <b>XIII.</b> | <b>ADDITIONAL RESOURCES</b> .....   | <b>437</b> |
| <b>A.</b>    | <b>The United States Constitution</b> .....   | <b>437</b> |
| <b>B.</b>    | <b>DOJ Guidance re: Use of Race/Other Factors by Federal Law Enforcement Agencies</b> ..... | <b>461</b> |
| <b>C.</b>    | <b>DOJ Memo: Legal Ethics for Investigative Agents</b> .....                                | <b>477</b> |
| <b>D.</b>    | <b>DOJ Memo re: Consensual Monitoring</b> .....   | <b>487</b> |
| <b>E.</b>    | <b>Giglio Policy</b> .....  | <b>499</b> |
| <b>F.</b>    | <b>Glossary of Terms</b> .....  | <b>507</b> |
| <b>G.</b>    | <b>Wray Memorandum on Garrity / Kalkines Warnings</b> .....                                 | <b>511</b> |
| <b>H.</b>    | <b>Fisher Letter on Garrity / Kalkines Warnings</b> .....                                   | <b>517</b> |
| <b>I.</b>    | <b>DHS - Use of Deadly Force Policy</b> .....   | <b>519</b> |
| <b>J.</b>    | <b>DHS – Public Safety Exception Policy</b> .....   | <b>523</b> |
| <b>K.</b>    | <b>DOJ Memo for Prosecutors re: Criminal Discovery</b> .....                                | <b>525</b> |
| <b>L.</b>    | <b>DOJ Memo re: eCommunications in Fed. Crim. Cases</b> .....                               | <b>537</b> |
| <b>M.</b>    | <b>DOJ Memo re: Electronic Recording of Statements</b> .....                                | <b>547</b> |
| <b>N.</b>    | <b>DOJ Guidance re: Use of Cell Site Simulator Technology</b> .....                         | <b>553</b> |
| <b>O.</b>    | <b>DOJ Memo: Eyewitness Identification - Procedures for Conducting Photo Arrays</b> .....   | <b>563</b> |



**P. DHS - Human Trafficking Indicators ..... 577**

**Q. Limited English Proficiency Resource..... 579**

**R. Table of Cases ..... 581**

## NOTES

## I. The Fourth Amendment: What is a Search?

*Olmstead v. United States*  
277 U.S. 438, 48 S. Ct. 564 (1928)

**FACTS:** The defendant was the leading figure in a major conspiracy. The government, observing that the defendant appeared to conduct some of his illegal business through the means of a telephone, tapped the telephone to his home and office. In doing so, the officers refrained from entering onto the defendant's property, using the public street near his home. These wiretaps generated much of the evidence against the defendant.

**ISSUE:** Whether the government conducted a "search" within the meaning of the Fourth Amendment?

**HELD:** No. The Fourth Amendment protects "persons, houses papers and effects," none of which were implicated here.

**DISCUSSION:** The Court held that, absent an intrusion onto the defendant's property, no search occurred. While this definition of search would be expanded in the Katz decision, at the time of the Olmstead ruling, no search occurred unless the government intruded into the defendant's person, home, papers or personal effects. The officers in this instance took special care not to intrude onto the defendant's property, so, under the only definition of a search at that time, the officers were permitted to listen to the defendant's telephone conversations.

Interestingly, the Court wrote "[C]ongress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence." Congress did so in Title III of the Omnibus Crime Control and Safe Streets Act of 1968.



*Katz v. United States*  
389 U.S. 347, 88 S. Ct. 507 (1967)

**FACTS:** FBI agents overheard conversations of the defendant by attaching an electronic listening and recording device to the outside of a public telephone booth from which he had placed his calls. The defendant was charged with transmitting wagering information out of state. At the trial, the court permitted the government to introduce evidence of the defendant's end of telephone conversations.

**ISSUE:** Whether the agents' actions amounted to a Fourth Amendment search?

**HELD:** Yes. The agents conducted a Fourth Amendment search.

**DISCUSSION:** The Court held that a "search" takes place whenever the government intrudes on a reasonable expectation of privacy. The Court concluded that the defendant's expectation of privacy was reasonable if he had taken measures to secure his privacy and the defendant's expectation of privacy met community standards.

What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected under the Fourth Amendment. A person in a telephone booth may rely upon the protection of the Fourth Amendment, and is entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.

Once the defendant established he met both prongs, any government intrusion into these areas must meet Fourth Amendment standards. The Fourth Amendment demands that all searches be reasonable. Searches conducted without a warrant are presumed to be unreasonable, except for some limited well-delineated exceptions. In this case, the agents did not have a warrant or valid exception.



*United States v. Jones*  
565 U.S. 400, 132 S. Ct. 945 (2012)

**FACTS:** The government attached a global positioning device (GPS) to the defendant's vehicle as it was parked on a public parking lot. The defendant was the exclusive driver of this vehicle. The government learned of the travel patterns of the defendant for the next 28 days. Some of this information led to his indictment for drug trafficking.

**ISSUE:** Whether the government's attachment of the GPS to the defendant's vehicle was a "search?"

**HELD:** Yes. A Fourth Amendment "search" occurs when the government trespasses on a person, house, paper or effect for the purpose of gathering information.

**DISCUSSION:** The Court recognized that the "Fourth Amendment provides in relevant part that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' It is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment." "The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." This definition of a "search" [government trespass on "persons, houses, papers and effects" for the purpose of obtaining information] is considered a supplement to and not a replacement of the well-recognized formula of the Katz case [government intrusion on a reasonable expectation of privacy].



**A. Applies to Government Activities Only**

*New Jersey v. T.L.O.*  
469 U.S. 325, 105 S. Ct. 733 (1985)

**FACTS:** The defendant, a fourteen-year-old student, was found smoking cigarettes in a public high school bathroom. She was taken to the vice-principal's office. He asked the defendant to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes. As he reached into the purse for the cigarettes, the vice-principal also noticed a package of cigarette rolling papers. Suspecting that a closer examination of the purse might yield further evidence of drug use, the vice-principal thoroughly searched it. He found several pieces of evidence that implicated the defendant in marijuana dealing.

**ISSUE:** Whether the intrusion of the defendant's purse by a public high school administrator was a Fourth Amendment search?

**HELD:** Yes. The Fourth Amendment regulates all government intrusions into reasonable expectations of privacy.

**DISCUSSION:** The Constitution acts as a regulation of governmental actions. Every governmental intrusion into a person's reasonable expectation of privacy must meet Fourth Amendment scrutiny. This is true whether the government is seeking evidence of a crime, inspecting a structure, or putting out a fire. The Court stated "[A]ccordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors [cite omitted], Occupational Safety and Health Act inspectors [cite omitted], and even firemen entering privately owned premises to battle a fire [cite omitted], are all subject to the restraints imposed by the Fourth Amendment." The fundamental command of the Fourth Amendment is that searches and seizures be reasonable.

Under ordinary circumstances, a search of a student by a teacher or other public school official will be justified at its inception when reasonable grounds exist for suspecting evidence that the student has violated either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.



*Coolidge v. New Hampshire*  
403 U.S. 443, 91 S. Ct. 2022 (1971)

**FACTS:** The defendant, a murder suspect, admitted to a theft. Other officers went to the defendant's house to corroborate his admission to the theft. The defendant was not home but his wife agreed to speak to the officers. The officers asked about any guns that might be in the house. The defendant's wife showed them four weapons that she offered to let them take. The officers took the weapons and several articles of clothing acquired in the same manner. One gun was later determined to be the murder weapon.

**ISSUE:** Whether the officers obtained the murder weapon and the clothing through an illegal search?

**HELD:** No. The officers obtained this evidence through private actions.

**DISCUSSION:** The Fourth Amendment controls governmental actions. The Fourth Amendment was not implicated when the government obtained the guns and clothing from the defendant's wife. The government exerted no effort to coerce or dominate her, and was not obligated to refuse her offer to take the guns. In making these and other items available to the government, she was not acting as an instrument or agent of the government. The items were secured through private actions.



*Gouled v. United States*  
255 U.S. 298, 41 S. Ct. 261 (1921)

**FACTS:** Gouled was involved in a conspiracy to commit mail fraud against the United States. At the direction of the government, Cohen, a business acquaintance of Gouled, pretended to make a friendly visit to Gouled at his office. When Gouled stepped out, Cohen seized and carried away several documents that were later introduced against Gouled at trial.

**ISSUE:** Whether an agent of a government has to comply with the Fourth Amendment?

**HELD:** Yes. The Fourth Amendment requires compliance by government agents.

**DISCUSSION:** The secret taking, without force, from the premises of anyone by a representative of any branch of the Federal government is a search and seizure. It is immaterial that entrance to the premises was obtained by stealth or through social acquaintance, or in the guise of a business call.



**B. Reasonable Expectation of Privacy**

*California v. Ciraolo*  
476 U.S. 207, 106 S. Ct. 1809 (1986)

**FACTS:** Officers received an anonymous telephone tip that the defendant was growing marijuana in his backyard. This area was enclosed by two fences, six and ten feet in height, and shielded from view at ground level. Officers trained in marijuana identification secured a private airplane, flew over the defendant's home at an altitude of 1,000 feet, and readily identified marijuana plants growing in his yard. A search warrant was issued based on this information.

**ISSUE:** Whether the naked-eye aerial observation of the defendant's backyard constituted a search?



**HELD:** No. Areas within the curtilage may be observed from public areas.

**DISCUSSION:** The Fourth Amendment's protection of the home and curtilage does not require law enforcement officers to shield their eyes when passing by a home on a public thoroughfare. Airways constitute a public thoroughfare. The government may use the public airways just as members of the public. While the fences were designed to conceal the plants at normal street level, they will not shield the plants from the elevated eyes of a citizen or a law enforcement officer.



*Dow Chemical Co. v. United States*  
476 U.S. 227, 106 S. Ct. 1819 (1986)

**FACTS:** The defendant operated a 2,000-acre chemical plant. The plant consisted of numerous covered buildings, with outdoor manufacturing equipment and piping conduits located between the buildings that were exposed to visual observation from the air. The defendant maintained an elaborate security system around the perimeter of the complex, barring ground-level public views of the area. When the defendant denied a request by the EPA for an on-site inspection of the plant, the EPA employed a commercial aerial photographer, using a standard precision aerial mapping camera, to take photographs of the facility from various altitudes, all of which were within lawful navigable airspace.

**ISSUE:** Whether this conduct was a Fourth Amendment search?

**HELD:** No. The government can use the air space just as other members of the public.

**DISCUSSION:** The EPA's aerial photograph of the defendant's plant complex from aircraft that was lawfully in public navigable airspace was not a search. Further, the open areas of an industrial plant complex are not analogous to the

“curtilage” of a dwelling. The open areas of an industrial complex are more comparable to an “open field” in which an individual may not legitimately demand privacy.



*Florida v. Riley*  
488 U.S. 445, 109 S. Ct. 693 (1989)

**FACTS:** The Sheriff’s Office received an anonymous tip that the defendant was growing marijuana on his property. The defendant lived in a mobile home on five acres of rural property. A deputy saw a greenhouse behind the mobile home, but could not see inside as walls, trees and the mobile home blocked his view. However, the deputy could see that part of the greenhouse roof was missing. The deputy flew over the curtilage at 400 feet in a helicopter, and with his naked eye saw marijuana inside the greenhouse. A search warrant was obtained and executed, resulting in the discovery of marijuana.

**ISSUE:** Whether naked eye observations on a curtilage from 400 feet in a helicopter constitute a search?

**HELD:** No. The government may use air space consistent with public use.

**DISCUSSION:** The Supreme Court had previously approved flying a fixed wing aircraft at 1,000 feet over curtilage. The aircraft was in public airspace and complied with FAA regulations. Therefore, no reasonable expectation of privacy existed. The Court also approved flying over an industrial complex and taking photographs, as in Dow Chemical Co. v. United States.

In this case, the defendant had no reasonable expectation of privacy from the helicopter overflight. FAA regulations allow any helicopter to fly lower than fixed wing aircraft if its operation is conducted without hazard to persons or property on the ground.



*United States v. Chadwick*  
433 U.S. 1, 97 S. Ct. 2476 (1977)

**FACTS:** Railroad officials in San Diego observed Machado and Leary load a footlocker onto a train bound for Boston. Their suspicions were aroused when they noticed that the trunk was unusually heavy for its size, and that it was leaking talcum powder, a substance often used to mask the odor of marijuana or hashish. Machado fit a drug-courier profile. The railroad officials notified DEA in San Diego who in turn notified DEA in Boston.

In Boston, DEA agents did not have a search warrant nor an arrest warrant, but they did have a trained drug dog. The agents observed Machado and Leary as they claimed their baggage and the footlocker. The agents released the drug dog near the footlocker and he covertly alerted to the presence of a controlled substance. The defendant joined Machado and Leary and together they lifted the 200-pound footlocker into the trunk of a car. At that point, the officers arrested all three. A search incident to the arrests produced the keys to the footlocker. All three were removed from the scene. Agents followed with the defendant's car and the footlocker. Ninety minutes later the agents opened the footlocker, discovering a large amount of marijuana.

**ISSUE:** Whether the defendant can expect privacy in his trunk?

**HELD:** Yes. The defendant's actions indicated he wanted to preserve his privacy in the trunk.

**DISCUSSION:** By placing personal effects inside a double-locked footlocker, defendants manifested an expectation of privacy in the footlocker. Since the defendants' principle privacy interest in the locked footlocker was not in the container itself, but in its contents, seizure of the locker did not diminish their legitimate expectation that its contents would remain private. A footlocker is not open to public view and not subject to regular inspections. By placing personal effects inside a

double-locked footlocker, the defendant manifested an expectation that the contents would remain free from public examination.

**NOTE:** This case was decided before California v. Acevedo. Today, if the officers could establish probable cause that the locker contained contraband, they could have opened it pursuant to the mobile conveyance doctrine.



*Illinois v. Andreas*  
463 U.S. 765, 103 S. Ct. 3319 (1983)

**FACTS:** A Customs inspector initiated a lawful border search and found marijuana concealed inside a table. The inspector informed the DEA of these facts. The next day, the agent put the table in a delivery van and drove it to the defendant's building. A police inspector met him there. Posing as deliverymen, the two men entered the apartment building and announced they had a package for the defendant. At the defendant's request, the officers left the container in the hallway outside the defendant's apartment. The agent stationed himself to keep the container in sight and observed the defendant pull the container into his apartment. While the inspector left to secure a search warrant for the defendant's apartment, the agent maintained surveillance. The agent saw the defendant leave his apartment, walk to the end of the corridor, look out the window, and then return to the apartment. The agent remained in the building but did not keep the apartment door under constant surveillance.

Between thirty and forty minutes after the delivery the defendant reemerged from the apartment with the shipping container and was immediately arrested. At the station the officers reopened the container and seized the marijuana found inside the table. The search warrant had not yet been obtained.

**ISSUE:** Whether the Fourth Amendment requires a search warrant to reopen a container that had previously

been lawfully opened?

**HELD:** No. A reopening of a sealed container in which contraband drugs had been discovered in an earlier lawful border search is not a “search” within the Fourth Amendment where the reopening is made after a controlled delivery.

**DISCUSSION:** When a common carrier or law enforcement officer discovers contraband in transit, the contraband could simply be destroyed. However, this would eliminate the possibility of prosecuting those responsible. Instead, the government may make a “controlled delivery” of the container to the person to whom it is addressed. As long as the initial discovery of the contraband is lawful, neither the shipper nor the addressee has any remaining expectation of privacy in the contents. Therefore, the government may, at the conclusion of the controlled delivery, seize the container and re-open it without procuring a warrant.

Normally, the government will not let the container out of their sight between the time they discover the contraband and the time it is delivered to the addressee and then seized. However, even if there is a brief lapse in surveillance, this will not re-institute the addressee’s expectation of privacy. The relatively short break in surveillance made it substantially unlikely that the defendant had removed the table or placed new items inside the container while he was in his apartment. Therefore, the seizure and re-opening of the container was not a Fourth Amendment search as it violated no reasonable expectation of privacy.



*United States v. Karo*  
468 U.S. 705, 104 S. Ct. 3296 (1984)

**FACTS:** The DEA learned through an informant the defendant had ordered fifty gallons of ether (commonly used to process cocaine). The government obtained a court order to

install and monitor a beeper in one of the cans of ether. With the informant's consent, the DEA substituted their own can of ether, containing a beeper, for one of the cans of ether in the shipment.

The agents saw the defendant pick up the ether from the informant, followed him to his home, and determined by using the beeper that the ether was inside the residence. The ether was moved several other times. Finally, the ether was transported to a house rented by Horton, Harley and Steele. Using the beeper, agents determined that the can was inside the house, and obtained a search warrant for the house, based in part on information derived through the use of the beeper. The agents executed the warrant and seized cocaine.

- ISSUES:**
1. Whether the installation of the beeper was lawful?
  2. Whether the monitoring of the beeper inside the residences was a search?

- HELD:**
1. Yes. The defendant did not have a reasonable expectation of privacy in the container when the beeper was installed.
  2. Yes. The defendant had a reasonable expectation of privacy inside the residence, which was intruded upon by monitoring the beeper while it was inside the residence.

**DISCUSSION:** No Fourth Amendment right was infringed by the installation of the beeper. The consent of the informant to install the beeper was sufficient. The transfer of the beeper-laden can to the defendant was neither a search nor a seizure, since it conveyed no information that he wished to keep private, and did not interfere with anyone's possessory interest in a meaningful way. Whether the installation and transfer would have been a violation of the Fourth Amendment under a Jones analysis is unclear.

The monitoring of the beeper in a private residence, an area of reasonable expectation of privacy, is a search. As this search was conducted without a warrant, it violated the Fourth Amendment. The government, by the surreptitious use of a beeper, obtained information that it could not have obtained from outside the curtilage of the house.

However, the officers, by surveillance and other investigation, had sufficient facts to constitute probable cause. They could not use information derived from the beeper while it was located inside the residence.



*Cardwell v. Lewis*  
417 U.S. 583, 94 S. Ct. 2464 (1974)

**FACTS:** Officers went to the defendant's place of business to question him in connection with a murder investigation. While there, the officers saw the car they suspected might have been used in the murder. Several months later, the officers questioned the defendant again. They also obtained an arrest warrant. The defendant drove his car to the station for questioning and left his car in a commercial parking lot. The suspect was arrested and the car was towed to a police impound lot where a warrantless examination of its exterior was conducted the following day.

**ISSUE:** Whether the examination of an automobile's exterior is reasonable under the Fourth Amendment?

**HELD:** Yes. The defendant had no reasonable expectation of privacy in the exterior of his automobile.

**DISCUSSION:** Nothing from the interior of the car and no personal effects were searched or seized. The intrusion was limited to the exterior of the vehicle left in a public parking lot. No reasonable expectation of privacy is violated by the examination of an exposed tire or in the taking of exterior paint

samples from a vehicle that had been parked in a public place. Further, the officers had probable cause to search the car. Where probable cause exists, a warrantless search of an auto is reasonable under the Fourth Amendment. See Carroll v. United States.



*Kyllo v. United States*  
533 U.S. 27, 121 S. Ct. 2038 (2001)

**FACTS:** Officers suspected the defendant of growing marijuana in his home. They used a thermal-imaging device to determine if the amount of heat emanating from his home was consistent with the high-intensity lamps typically used for indoor marijuana growth. The scan of the defendant's home took a few minutes and was performed from the passenger seat of an officer's vehicle. The scan showed that the house was warmer than neighboring homes. The officers obtained a search warrant, in part based on this information.

**ISSUE:** Whether the use of a thermal-imaging device to detect levels of heat is a search under the Fourth Amendment?

**HELD:** Yes. Employing technology that is not used by the general public to obtain information about a home's interior that could not have been obtained without physical entry constitutes a search.

**DISCUSSION:** The government argued that the scan only detected heat radiating from the home and that it did not detect "intimate details." The government also argued that the defendant had not shown an expectation of privacy because he made no attempts to conceal the heat escaping from his home. The Court held that any information of a home that cannot be obtained except through either physical entry or sophisticated technology not readily available to the public is considered "intimate details." In this case, the surveillance was a search and a warrant was needed to engage in the scan.





*Hoffa v. United States*  
385 U.S. 293, 87 S. Ct. 408 (1966)

**FACTS:** The defendant, the President of Teamsters Union, was on trial for labor racketeering. During the trial, he occupied a three-room suite in a hotel. Several friends and fellow teamster officials were the defendant's constant companions during the trial. One companion was a teamster official and a government informant.

During the trial, the defendant told this companion/informant that he was attempting to bribe jurors to insure a hung jury, and made other incriminating statements. The companion/informant reported these statements to the government. As the defendant predicted, the jury failed to reach a verdict in the case and a mistrial was declared. The government later tried the defendant for obstruction of justice.

**ISSUE:** Whether the presence of a government informant in the defendant's hotel room was a search?

**HELD:** No. The defendant cannot reasonably expect privacy in conversations he openly engages in before a government informant, present by invitation of the defendant.

**DISCUSSION:** The defendant has no reasonable expectation that his conversation will not be reported to the government. Where the informant was in the suite by invitation, and every conversation that he heard was either directed to him or knowingly carried on in his presence, the defendant assumes the risk that the person will maintain confidentiality. The Fourth Amendment does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.



*Minnesota v. Olson*  
495 U.S. 91, 110 S. Ct. 1684 (1990)

**FACTS:** The defendant was suspected of driving a getaway car involved in a robbery and murder. Officers learned that the defendant was staying in a home occupied by two women. After receiving this information, the officers surrounded the home and telephoned the women, urging them to tell the defendant to come out. During this conversation, a male voice was heard saying “tell them I left.” One of the women relayed this message to the officers. There were no indications that the women were in danger or being held against their will by the defendant. Nonetheless, without either the consent of the homeowners or a warrant, the officers entered the home to arrest the defendant. The officers found the defendant hiding in a closet and arrested him. Shortly thereafter, the defendant made incriminating statements to government officers.

**ISSUE:** Whether the warrantless, non-consensual entry into the house where the defendant had been staying violated his Fourth Amendment rights?

**HELD:** Yes. As an “overnight guest,” the defendant had a reasonable expectation of privacy in the house. The entry to arrest him, made without a warrant, consent, or exigent circumstances, was a violation of the Fourth Amendment.

**DISCUSSION:** While the defendant in this case was not the legal owner of the home, he was an “overnight guest” there. This fact allowed him to create a reasonable expectation of privacy in the home. An overnight guest “seeks shelter in another’s home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside.”

No exigent circumstances existed that would excuse the officers’ warrantless entry into the home. While the crime was serious, the defendant was not considered to be the murderer, but only the getaway driver. The officers had previously recovered the

murder weapon and there was no evidence that the two women inside the residence were in danger. The officers had the home surrounded. It was apparent that the defendant was not able to leave. If he had, he would have been arrested in a public place. For all of these reasons, exigent circumstances did not exist to enter the home. The defendant's statement was suppressed as the fruit of his unlawful arrest.



*Minnesota v. Carter*  
525 U.S. 83, 119 S. Ct. 469 (1998)

**FACTS:** The defendant and the lessee of an apartment packaged cocaine in the apartment. A law enforcement officer observed this activity by looking through a drawn window blind. The defendant did not live in the apartment, he had never visited that apartment before and his visit only lasted a matter of hours. His singular purpose in being there was to package cocaine. The defendant was arrested for conspiracy to commit a controlled substance crime. He complained that the information that led to his arrest was the product of an unreasonable search.

**ISSUE:** Whether a visitor enjoys a reasonable expectation of privacy in a premises visited for commercial reasons?

**HELD:** No. Commercial visitors do not obtain a reasonable expectation of privacy in a premises.

**DISCUSSION:** The Supreme Court distinguished the defendant's presence in this apartment from the social, overnight guests' presence in Minnesota v. Olson. In Olson, the Court held that a guest staying overnight in another's home had a reasonable expectation of privacy. The defendant in Carter however, went to the apartment for a business transaction, limiting his presence to a matter of hours. He did not have a previous relationship with the lessee of the apartment, nor did he have a connection to the apartment similar to that of an

overnight guest. While the apartment was a dwelling for the lessee, the property was equivalent to a commercial site to the defendant. Lacking a significant connection to the property, the defendant did not have standing to object to the search conducted on that premises.



*O'Connor v. Ortega*  
480 U.S. 709, 107 S. Ct. 1492 (1987)

**FACTS:** The defendant, a physician, was an employee of a state hospital. Hospital officials became concerned about possible improprieties in his conduct. Hospital officials entered his office while the defendant was on administrative leave pending the investigation. The officials entered the office to inventory and secure state property. They seized personal items from his desk and file cabinets. These items were later used in administrative proceedings resulting in his discharge.

- ISSUES:**
1. Whether the defendant, a public employee, had a reasonable expectation of privacy in his office, desk, and file cabinet at his place of work?
  2. Whether a public employer must establish probable cause before searching an employee's reasonable expectation of privacy?

- HELD:**
1. Yes. It is possible for an employee to establish a reasonable expectation of privacy in a work place environment.
  2. It depends. When the employer's search is work-related, the search must be reasonable under the circumstances.

**DISCUSSION:** The Court recognized that employees may develop a reasonable expectation of privacy in government workplaces. Justice Scalia stated "[c]onstitutional protection

against unreasonable searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer.” The operational realities of the workplace, however, may make some employees’ expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement officer.

The Court concluded the defendant had a reasonable expectation of privacy in his office. Regardless of any legitimate right of access the hospital staff may have had to the office, the defendant had a reasonable expectation of privacy in his desk and file cabinets as he did not share these areas with any other employees.

A determination of reasonableness applicable to a search requires “balancing the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.” In the case of searches conducted by a public employer, the court must balance the invasion of the employees’ legitimate expectations of privacy against the government’s need for supervision, control and the efficient operation of the workplace.

To ensure the efficient and proper operation of the agency, public employers must be given wide latitude to enter employee offices for work-related, non-investigatory reasons, as well as work-related employee misconduct. The Court held that public employer intrusions on the constitutionally protected privacy interests of employees for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances.



*City of Ontario v. Quon*  
560 U.S. 746, 130 S. Ct. 2619 (2010)

**FACTS:** The defendant was employed by City of Ontario. The city provided the defendant with a pager, capable of sending and receiving text messages, to assist with his duties. Each receiving employee was notified that the city “reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.” The defendant signed a statement acknowledging that he understood this policy. Although the policy did not explicitly cover text messages, the city made clear to the employees that text messages were to be treated as e-mails. Over the next few months, the defendant exceeded his character limit three or four times. Each time he reimbursed the city the costs. His supervisor, who tired of collecting overages on behalf of the city, obtained the transcripts of the text usage to determine if the city needed to amend its service plan. He discovered the defendant was using the pager to pursue personal matters while on duty. The defendant was disciplined.

**ISSUE:** Whether the government’s intrusion into the contents of the pager transcripts was reasonable?

**HELD:** Yes. Though the Court refused to address whether the employee had a reasonable expectation of privacy in the pager, it nonetheless found the government’s intrusion as reasonable.

**DISCUSSION:** The Court hesitated to declare that the employee had a reasonable expectation of privacy in this instance. “The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.”

Assuming that the employee had a reasonable expectation of privacy, the Court still found the government's intrusion as a reasonable workplace intrusion. Quoting O'Connor, the Court held that a search "conducted for a 'noninvestigatory, work-related purpos[e]' or for the 'investigatio[n] of work-related misconduct,'" is reasonable if "it is 'justified at its inception' and if 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive..." The city's "legitimate work-related rationale" was to determine whether the city's contract was sufficient to meet the city's needs. Its intrusion was limited in scope because "reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether [the defendant's] overages were the result of work-related messaging or personal use."



*Hudson v. Palmer*  
468 U.S. 517, 104 S. Ct. 3194 (1984)

**FACTS:** The defendant, a prison inmate, was subjected to a prison cell search, or "shakedown." The officers discovered a ripped pillow case and charged the defendant with destruction of government property.

**ISSUE:** Whether a prison inmate has a reasonable expectation of privacy in a prison cell?

**HELD:** No. Society is not willing to recognize that prisoners have a legal right to exclude the government from their cells.

**DISCUSSION:** Prisoners are afforded only those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration (to be free from racial discrimination and cruel and unusual punishment, to petition for redress of grievances, certain First Amendment religious and speech protections, due process). However, imprisonment also entails a series of personal deprivations. One of those deprivations, rationally and logically, is the loss of

personal privacy. The Court held that “society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.”



*Maryland v. Macon*  
472 U.S. 463, 105 S. Ct. 2778 (1985)

**FACTS:** An undercover officer entered an adult bookstore and purchased two magazines with a marked \$50 bill from the defendant. The officer left the store and met with two other officers waiting outside. After reviewing the magazines, they determined that the material was obscene and went into the store. The officers arrested the defendant and retrieved the \$50 bill from the register.

**ISSUE:** Whether the officers searched for and “seized” the two magazines under the definition of the Fourth Amendment?

**HELD:** No. The defendant does not have a reasonable expectation of privacy in items offered for public sale nor a possessory interest in items sold.

**DISCUSSION:** The Court held that “[A]bsent some action taken by government agents that can properly be classified as a “search” or a “seizure,” the Fourth Amendment rules designed to safeguard First Amendment freedoms do not apply.” The defendant does not have an expectation of privacy in areas where the public has been invited to peruse wares for sale. Therefore, the officer’s entry into the store and examining materials for sale cannot be considered a “search.”

Nor did the Court consider the purchase of the magazines a seizure (defined as a “meaningful interference with an individual’s possessory interests” in United States v. Jacobsen).



The defendant “voluntarily transferred any possessory interest he may have had in the magazines to the purchaser upon the receipt of the funds.” Therefore, these actions cannot be deemed a Fourth Amendment seizure.



*New York v. Class*  
475 U.S. 106, 106 S. Ct. 960 (1986)

**FACTS:** Two police officers observed the defendant engaging in traffic violations. They stopped the defendant, who emerged from his car and approached the officers. One officer went directly to the defendant’s vehicle. The defendant provided the other officer with a registration certificate and proof of insurance, but stated that he did not have a driver’s license.

The first officer opened the door of the vehicle to look for the VIN (which was located on the left doorjamb on vehicles manufactured before 1969). When he did not find the VIN there, he reached into the interior of the car to move some papers obscuring the area of the dashboard where the VIN is located in later model cars. In doing so, the officer saw the handle of a gun protruding from underneath the driver’s seat. He seized the gun and arrested the defendant. The officers had no reason to suspect that the defendant’s car was stolen, that it contained contraband, or that the defendant had committed an offense other than the traffic violations.

**ISSUE:** Whether the defendant has a reasonable expectation of privacy in his vehicle’s VIN location?

**HELD:** No. Because of the important role played by the VIN in the pervasive government regulation of the automobile and the efforts by the government to ensure that the VIN is placed in plain view, there is no reasonable expectation of privacy in the VIN.

**DISCUSSION:** An automobile’s interior is protected by the Fourth Amendment’s prohibition against unreasonable

intrusions by the government. However, the officer's reaching into the vehicle to remove the papers was not an unreasonable search but was incidental to viewing something in which the defendant has no reasonable expectation of privacy. The fact that papers on the dashboard obscured the VIN from plain view did not create a reasonable expectation of privacy in the VIN.



*Bond v. United States*  
529 U.S. 334, 120 S. Ct. 1462 (2000)

**FACTS:** A Border Patrol agent entered a bus to check the immigration status of the occupants. After satisfying himself that the passengers were lawfully in the United States, the agent walked toward the front of the bus, squeezing the soft luggage passengers had placed in the overhead storage bin. The agent felt a “brick-like” object in a green canvas bag. After verifying with the defendant that he owned the bag, the agent obtained consent to search its contents. He found a quantity of methamphetamine wrapped in duct tape, rolled in a pair of pants.

**ISSUE:** Whether the agent's squeezing of the passengers' containers was a “search” under the Fourth Amendment?

**HELD:** Yes. Placing items in public view does not convey the expectation that they will be handled by members of the public.

**DISCUSSION:** Under Katz, a search can be defined as a government intrusion on a reasonable expectation of privacy. The government argued that the defendant did not have a reasonable expectation of privacy because he exposed his container to the public. The defendant could not prevent any other member of the public from handling the container. Therefore, he should not have the ability to complain when the government does.

However, the Court found this does not mean that introducing items into the public allows others to manipulate the property. It is true that fellow passengers and bus employees may handle the containers found in the overhead bin. However, the defendant would not have expected anyone to “feel the bag in an exploratory manner.” The Border Patrol agent exceeded the scope of what the public could have been expected to do (which went beyond merely viewing or engaging in incidental contact), thereby intruding on the defendant’s reasonable expectation of privacy.



*United States v. Place*  
462 U.S. 696, 103 S. Ct. 2637 (1983)

**FACTS:** The defendant’s behavior aroused the suspicion of law enforcement officers as he waited in line at the Miami International Airport to purchase a ticket to New York’s LaGuardia Airport. The officers approached the defendant and requested and received identification. There was a discrepancy in the name given by the defendant and his baggage tags. The defendant gave permission to the officers to open his luggage. As the defendant’s flight was about to leave, the officers decided not to search his luggage and allowed the defendant to depart. They called DEA in New York and relayed their information. Upon the defendant’s arrival in New York, two DEA agents approached him and said that they believed he might be carrying narcotics. When he refused to consent to a search of his luggage, one of the agents told him they were going to take the luggage to a federal judge to obtain a search warrant. The agents took the luggage to Kennedy Airport where it was subjected to a “sniff test” by a drug dog. The dog reacted positively to one of the suitcases. At this point, ninety minutes had elapsed since the seizure of the luggage. The agents obtained a search warrant and opened the luggage. They discovered cocaine inside.

**ISSUES:** 1. Whether the prolonged seizure of the defendant’s baggage rendered the seizure

unreasonable?

2. Whether a dog sniff is a “search” within the meaning of the Fourth Amendment?

- HELD:**
1. Yes. The agents were justified in conducting a limited seizure of the containers, but their unnecessary delay rendered their seizure unreasonable.
  2. No. Dog sniffs do not entail the intrusions typically found in the traditional Fourth Amendment searches.

**DISCUSSION:** Traditionally, the Court has viewed a seizure of personal property as per se unreasonable unless it is accomplished pursuant to a search warrant. When law enforcement authorities have probable cause to believe “that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.” Neither of those circumstances was present in this case. However, “when an officer’s observations lead him to reasonably to believe that a traveler is carrying luggage that contains narcotics, the principle of Terry and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provide that the investigative detention is properly limited in scope.”

In evaluating the reasonableness of a Terry-type detention, the brevity of the invasion of the individual’s Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. Moreover, in assessing the effect of the length of detention, we take into account whether the police diligently pursue their investigation.” On this occasion, the agents in New York did not make effort to have minimized the

intrusion on the defendant's Fourth Amendment protection.

As for the "sniff test" by a trained narcotics dog, the Court found that this tool does not amount to a "search" because it "does not require opening the luggage. It does not expose non-contraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage." "Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited."



## 1. Open Fields

*Hester v. United States*  
265 U.S. 57, 44 S. Ct. 445 (1924)

**FACTS:** Federal agents, hiding fifty to one hundred yards from defendant's house, saw a car drive on to the property. They observed the defendant sell moonshine to the driver.

**ISSUE:** Whether the Fourth Amendment protection of privacy in persons, houses, papers, and effects extends to "open fields?"

**HELD:** No. Those observations made from the "open fields" are not subject to Fourth Amendment protections.

**DISCUSSION:** The concept of "open fields" is very old. The special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the "open fields." There is no intrusion onto reasonable expectation of privacy when government agents enter onto open fields. Therefore, there is no Fourth Amendment search. The Court said that, even if there had been a trespass, the observations were not obtained by an illegal search or seizure. The Court affirmed this viewpoint in U.S. v.

Jones, which expanded the definition of a search to include trespass onto the property of others for the purpose of obtaining information.



*Oliver v. United States*  
466 U.S. 170, 104 S. Ct. 1735 (1984)

**FACTS:** Narcotic agents, acting on a report that marijuana was being grown on the defendant's farm, went there to investigate. They drove past the defendant's house to a locked gate with a "no trespassing" sign, but with a footpath around the gate on one side. The agents walked around the gate and along the footpath and found a field of marijuana over a mile from the defendant's house.

**ISSUE:** Whether the officers' observations were made from the open field?

**HELD:** Yes. The officers' observations were made from an area in which the defendant did not have the ability to challenge.

**DISCUSSION:** Steps taken to protect privacy, such as planting the marijuana on secluded land and erecting fences and "No Trespassing" signs around the property, do not necessarily establish an expectation of privacy in an open field. Open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government intrusion or surveillance.



*United States v. Dunn*  
480 U.S. 294, 107 S. Ct. 1134 (1987)

**FACTS:** DEA agents suspected the defendant of manufacturing controlled substances on his ranch. The ranch was completely encircled by a perimeter fence, and contained several interior barbed wire fences, including one around the

house approximately fifty yards from the barn, and a wooden, corral fence enclosing the front of the barn. The barn had an open overhang and locked, waist high gates. Agents, without a warrant, climbed over the perimeter fence, several of the barbed wire fences, and the wooden fence in front of the barn. They were led there by the smell of chemicals, and while there, could hear a motor running inside. They shined a flashlight inside and observed a drug lab. Using this information, the agents obtained and executed a search warrant.

**ISSUE:** Whether the officers' observations were made in the open field?

**HELD:** Yes. The officers did not intrude upon an area where the defendant had a reasonable expectation of privacy, nor did they intrude upon a constitutionally protected area. (the defendant's person, house, papers or effects).

**DISCUSSION:** The Court held that it will consider four factors in determining if an area is in the open field or curtilage:

- 1) Proximity of the area to the home;
- 2) Whether the area is within an enclosure that also surrounds the home;
- 3) The nature and use to which the area is put; and,
- 4) Steps taken by the resident to protect the area from observation by passers-by.

The Court held that the defendant did not establish the area surrounding his barn as curtilage. Therefore, the officers' intrusion into this area was not a search. Also, the warrantless naked-eye observation of an area in which a reasonable expectation of privacy exists is not a search; nor is the shining of a flashlight into an area of reasonable expectation of privacy.



## 2. Abandoned Property

*California v. Greenwood*  
486 U.S. 35, 108 S. Ct. 1625 (1988)

**FACTS:** Officers had information indicating that the defendant was involved in trafficking narcotics. They obtained garbage bags from his regular trash collection left on the curb in front of his house. The officers developed probable cause and obtained a search warrant based on evidence found in the garbage. The search warrant yielded quantities of controlled substances. The defendant and others were arrested and released on bail. The officers again received information that the defendant was engaged in narcotics trafficking. Again the officers obtained his garbage from the regular trash collector. A second warrant was executed and the officers found more evidence of trafficking in narcotics.

**ISSUE:** Whether the defendant had a reasonable expectation of privacy in garbage left for collection outside the curtilage of his home?

**HELD:** No. The defendant abandoned any reasonable expectation of privacy in the items he left for collection outside the curtilage of his home.

**DISCUSSION:** An individual abandons any expectation of privacy in garbage bags once left at the curb outside his curtilage. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. In addition, in this case, the defendant placed his trash at the curb for the express purpose of conveying it to a third party, the trash collector. The trash collector might have sorted through the trash or allowed others, such as the government, to do so. Accordingly, the defendant had no reasonable expectation of privacy in the items discarded. What a person knowingly exposes to the public, even in his own home or office, does not enjoy Fourth Amendment protection.





*Abel v. United States*  
362 U.S. 217, 80 S. Ct. 683 (1960)

**FACTS:** INS agents arrested the defendant in his hotel room to deport him. The defendant was permitted to pay his bill and get out of the room. Immediately thereafter, FBI agents obtained the permission of hotel management to search the room vacated by the defendant. They found evidence linking the defendant to espionage.

**ISSUE:** Whether the defendant maintained a reasonable expectation of privacy in the hotel room?

**HELD:** No. The defendant has abandoned his interests of privacy in the room.

**DISCUSSION:** Once the defendant checked out of the room, the hotel management had the exclusive right of access. The government obtained consent from a party with the authority to grant it. The Court held that the defendant “had abandoned these articles. He had thrown them away.” Therefore, their seizure was lawful.



### 3. Foreign Searches

*United States v. Verdugo-Urquidez*  
494 U.S. 259, 110 S. Ct. 1056 (1990)

**FACTS:** The defendant was a citizen and resident of Mexico. A federal court issued a warrant for his arrest for narcotic-related offenses. He was arrested by Mexican officials and turned over to U.S. Marshals in California. Following the arrest, a DEA Agent in concert with Mexican law enforcement searched the defendant’s residences located in Mexico. The agent believed the searches would reveal evidence of defendant’s narcotics trafficking and his involvement in the torture-murder of a DEA Agent. Arrangements were made with appropriate

Mexican officials who authorized the searches. One search uncovered a tally sheet that the government believed reflected the quantities of marijuana smuggled by defendant into the United States.

**ISSUE:** Whether the Fourth Amendment applies to the search and seizure by U.S. agents of property that is owned by a foreign national and located in a foreign country?

**HELD:** No. The Fourth Amendment's Warrant Clause has no applicability to searches of non-U.S. citizens' homes located in foreign jurisdictions because U.S. magistrates have no power to authorize such searches.

**DISCUSSION:** The Fourth Amendment does not apply where American officers search a foreign national who has no "substantial connections" with the United States and where the search takes place outside the United States. The Fourth Amendment protects "the people." The term "the people" refers to a class of persons who consist of a national community or who have otherwise developed sufficient ties with this country to be considered part of that community. This language contrasts with the words "person" and "accused" used in the Fifth and Sixth Amendments regulating procedure in criminal cases.

The Fifth and Sixth Amendment rights are different from Fourth Amendment rights. They are fundamental trial rights; a violation occurs only at trial. A violation of the Fourth Amendment is fully accomplished at the time of an unreasonable intrusion by government agents. Therefore, any possible Fourth Amendment violation occurred in Mexico.

The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that

the Fourth Amendment warrant requirement should not apply abroad.



#### 4. Private Intrusions

*United States v. Jacobsen*  
466 U.S. 109, 104 S. Ct. 1652 (1984)

**FACTS:** While examining a damaged package, two delivery company employees opened it to check the contents. They observed a white, powdery substance. The substance had been wrapped eight times before being placed in the package. The employees repacked the contents of the package and notified the DEA of their discovery. A DEA agent went to the company office, removed some of the contents and conducted a field test that identified the substance as cocaine.

**ISSUE:** Whether the Fourth Amendment required the DEA agent to obtain a search warrant before removing part of the powder and conducting a field test on it?

**HELD:** No. The defendant's reasonable expectation of privacy in the package had been destroyed by the actions of the private delivery employees.

**DISCUSSION:** A "search" under the Fourth Amendment occurs when the government intrudes on an area where an individual has a reasonable expectation of privacy, or trespasses on a person, house, paper or effect for the purpose of gathering information. The Constitution and its amendments do not apply to the activities of private individuals not acting as agents of the government. Here, the initial invasion by the two employees was not subject to the Fourth Amendment. And, once an individual's original expectation of privacy is destroyed, the Fourth Amendment does not prohibit governmental use of the now non-private information. The additional intrusion of the field test was also determined to be reasonable.



*Walter v. United States*  
447 U.S. 649, 100 S. Ct. 2395 (1980)

**FACTS:** A private carrier mistakenly delivered several packages containing films depicting pornographic images to a third party. The third party opened the packages, finding suggestive drawings and explicit descriptions of the contents. The third party opened one or two of the packages and attempted without success to view portions of the film by holding it up to the light. After the FBI was notified and picked up the packages, agents viewed the films with a projector.

**ISSUE:** Whether the viewing of the films constituted a government intrusion on a reasonable expectation of privacy?

**HELD:** Yes. Even though the private parties destroyed any reasonable expectation of privacy regarding the depictions and descriptions found on the film boxes, the agents exceeded the scope of this intrusion by viewing the film.

**DISCUSSION:** It is well settled that an officer's authority to possess a package is distinct from his authority to examine its contents. When the contents of the package are books or other materials arguably protected by the First Amendment, and when the basis for the seizure is disapproval of the message contained therein, it is especially important that this requirement be scrupulously observed.

Some circumstances – for example, if the results of the private search are in plain view when materials are turned over to the government (see United States v. Jacobsen) – may justify the government's re-examination of the materials. However, the government may not exceed the scope of the private search unless it has the right to make an independent search. The nature of the contents of the films was indicated by descriptive material on their individual containers. This did not allow the government's unauthorized screening of the films absent consent, exigency or a warrant. The screening constituted an

unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances. Therefore, the intrusion of viewing the films with a projector was unreasonable.



## 5. Third Party Control

*United States v. Miller*  
425 U.S. 435, 96 S. Ct. 1619 (1976)

**FACTS:** ATF agents were investigating the defendant. Agents served grand jury subpoenas on the presidents of banks where the defendant kept accounts. The banks made the documents available to the agents, which were used in their investigation of the defendant.

**ISSUE:** Whether the defendant had a reasonable expectation of privacy in records held by the banks?

**HELD:** No. The defendant had no reasonable expectation of privacy in his bank records, since the bank was a third party to which he disclosed his affairs when he opened his accounts at the bank.

**DISCUSSION:** There is no reasonable "expectation of privacy" in the contents of the original checks and deposit slips, since the checks are not confidential communications. They are negotiable instruments to be used in commercial transactions, and all the documents obtained contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities. The issuance of a subpoena to a third party does not violate a defendant's rights, even if a criminal prosecution is contemplated at the time the subpoena is issued.

**NOTE:** The requisition of bank records must be in compliance with federal statutes.



*Smith v. Maryland*  
442 U.S. 735, 99 S. Ct. 2577 (1979)

**FACTS:** The victim of a robbery began receiving phone calls from the person who claimed to be the robber. After developing a suspect, the government installed a pen register, without a warrant, at the central telephone system to determine the specific phone numbers the suspect was dialing. After the government discovered the suspect had called the victim, the suspect (defendant) was charged him with robbery.

**ISSUE:** Whether the use of the pen register constituted a search?

**HELD:** No. The defendant did not have a reasonable expectation of privacy in the phone numbers he dialed.

**DISCUSSION:** The Court found that the defendant did not have a reasonable expectation of privacy regarding the numbers he dialed on his phone since those numbers were automatically turned over to a third party, the phone company. Even if the defendant did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation was not one that society was prepared to recognize as “reasonable.” Therefore, the Court concluded that installation of the pen register was not a “search” and no warrant was required.

**NOTE:** The installation of pen registers must be in compliance with federal statutes.



## II. The Fourth Amendment: What is a Seizure?

*California v. Hodari*  
499 U.S. 621, 111 S. Ct. 1547 (1991)

**FACTS:** Two officers were on patrol in a high-crime area. They discovered a group of youths huddled around a car. The youths, including the defendant, fled when they observed the approaching unmarked police car. A police officer, wearing a “raid” jacket, left the patrol car to give chase. The officer took a circuitous route that brought him in direct contact with the defendant. The defendant was looking behind as he ran and did not turn to see the officer until the officer was almost upon him, whereupon the defendant tossed away a small rock. The officer tackled him, handcuffed him, and radioed for assistance. Officers recovered the rock, which proved to be crack cocaine.

**ISSUE:** Whether the defendant was “seized” at the time he dropped the controlled substance?

**HELD:** No. The government had not seized the defendant until it engaged in physical contact with him.

**DISCUSSION:** To constitute a Fourth Amendment seizure of a person, there must be either:

1) An application of force, however slight;

or

2) Submission to an officer’s “show of authority” to restrain the subject’s freedom of movement.

The defendant was not seized at the time he dropped the controlled substance. No physical force was applied to the defendant, nor did he submit to a “show of authority.” He was not seized until he was tackled.

Assuming that the officer’s pursuit constituted a “show of authority” requesting the defendant to halt, the defendant did

not submit. He therefore was not seized until he was tackled.



*Brower v. Inyo County*  
489 U.S. 593, 109 S. Ct. 1378 (1989)

**FACTS:** The decedent was killed one evening when he drove a stolen car through a police roadblock. The roadblock consisted of an unilluminated 18-wheel tractor-trailer placed across both lanes of a two-lane road, behind a curve. A police car, with its headlights on, was placed between the decedent's vehicle and the tractor-trailer.

**ISSUE:** Whether the officers' actions constituted a seizure under the Fourth Amendment?

**HELD:** Yes. The officers' action of setting up the roadblock was not a seizure. However, when the decedent crashed into the roadblock he was "seized" within the meaning of the Fourth Amendment.

**DISCUSSION:** A person is seized within the meaning of the Fourth Amendment whenever the government has terminated a person's freedom of movement through means intentionally applied. A Fourth Amendment seizure, however, does not occur just because there is a governmentally caused termination of an individual's freedom of movement. Only when that termination is intentionally applied does a Fourth Amendment seizure occur, as was the case here.



*Michigan v. Chesternut*  
486 U.S. 567, 108 S. Ct. 1975 (1988)

**FACTS:** Officers, riding in a marked car, observed the defendant standing on a street corner. When he saw the police car approaching, the defendant began to run. The officers followed him, driving next to him as he ran. While they drove alongside, the officers did not activate their siren or flashing



lights, order the defendant to stop, display any weapons, or use the vehicle to try to block the defendant's path. As the officers observed him, the defendant threw a number of small packets. One of the officers retrieved the packets and identified the contents as a controlled substance. The defendant was arrested and a search of his person revealed other drugs and a hypodermic needle.

**ISSUE:** Whether the government pursuit of the defendant was a "seizure" within the meaning of the Fourth Amendment?

**HELD:** No. The officers neither applied force nor demonstrated authority to the defendant.

**DISCUSSION:** The test for determining when a person is "seized" under the Fourth Amendment is whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Here, there was no evidence the government attempted to impinge the defendant's ability to leave. "While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure." In sum, the police conduct in this case would not have communicated to a reasonable person an attempt to capture or otherwise intrude upon the defendant's freedom of movement. No "seizure" occurred.



*Brendlin v. California*  
551 U.S. 249, 127 S. Ct. 2400 (2007)

**FACTS:** An officer stopped a car with a temporary license plate even though there was nothing unusual about the circumstances. During the stop, he recognized the passenger in the car as someone who might be a parole violator. The officer asked the passenger to identify himself. After verifying an arrest warrant of the passenger through dispatch, the officer placed him under arrest. A search incident to his arrest yielded

evidence of his capability to produce a controlled substance.

**ISSUE:** Whether a passenger in a stopped motor vehicle has been “seized?”

**HELD:** Yes. The passengers in a motor vehicle are “seized” just as well as the driver during a routine vehicle stop as they do not feel free to leave the encounter.

**DISCUSSION:** The Court held that unintended persons can be subjected to a seizure, as happened in this case. As the Fourth Amendment applies to traffic stops, the Court has consistently held that the government seizes drivers and occupants during these encounters. The Court stated “we have said over and over in dicta that during a traffic stop an officer seizes everyone in the vehicle, not just the driver.” The critical issue is whether a reasonable person would feel free to terminate the encounter. The Court concluded that “any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.”



*Florida v. Bostick*  
501 U.S. 429, 111 S. Ct. 2382 (1991)

**FACTS:** As part of a drug interdiction effort, police officers routinely boarded passenger buses at scheduled stops and asked travelers for permission to search their luggage. Two officers boarded the bus that the defendant was riding. Without articulable suspicion, the officers questioned the defendant and asked for his consent to search his luggage for drugs. They advised the defendant of his right to refuse and he granted his consent. The officers found cocaine and arrested the defendant.

**ISSUE:** Whether the encounter constituted a “seizure” within the meaning of the Fourth Amendment?

**HELD:** No. A person is “seized” when freedom of

movement is restricted by government action.

**DISCUSSION:** In some circumstances, the proper test in deciding whether a person has been seized is not whether a reasonable person would feel free to leave, but whether, a reasonable passenger would feel free to terminate the encounter. Random bus searches pursuant to a passenger's consent are not per se unconstitutional. The cramped confines of a bus is just one factor to be considered in evaluating whether that encounter constitutes a "seizure" within the meaning of the Fourth Amendment.

Even when officers have no basis for suspecting a particular individual of criminal activity, they may generally ask questions of that individual, ask to examine his identification, and request to search his luggage. It is important that they do not convey the impression that compliance with their requests is mandatory.

In this case, the fact that the defendant did not feel free to leave the bus does not mean that he was seized. His movements were confined in a sense, but this was the natural result of his decision to ride the bus. The officers did not point weapons at the defendant or threaten him or otherwise imply that compliance with their request was mandatory. Further, the officers specifically advised him that he could refuse consent. Therefore, the action by the police on the bus did not constitute a Fourth Amendment seizure.



*United States v. Drayton*  
536 U.S. 194, 122 S. Ct. 2105 (2002)

**FACTS:** Three police officers boarded a bus as part of a routine drug and weapons interdiction effort. One officer knelt on the driver's seat, facing the rear of the bus, while another officer stayed in the rear, facing forward. The third officer worked his way from back to front, speaking with individual passengers as he went. To avoid blocking the aisle, this officer

stood next to or just behind each passenger with whom he spoke. He testified that passengers who declined to cooperate or who chose to exit the bus at any time would have been allowed to do so, that most people are willing to cooperate, and that passengers often leave the bus for a break while officers are on board. The officer approached the defendant and his traveling companion, who were seated together, and identified himself. Speaking just loud enough for them to hear, he declared that he was looking for drugs and weapons and asked if the defendants had any bags. Both of them pointed to a bag overhead. The officer asked if they minded if he checked it. The traveling companion agreed, but the search did not reveal anything. The officer then asked the companion whether he minded if the officer checked his person. The companion agreed and the officer felt hard objects similar to drug packages. The officer arrested the companion. The officer then asked the defendant, “Mind if I check you?” When the defendant agreed, a pat-down revealed objects similar to those found on the companion, and the officer arrested the defendant.

**ISSUE:** Whether the defendant and his traveling companion were coerced (by being seized) into giving consent to search their persons?

**HELD:** No. The officers did not seize the defendant nor does the Fourth Amendment require officers to advise bus passengers of their right to refuse cooperation.

**DISCUSSION:** The Court previously held in Florida v. Bostick that the Fourth Amendment allows officers to approach bus passengers at random to ask questions and request their consent to search. The limitation to this authority is that a reasonable person must feel free to decline the requests or otherwise terminate the encounter. Applying Bostick’s rationale to this case demonstrates that the officers did not seize the defendants. The officers gave the passengers no reason to believe that they were required to answer questions. They did not display weapons or make any intimidating movements, and they left the aisle free so that the defendants could exit. The

communicating officer spoke to the defendants one by one and in a polite, quiet voice. The Court held that if this encounter occurred on a public street, no seizure would have occurred. The fact that an encounter takes place on a bus does not transform it into a seizure.



*Soldal v. Cook County*  
506 U.S. 56, 113 S. Ct. 538 (1992)

**FACTS:** A mobile home park owner requested the presence of deputy sheriffs to deter any resistance during an eviction. Up to five deputy sheriffs were present as park employees disconnected the trailer's sewer and water connections and towed it out of the park, which caused serious damage to the home. The deputies informed the tenant that they were there to prevent him from interfering. Throughout this period, the deputies were aware that the park owner did not have an eviction order and that the eviction was unlawful.

**ISSUE:** Whether the officers "seized" the mobile home?

**HELD:** Yes. The officers had "seized" the mobile home within the definition of the Fourth Amendment and could be subject to a § 1983 lawsuit.

**DISCUSSION:** The Court held that the forcible removal of the trailer home from the park was a "seizure" of the home within the meaning of the Constitution's Fourth Amendment. This was true although the officers did not enter the home or rummage through the homeowner's possessions and did not interfere with the homeowner's liberty during the eviction. The Court cited precedents indicating that the Fourth Amendment protects against unreasonable seizures of property regardless of whether the seizure is the outcome of a search, and protects pure property interests even in a setting other than law enforcement.



## **A. Arrests**

*Atwater v. City of Lago Vista*  
532 U.S. 318, 121 S. Ct. 1536 (2001)

**FACTS:** An officer observed the defendant violate a state seat belt law. The law is a misdemeanor, punishable only by a fine. The warrantless arrest of anyone violating this statute is expressly authorized by statute, but the police may issue a citation instead of making an arrest. The officer pulled the defendant over, verbally berated her, and handcuffed her. He placed the defendant in his squad car, and drove her to the local police station. Once there, she was searched incident to the arrest, and processed in the same manner as all other arrests.

**ISSUE:** Whether the officer acted unreasonably in arresting the defendant for a crime that only carried the possibility of a fine as a punishment?

**HELD:** No. 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.

**DISCUSSION:** In interpreting the Fourth Amendment, the Court considers the traditional protections against unreasonable searches and seizures that were provided by the common law at the time of the Constitution's founding. The Court found the history of the common law conflicted in this area. As a result, it rejected the defendant's request to create a new rule of constitutional law forbidding custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time. The Court has traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need. Otherwise, every discretionary judgment in the field would be converted into an occasion for constitutional review.



## 1. Premises

*Payton v. New York*  
445 U.S. 573, 100 S. Ct. 1371 (1980)

**FACTS:** Officers developed probable cause the defendant murdered the manager of a gas station two days earlier. Six officers went to his apartment intending to arrest him. The officers did not have a warrant. Although light and music emanated from the apartment, there was no response to the officers' knock on the metal door. The officers summoned additional assistance and, about thirty minutes later, used crowbars to break open the door and enter the apartment. No one was there. However, the officers found a .30 caliber shell casing that was later admitted into evidence at the defendant's murder trial.

**ISSUE:** Whether the warrantless entry into the apartment was reasonable?

**HELD:** No. The physical entry into the home is the chief evil against which the wording of the Fourth Amendment is directed.

**DISCUSSION:** Arrest in the home involves not only the invasion associated to all arrests, but also an invasion of the sanctity of the home. The law has long held that this is too substantial an invasion to allow without a warrant or exigent circumstances.

This applies equally to seizures of property. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.



*New York v. Harris*  
495 U.S. 14, 110 S. Ct. 1640 (1990)

**FACTS:** Officers established probable cause the defendant committed a murder. Without obtaining an arrest warrant, the officers went to the defendant's apartment to arrest him. The officers entered the apartment without the defendant's consent and read the defendant his Miranda rights. The defendant told the officers he committed the murder and the officers arrested him. At the police station, officers again advised the defendant of his Miranda rights and the defendant provided a written statement in which he admitted to committing the murder.

- ISSUES:**
1. Whether the officers could enter the defendant's home to arrest him based on probable cause alone?
  2. Whether a violation of the rule in Payton v. New York required suppression of the defendant's statement made to the officers at the police station.

- HELD:**
1. No. The officers needed to have an arrest warrant, the defendant's consent, or some exigency to enter the defendant's home to arrest him.
  2. No. Where the officers had probable cause to arrest the defendant, the exclusionary rule does not bar the government's use of a statement made by the defendant outside of his home, even though the statement was taken after an arrest made in the home in violation of Payton.

**DISCUSSION:** Probable cause does not, by itself, permit officers to intrude into a home to place someone inside under arrest. They must have a warrant, consent, or operate under some exigency (such as hot pursuit). The exclusionary rule may bar evidence discovered inside the home from the government's



use, including, in this case, the defendant's first statement.

However, when the government has probable cause to arrest, the exclusionary rule will not bar the government's use of a statement made by the defendant outside of his home, even though the statement was taken after an illegal entry into the home to make an arrest. The rule in Payton was designed to protect the physical integrity of the home, not to grant criminal suspects protection for statements made outside their premises.

There was no valid claim that the defendant was immune from prosecution because his person was the fruit of an illegal arrest. Nor is there any reason that the warrantless arrest required the government to release the defendant. Because the government had probable cause to arrest the defendant for a crime, the defendant was lawfully in custody when he was removed to the police station. The Court noted that any evidence found while illegally in the defendant's house would have been suppressed as fruits of the illegal entry. However, the defendant's statement taken at the police station was not the product of being in unlawful custody (as the officers had probable cause to arrest).



*Kirk v. Louisiana*  
536 U.S. 635, 122 S. Ct. 2458 (2002)

**FACTS:** Officers surveyed the defendant's apartment after receiving an anonymous tip regarding drug sales. The officers observed what appeared to be several drug transactions and allowed the buyers to leave the area. They stopped one of the buyers in a location removed from the defendant's premises to confirm their suspicions. The officers then knocked on the defendant's door, immediately entered and placed him under arrest. A subsequent search of his person resulted in the discovery of controlled substances.

**ISSUE:** Whether the government is justified in entering a premises to affect an arrest without consent, a

warrant or exigent circumstance?

**HELD:** No. As a premises has a special status against a government intrusion, the government may only justify its entry with a warrant, consent or an exigent circumstance.

**DISCUSSION:** The Court stated that “[A]s Payton makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.” As neither existed in this case, the entry was unlawful.



## 2. Third Party Premises

*Steagald v. United States*  
451 U.S. 204, 101 S. Ct. 1642 (1981)

**FACTS:** A federal agent in Detroit was contacted by a confidential informant who suggested that he might be able to locate Ricky Lyons, a federal fugitive. The informant gave the agent a telephone number in the Atlanta area where, according to the informant, Lyons could be reached during the next twenty-four hours. The information was relayed to agents in Atlanta, who learned that the telephone number was assigned to Steagald’s house.

Two days later, agents went to the address to execute an arrest warrant for Lyons. They observed two men, Gaultney and Steagald, standing in front of the house. The agents frisked and identified the two men. Several agents proceeded to the house. Gaultney’s wife answered the door. She was detained while one agent searched the house for Lyons. Lyons was not found, but during the search of the house the agent observed what he believed to be cocaine. An agent was sent to secure a search warrant and in the meantime, a second search was conducted and incriminating evidence was discovered. During the third search of the house (which was conducted with the search

warrant) forty-three pounds of cocaine were found.

**ISSUE:** Whether the evidence from all three searches was illegally obtained because the agents failed to obtain a search warrant before entering the house?

**HELD:** Yes. An arrest warrant for a suspect does not grant the authority to enter a third-party's home to effect the arrest. A search warrant, consent or an exigency is necessary to do so.

**DISCUSSION:** The Fourth Amendment has drawn a firm line at the entrance to a dwelling, and, absent a warrant, exigent circumstances or consent, that threshold may not be crossed. The purpose of a warrant is to allow a neutral and detached magistrate to assess whether the government has probable cause to make an arrest or conduct a search.

An arrest warrant authorizing the agent to deprive a person of his liberty also authorizes a limited invasion of that person's privacy when it is necessary to arrest him in his home. However, the arrest warrant does not authorize the government to deprive a third person of his liberty, nor does it include any authority to deprive that person of their interest in their home. Absent a search warrant, exigent circumstances or consent, law enforcement officers cannot search for the subject of an arrest warrant in the home of a third party.



*Pembaur v. Cincinnati*  
475 U.S. 469, 106 S. Ct. 1292 (1986)

**FACTS:** The government indicted Pembaur, a physician, for fraudulently accepting payments from state welfare agencies. During the investigation, grand jury subpoenas were issued for two of Pembaur's employees. When the employees failed to appear before the grand jury, arrest warrants were issued for their arrests. When two deputies attempted to serve the warrants at Pembaur's clinic, he barred the door and refused to

allow the deputies enter the private part of the clinic. The deputies then called the County Prosecutor, who instructed them to “go in and get” the employees. After the deputies were unable to force the door open, they chopped it down with an axe and entered the private part of the clinic; however, the deputies were unable to locate the two employees.

Pembaur filed a lawsuit against the county and others under 42 U.S.C. § 1983 alleging that his Fourth and Fourteenth Amendment rights had been violated. Pembaur argued that, absent exigent circumstances, the Fourth Amendment prohibits the government from searching an individual’s home or business without a search warrant, even to execute an arrest warrant for a third person.

**ISSUE:** Whether law enforcement officers must obtain a search warrant to execute an arrest warrant in areas in which a third party has reasonable expectation of privacy?

**HELD:** Yes. Generally, officers must obtain a search warrant to execute an arrest warrant in areas where a third party has reasonable expectation of privacy.

**DISCUSSION:** Absent some exigency or consent, law enforcement officers must have a search warrant to enter a third party’s zone of reasonable expectation of privacy to serve an arrest warrant.



### 3. Arrest Warrants

*Whiteley v. Warden*  
401 U.S. 560, 91 S. Ct. 1031 (1971)

**FACTS:** A sheriff received information that the defendant had broken into a building and stolen some property. The sheriff filed a complaint that did not mention nor corroborate

this information. It merely contained the officer's conclusion that the defendant had committed the crime. Based on this complaint, the magistrate issued an arrest warrant and the defendant was arrested.

**ISSUE:** Whether the government can establish probable cause for an arrest warrant on information that was not presented to the issuing judge, but which the government possessed at the time of the warrant application?

**HELD:** No. An arrest warrant must be based on the facts as they were presented to the issuing judge. Any subsequent arrest based on that arrest warrant alone cannot be sustained by facts that were not presented to the judge.

**DISCUSSION:** If a warrant is challenged, its validity may only be established by information in the affidavit (or complaint). The government may not present information other than that originally presented to the magistrate judge.

In this case, the arrest warrant was struck down as invalid. Since an objectively reasonable officer in the sheriff's position would have recognized that the affidavit was insufficient, the "good faith exception" of United States v. Leon does not apply. Also, since the arresting officer did not have information other than the fact that an arrest warrant had been issued, the Court refused to consider information that was not contained in the complaint on which the arrest warrant had been based.



*United States v. Watson*  
423 U.S. 411, 96 S. Ct. 820 (1976)

**FACTS:** A reliable informant told a Postal Inspector that the defendant had provided the informant with a stolen credit card. The Inspector later verified that the card had been stolen. The informant also told the Inspector that the defendant had agreed

to furnish additional stolen credit cards. A meeting was arranged between the informant and the defendant in a public place. Upon receiving a signal from the informant that the defendant was in possession of additional stolen credit cards, Postal Officers made a warrantless arrest of the defendant. When a search of his person failed to turn up the additional cards, the defendant consented to a search of his nearby vehicle. Prior to consenting to the vehicle search, the defendant was told that if anything was found, "it was going to go against [him]." Two credit cards in the name of other persons were found in the vehicle.

- ISSUES:**
1. Whether the warrantless arrest of the defendant was a violation of the Fourth Amendment, in that the officers had time to obtain a warrant, but failed to do so?
  2. Whether the defendant's consent to search the vehicle was coerced?

- HELD:**
1. No. The officers had probable cause to arrest for the felony and, because the arrest occurred in public, they could do so without first obtaining a warrant.
  2. No. There was no evidence to indicate that the defendant's consent was coerced from him.

**DISCUSSION:** Nothing in the Fourth Amendment requires a warrant before an officer makes an arrest for a felony offense in a public place. Cases interpreting the Fourth Amendment have traditionally followed the common law approach, which permitted officers to make warrantless arrests that were committed in the officer's presence. Common law permitted arrests for felonies not committed in the officer's presence, but for which probable cause existed.

There was no evidence presented that the consent was coerced or otherwise not a product of the defendant's free will. There

were no threats of force made, nor were there any promises made to the defendant that would have flawed his judgment. The fact that the defendant was in custody is not sufficient to show coercion, though it may be a factor. However, the defendant's consent was given on a public street, after he had been given Miranda warnings, not in the confines of a police station. There was no evidence that the defendant was mentally deficient or unable to exercise his free choice, nor was there evidence that the defendant was a "newcomer to the law." Based on the totality of the circumstances, his consent was voluntarily given.



*Maryland v. Buie*  
494 U.S. 325, 110 S. Ct. 1093 (1990)

**FACTS:** Two men committed armed robbery in a restaurant. One of the robbers wore a red running suit. The government obtained arrest warrants for the defendant and his suspected accomplice and went to his house to serve them. Once inside, the officers fanned out. One of the officers found the defendant in the basement and ordered him out, whereupon he was arrested, searched and handcuffed. Following the defendant's arrest, another officer entered the basement "in case there was someone else down there." While in the basement, he saw a red running suit on a stack of clothing and seized it. The red running suit was introduced into evidence against the defendant.

**ISSUE:** Whether the Fourth Amendment permits officers, when effecting the arrest of a suspect in his home, to conduct a warrantless protective sweep of the premises?

**HELD:** Yes. A limited protective sweep, in conjunction with an in-home arrest, is permitted when the searching officer possesses a reasonable belief that the area to be swept harbors an individual posing a danger to those on the arrest scene.

**DISCUSSION:** As an incident to an arrest, police officers may, as a precautionary matter and without probable cause or reasonable suspicion, look inside closets or other spaces immediately adjoining the place of arrest from which an attack could be launched. Beyond that, however, there must be articulable facts that would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger.

A “protective sweep” is a quick and limited search of a premises, incident to an arrest and conducted to protect the safety of the officers or others. Protective sweeps are not automatically permitted. They are also not full searches of the premises, but extend only to a cursory inspection of those spaces where a person may be found as justified by the circumstances. A sweep may last no longer than is necessary to dispel the reasonable suspicion of danger, and in any event, no longer than it takes to complete the arrest and depart the premises.

In this case, possessing an arrest warrant and probable cause to believe that the defendant was in his home, the officers were entitled to search anywhere in the house, including the basement, in which he might be found. However, once the defendant was found, that search for him ceased, and there was no longer justification for entering any rooms that had not been searched. Nevertheless, the government had an interest in taking steps to assure themselves that the defendant’s house was not harboring other people who were dangerous and could unexpectedly launch an attack. The second officer did not go into the basement to search for evidence, but rather to look for the suspected accomplice or anyone else who might pose a threat to the officers. The interest in ensuring the officer’s safety was sufficient to outweigh the intrusion this procedure entailed.





## **B. Stops**

### **1. Generally**

*Terry v. Ohio*  
392 U.S. 1, 88 S. Ct. 1868 (1968)

**FACTS:** Police Detective McFadden had been a police officer for 39 years. He served 35 years of those years as a detective and 30 of those years walking a beat in downtown Cleveland. At approximately 2:30 p.m. on October 31, 1963, Officer McFadden was patrolling in plain clothes. Two men, Chilton and the defendant, standing on a corner, attracted his attention. He had never seen the men before, and he was unable to say precisely what first drew his eye to them. His interest aroused, Officer McFadden watched the two men. He saw one man leave the other and walk past several stores. The suspect paused and looked in a store window, then walked a short distance, turned around and walked back toward the corner, pausing again to look in the same store window. Then the second suspect did the same. This was repeated approximately a dozen times. At one point, a third man approached the suspects, engaged them in a brief conversation, and left. Chilton and the defendant resumed their routine for another 10-12 minutes before leaving to meet with the third man.

Officer McFadden suspected the men were “casing a job, a stick-up,” and that he feared “they may have a gun.” Officer McFadden approached the three men, identified himself and asked for their names. The suspects “mumbled something” in response. Officer McFadden grabbed the defendant, spun him around and patted down the outside of his clothing. Officer McFadden felt a pistol in the defendant’s left breast pocket of his overcoat, which he retrieved. Officer McFadden then patted down Chilton. He felt and retrieved another handgun from his overcoat. Officer McFadden patted down the third man, Katz, but found no weapon. The government charged Chilton and the defendant with carrying concealed weapons.

- ISSUES:**
1. Whether the detective's actions constituted a seizure?
  2. Whether the detective's actions constituted a search?

- HELD:**
1. Yes. Detective McFadden "seized" the defendant when he grabbed him.
  2. Yes. Detective McFadden "searched" the defendant when he put his hands on the defendant's person.

**DISCUSSION:** The Constitution only prohibits unreasonable searches and seizures. An officer "seizes" a person when he or she restrains their freedom to walk away. Likewise, there is a "search" when an officer makes a careful exploration of outer surfaces of person's clothing to attempt to find weapons. These searches and seizures must be reasonable to justify them under the Fourth Amendment.

In justifying any particular intrusion, the government must be able to point to specific and articulable facts that, taken with rational inferences from those facts, reasonably warrant that intrusion. Searches and seizures must be based on more than hunches. Simple good faith on part of the officer is not sufficient.

The Court permitted Detective McFadden to conduct the limited intrusions of stopping the suspects based on articulable (reasonable) suspicion that criminal activity was afoot. The Court also found that Detective McFadden demonstrated reasonable suspicion that the men were armed and dangerous. Therefore, the Court allowed his limited intrusion onto their persons in search of weapons. While both standards are less than probable cause, the Court acknowledged that limited intrusions, based on articulated, reasonable suspicion can be reasonable.



*Davis v. Mississippi*  
394 U.S. 721, 89 S. Ct. 1394 (1969)

**FACTS:** A rape victim provided a physical description of her assailant. Officers found fingerprints on a window through which the rapist had apparently entered the victim's home. On December 3, the defendant and several others were taken to police headquarters, without either a warrant or probable cause for an arrest, for fingerprinting and questioning. Over the next five days, the officers questioned the defendant on several occasions at a variety of locations, including police headquarters. He was also shown to the victim on several occasions, although she did not identify him as the rapist. On December 12, the defendant was arrested without either probable cause or a warrant. The officers fingerprinted him for a second time two days later. These fingerprints were later shown to match those taken from the victim's window.

**ISSUE:** Whether the fingerprints taken by officers on December 14th were obtained through an illegal detention under the Fourth Amendment?

**HELD:** Yes. Because the defendant's detention on December 12th was unlawful, the fingerprints taken during his confinement were obtained in violation of the Fourth Amendment.

**DISCUSSION:** The fingerprint evidence taken on December 14th was obtained while the defendant was still confined following his arrest on December 12th. Because the arrest and subsequent confinement were not based on either a warrant or probable cause, both violated the Fourth Amendment. The Court noted that the fingerprints taken on December 3rd were also taken in violation of the Fourth Amendment. There was no evidence that the defendant voluntarily accompanied the police to headquarters. Therefore, the seizure of the defendant on either date was constitutionally invalid, as were the fingerprints obtained during the illegal detention.



*Florida v. Royer*  
460 U.S. 491, 103 S. Ct. 1319 (1983)

**FACTS:** The defendant paid cash for a one-way airline ticket to New York City at Miami International Airport under an assumed name, which was legal at the time. The defendant also checked his two suitcases bearing identification tags with the same assumed name. Two officers had previously observed him and believed that his characteristics fit a “drug courier profile.” They approached him. Upon request the defendant produced his airline ticket and driver’s license, which bore his correct name. The defendant explained that a friend had made the ticket reservations in the assumed name. The officers told the defendant that they were narcotics investigators and that they had reason to suspect him of transporting narcotics. Without returning his ticket or driver’s license, the officers asked him to accompany them to a small room about forty feet away. Without the defendant’s consent, one of the officers retrieved his luggage and brought it to the room. Although he did not orally consent to a search of the luggage, the defendant produced a key and unlocked a suitcase in which marijuana was found.

- ISSUES:**
1. Whether the seizure of the defendant was unreasonable, tainting his consent?
  2. Whether the defendant’s consent was validly granted.

- HELD:**
1. Yes. The officers exceeded the scope of their stop, turning it into an arrest without probable cause.
  2. No. Consent granted during an illegal seizure is typically the result of government coercion.

**DISCUSSION:** Investigative detentions (“stops”) must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Investigative methods employed should be the least intrusive means reasonably available to verify or dispel

reasonable suspicion in a quickest time possible. Officers did not do that here as they failed to return his ticket and license. They did not have probable cause to either arrest the defendant or search his suitcases. Finally, consent granted during an illegal seizure will typically be held to be invalid as the result of government coercion.



## 2. Terry Stops / Traffic Stops

*Delaware v. Prouse*  
440 U.S. 648, 99 S. Ct. 1391 (1979)

**FACTS:** An officer stopped a vehicle occupied by the defendant. The officer testified that, prior to the stop, he had observed neither traffic or equipment violations, nor any other suspicious activity. Instead, he made the stop only to check the driver's license and the vehicle's registration documents. In making the stop, the officer was not acting pursuant to any standards, guidelines, or procedures promulgated by either his department or the State Attorney General. Upon approaching the vehicle, the officer smelled marijuana. He later seized marijuana in plain view on the floor of the car.

**ISSUE:** Whether the officer's stop of the vehicle without reasonable suspicion violated of the Fourth Amendment?

**HELD:** Yes. The officer may not stop a vehicle without establishing that an articulable reason exists to suspect that criminal activity is afoot.

**DISCUSSION:** While the State has an interest in ensuring the safety of its roadways, an individual still retains a reasonable expectation of privacy in a vehicle, despite significant governmental regulation of vehicles. If an individual was subjected to unrestricted governmental intrusion every time he or she entered a vehicle, the Fourth Amendment prohibition against unreasonable searches and seizures would

be severely undermined. Instead, “except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver’s license and the registration of the vehicle are unreasonable under the Fourth Amendment.”



*United States v. Sharpe*  
470 U.S. 675, 105 S. Ct. 1568 (1985)

**FACTS:** While patrolling a highway in an area under surveillance for suspected drug trafficking, a DEA agent noticed an apparently overloaded pickup truck. The truck had an attached camper and appeared to be traveling in tandem with a Pontiac. Savage was driving the truck, and the defendant was driving the Pontiac. The windows of the camper were covered with a thick bed-sheet material. After following the two vehicles for about 20 miles, the agent decided to make an “investigative stop” and radioed a highway patrol officer for assistance. The patrol officer and the DEA agent continued to follow the two vehicles. Both suspect vehicles engaged in evasive actions and started speeding as soon as the marked police car began to follow them. When the officers attempted to stop the vehicles, the defendant pulled over, but the truck continued, pursued by the state officer. The patrol officer stopped the truck, questioned Savage, and told him that he would be held until the DEA agent arrived. The agent arrived at the scene approximately 15 minutes after the truck had been stopped. After confirming his suspicion that the truck was overloaded and upon smelling marijuana, the agent opened the rear of the camper without Savage's permission and observed a number of burlap-wrapped bales resembling bales of marijuana the agent had seen in previous investigations. The agent then placed Savage and the defendant under arrest.

**ISSUE:** Whether the seizures met the Fourth Amendment’s

requirement of brevity governing detentions on less than probable cause?

**HELD:** Yes. The seizures were reasonable under the Fourth Amendment as they were accomplished with the least amount of intrusion as possible.

**DISCUSSION:** In evaluating the reasonableness of an investigative stop, this Court examines “whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances that justified the interference in the first place.” In assessing whether a detention is too long to be justified as an investigative stop, it is appropriate to examine whether the government diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.

If an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop. However, the Court refused to impose a rigid time limitation on Terry stops. It is clear that the brevity of the intrusion is an important factor in determining whether the seizure is reasonable. As much as a “bright line” rule would be desirable in evaluating whether an investigative detention is unreasonable, the Court held that common sense and ordinary human experience must govern over rigid criteria. Here, the DEA agent diligently pursued his investigation, and involved no unnecessary delay to the investigation. He concluded his investigation as quickly as he could. Therefore, the investigative stops were reasonable.



*Heien v. North Carolina*  
574 U.S. \_\_\_, 135 S. Ct. 530 (2014)

**FACTS:** A police officer stopped the car in which Heien was a passenger because it only had one operating brake light. During the stop, the officer received consent to search the car and discovered cocaine inside a duffel bag. Heien and the

driver were charged with trafficking cocaine.

Heien argued North Carolina law did not require a vehicle to be equipped with more than one working brake light. As a result, Heien claimed the traffic stop constituted an unlawful seizure in violation of the Fourth Amendment; therefore, the cocaine should have been suppressed.

**ISSUE:** Whether a police officer’s mistake of law can provide reasonable suspicion to support a traffic stop.

**HELD:** Yes, as long as the mistake is objectively reasonable.

**DISCUSSION:** The Supreme Court held that the Fourth Amendment requires government officials to act reasonably, not perfectly, and gives those officials “fair leeway for enforcing the law.” In this case, the Supreme Court found there was little difficulty in concluding the officer’s mistake of law was reasonable. The North Carolina vehicle code that requires “a stop lamp” also provides that the lamp “may be incorporated into a unit with one or more other rear lamps,” and that “all originally equipped rear lamps” must be “in good working order.” Although the North Carolina Court of Appeals held that “rear lamps” do not include brake lights, the word “other,” coupled with the lack of state-court precedent interpreting the provision, made it objectively reasonable for the officer to believe that a faulty brake light constituted a violation.



*Rodriguez v. United States*  
575 U.S. \_\_\_, 135 S. Ct. 1609 (2015)

**FACTS:** A police officer stopped Rodriguez for a traffic violation. After completing all of the tasks related to the stop, to include checking Rodriguez’s driver’s license and issuing a warning ticket, the officer asked Rodriguez for permission to walk his drug-sniffing dog around Rodriguez’s car. After Rodriguez



refused, the officer directed Rodriguez to get out of the car until a back-up officer arrived. After the back-up officer arrived, the officer walked his dog around Rodriguez's car and the dog alerted to the presence of drugs. The officer searched the car, found a large bag of methamphetamine and arrested Rodriguez. Approximately seven or eight minutes elapsed from the time the officer issued the warning ticket until the dog alerted on Rodriguez's car.

**ISSUE:** Whether an officer may extend an already completed traffic stop for a dog sniff without reasonable suspicion or other lawful justification.

**HELD:** No. Even though the seven to eight minutes added to the duration of the stop constituted a de minimis intrusion on Rodriguez's personal liberty, it was not reasonable for the officer to extend the duration of the stop after issuing Rodriguez a ticket.

**DISCUSSION:** The court held that "a police stop exceeding the time needed to handle the matter for which the stop was made" constitutes an unreasonable seizure under the Fourth Amendment. When conducting a traffic stop, officers may check the driver's license, determine whether there are outstanding warrants against the driver and inspect the automobile's registration and proof of insurance. The court noted that all of these tasks are related to the objective of the stop, which is enforcement of the traffic code and ensuring that vehicles on the road are operated safely and responsibly. On the other hand, a dog sniff aimed at detecting evidence of a crime is not a routine measure ordinarily incident to a traffic stop. Consequently, the court noted the critical question is not whether the dog sniff occurs before or after the officer issues the ticket, but whether conducting the dog sniff extends the duration of the stop. If the dog sniff extends the duration of the stop, it is a violation of the Fourth Amendment unless the officer has reasonable suspicion of criminal activity.



*Illinois v. Caballes*  
543 U.S. 405, 125 S. Ct. 834 (2005)

**FACTS:** The defendant was stopped for speeding. While the officer wrote the defendant a ticket, a second officer arrived at the scene with a drug-detection dog and walked the dog around the defendant's vehicle. After the dog alerted on the trunk of the car, the officers opened the trunk, discovered a controlled substance, and arrested the defendant.

**ISSUE:** Whether the Fourth Amendment requires reasonable suspicion to justify the use of a drug-detection dog during a lawful traffic stop?

**HELD:** No. No suspicion is required to use a drug-detecting dog during a traffic stop as long as the use of the dog does not prolong the length of time normally associated with conducting such a stop.

**DISCUSSION:** The initial seizure of the defendant was lawful as the officer established probable cause the defendant was speeding. However, a seizure that is justified at its inception by the officer's desire to write a ticket can become unlawful if the stop is prolonged beyond the time reasonably required to write the ticket. In this case, the court concluded the duration of the stop was entirely justified by the traffic offense and the ordinary tasks an officer must complete incident to such a stop.

In addition, the court found that conducting a dog sniff, by itself, does not change the character of a lawful seizure, as long as the dog sniff does not infringe upon the defendant's privacy interests. Consequently, the court held the use of a "well-trained narcotics-detection dog" during a lawful traffic stop, generally does not implicate legitimate privacy interests. Here, the dog sniff was performed on the exterior of the defendant's car while he was lawfully seized for a traffic violation. Such a dog sniff that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.



*Pennsylvania v. Mimms*  
434 U.S. 106, 98 S. Ct. 330 (1977)

**FACTS:** Officers lawfully stopped the defendant for driving a vehicle with an expired license plate. One of the officers approached and asked the defendant to step out of the car and produce his driver's license and registration. It was the common practice of the officer to order all drivers out of their vehicles whenever they conducted a stop for a traffic violation. As the defendant got out of the car, the officer noticed a large bulge under the defendant's sport jacket. Fearing that the bulge might be a weapon, the officer frisked the defendant and discovered a loaded handgun. The defendant was immediately arrested for carrying a concealed deadly weapon and for carrying a firearm without a license.

- ISSUES:**
1. Whether the officer's order to get out of the car during a lawful traffic stop was reasonable under the Fourth Amendment?
  2. Whether the frisk of the defendant was lawful under the Fourth Amendment?

- HELD:**
1. Yes. The officer's order to get out of the car did not violate the Fourth Amendment, since the interest in the officer's safety outweighed what was, at most, a mere inconvenience to the driver.
  2. Yes. The frisk of the defendant, conducted when the officer observed a bulge under the defendant's jacket, was lawful under the Fourth Amendment.

**DISCUSSION:** The key to any Fourth Amendment analysis is whether the challenged conduct was reasonable. The reasonableness of conduct depends on "a balance between the public interest and the individual's right to personal security

free from arbitrary interference by police officers.” With regard to the first issue, the safety of an officer is a legitimate and weighty concern (officer will not have to stand near traffic flow, etc.) that outweighs the minimal intrusion suffered by a driver who is asked to get out of a lawfully stopped car. With regard to the second issue, the Court’s decision in Terry v. Ohio was controlling. “The bulge in the defendant’s jacket permitted the officer to conclude that the defendant was armed and thus posed a serious and present danger to the safety of the officers.”



*Maryland v. Wilson*  
519 U.S. 408, 117 S. Ct. 882 (1997)

**FACTS:** An officer observed a speeding passenger car with no regular license tag and a torn piece of paper bearing the name of a rental car company dangling from the rear of the car. He activated his lights and, after a mile and half, the suspect’s car pulled over. During the traffic stop, the officer noticed that the defendant, a passenger in the vehicle, appeared to be nervous. The officer ordered the defendant out of the vehicle. When he exited the vehicle, a quantity of crack cocaine fell to the ground. The officer placed the defendant under arrest.

**ISSUE:** Whether the officer’s action of ordering the passenger out of the vehicle was reasonable?

**HELD:** Yes. The Supreme Court extended the rule expressed in Pennsylvania v. Mimms to include passengers in lawfully stopped vehicles.

**DISCUSSION:** The touchstone of almost all Fourth Amendment analysis is whether the government’s intrusion on privacy was reasonable. Reasonableness depends on striking a balance between the public’s interest in conducting the search or seizure and the individual’s interest in preserved privacy. Here, the public has a great interest in preserving the safety of the officer. The officer must maintain an awareness of the driver and any passengers, any of whom can pose a threat,

during the encounter. The passenger is only minimally intruded upon. The only change in their circumstance is that they will be outside the vehicle, where they cannot access concealed weapons found in the vehicle. Therefore, it is reasonable for officers to order passengers of lawfully stopped vehicles out of the conveyance.



*United States v. Hensley*  
469 U.S. 221, 105 S. Ct. 675 (1985)

**FACTS:** Six days after an armed robbery, an officer received reliable information that the defendant had been involved as the getaway driver. The officer immediately issued a “wanted flyer” to other police departments in the area, containing the defendant’s name, as well as the date and location of the robbery. The flyer also stated that the defendant was wanted for investigation of an armed robbery and cautioned that he was considered to be armed and dangerous. Approximately six days later, an officer from a nearby police department stopped the defendant while driving a vehicle, based on the “wanted flyer.” The officer was unable to confirm whether a warrant had been issued for the defendant’s arrest before approaching the vehicle. The officer ordered the defendant and a passenger out of the vehicle. Another officer arrived on the scene and observed through the open passenger door of the vehicle the butt of a revolver. The passenger, a convicted felon, was arrested. Two other weapons were found during the ensuing search and the defendant was arrested.

- ISSUES:**
1. Whether a Terry stop for a crime that has already been completed is lawful under the Fourth Amendment?
  2. Whether a Terry stop can be based on a “wanted flyer” issued by officers who had a reasonable suspicion that the suspect has committed an offense?

- HELD:**
1. Yes. There is no limitation that the suspect stopped be either in the process of committing, or about to commit, a crime.
  2. Yes. The validity of the “wanted flyer” rests on the issuing officer’s reasonable suspicion to stop the suspect.

**DISCUSSION:** Where officers have a reasonable suspicion that the suspect was involved in a prior crime and have been unable to locate him to investigate their suspicions, the government retains an interest in detecting and punishing those behaviors. This interest outweighs the intrusion caused by a Terry stop. However, the Court did not address whether Terry stops to investigate all past crimes are permissible.

Whether the officers who actually stopped the defendant had knowledge of the facts that gave rise to reasonable suspicion is immaterial. What is key is whether the officers who issued the “wanted flyer” had reasonable suspicion to conduct a Terry stop. If so, the suspect may be stopped on the basis of the flyer to “check identification, pose questions to the person, or to detain the person briefly while attempting to obtain further information.” Here, the officers who stopped the defendant did so lawfully, in that the officer who issued the flyer had reasonable suspicion for a stop. Because the initial stop was lawful, all evidence seized in plain view or incident to the arrest that followed was admissible.



*Hayes v. Florida*  
470 U.S. 811, 105 S. Ct. 1643 (1985)

**FACTS:** The defendant was the primary suspect in a burglary. Officers had reasonable suspicion to believe the defendant was involved. Without a warrant, officers went to the defendant’s home to in an effort to get the defendant to provide them with his fingerprints. When the defendant expressed reluctance to go with the officers to the police station, one of the

officers told the defendant they would arrest him. The officers did not have probable cause. The defendant told the officers he would rather go to the police station than be arrested. The defendant then went with the officers and was fingerprinted. When the officers determined the defendant's fingerprints matched those recovered at the scene of the crime, he was arrested.

**ISSUE:** Whether the government can transport suspects and take their fingerprints on the basis of reasonable suspicion?

**HELD:** No. Where there is no probable cause to arrest a suspect, no uncoerced consent to journey to the police station, and no prior judicial authorization for detaining him, the investigative detention at the station for fingerprinting purposes is unreasonable.

**DISCUSSION:** When the government forcibly removes a person from his home and transport him to the police station, the person has been seized. The Court refused to characterize this seizure, as brief as it may have been, as an investigative stop. The seizure was comparable to the acts of a traditional arrest. Therefore, the Court held this seizure, where not under judicial supervision, is sufficiently like an arrest to require probable cause.



### 3. Stops at the Border

*United States v. Montoya de Hernandez*  
473 U.S. 531, 105 S. Ct. 3304 (1985)

**FACTS:** The defendant traveled to Los Angeles on a direct flight from Columbia. A Customs Inspector noticed from her passport that the defendant had made approximately eight recent trips from Columbia to either Miami or Los Angeles. The Inspector knew that Bogota was a source city for drugs. The Inspector discovered that the defendant spoke no English and

had no family or friends in the United States. She carried \$5,000 in cash, primarily in \$50 bills, and claimed that she had come to the United States to buy goods for her husband's store in Bogota. However, she had not set up any meetings with retailers. She did not have hotel reservations. She could not remember how her airline ticket was purchased, and had only four changes of clothing. The defendant only possessed the shoes (high-heeled) she was wearing. She had no checks, credit cards, waybills, or letters of credit, although she did have old receipts and waybills, and a Colombian business card. Based upon these facts and his experience, the Inspector suspected the defendant was a "balloon swallower," one who attempts to smuggle drugs into the country through her alimentary canal.

A female Inspector moved the defendant into a private area and conducted a pat-down and strip search. Nothing was found, but the inspector noted a "firm fullness" in the defendant's abdomen area. She was also wearing two pair of underpants with a paper towel lining the crotch area. The defendant was told she was suspected of smuggling drugs in her alimentary canal. When asked to be x-rayed, the defendant agreed, but stated she was pregnant. She agreed to a pregnancy test prior to the x-ray, but later withdrew her consent to the x-ray. For approximately sixteen hours, the defendant refused to eat or drink anything or use the toilet facilities. Customs officials sought a court order authorizing a pregnancy test, an x-ray, and a rectal examination. A Federal magistrate authorized the rectal examination and an involuntary x-ray, provided the doctor considered the defendant's claim of pregnancy. At a local hospital, the defendant's pregnancy test was negative. During the rectal examination, a balloon was found containing an unknown substance. The defendant was then formally arrested. Over the next four days, the defendant passed a total of 88 balloons containing 528 grams of cocaine.

- ISSUES:**
1. Whether the government developed a proper level of suspicion to detain the defendant at the border beyond the scope of a routine customs search and inspection?



2. Whether the sixteen-hour detention in this case was unreasonable under the Fourth Amendment?

- HELD:**
1. Yes. To detain a traveler at the border beyond the scope of a routine customs search and inspection, reasonable suspicion must exist.
  2. No. Given the circumstances of this case, the sixteen-hour detention was reasonable.

**DISCUSSION:** Under the Fourth Amendment, searches and seizures must be reasonable. The test for “reasonableness” at the international border is significantly different than it is within the interior of the United States. Not only is an individual’s expectation of privacy reduced at the border, but the government’s interest in protecting the border from those who would bring anything harmful into the country is substantial. As for the first issue, the “reasonable suspicion” standard “fits well into the situations involving alimentary canal smuggling at the border: this type of smuggling gives no external signs and Inspectors will rarely possess probable cause to arrest or search, yet governmental interests in stopping smuggling at the border are high indeed.” Here, the Inspector had reasonable suspicion to detain the defendant beyond the scope of a routine customs search and inspection.

As for the second issue, it is obvious that alimentary canal smuggling cannot be detected in the amount of time that most other illegal activities can. The detention in this case was further lengthened by the defendant’s own refusal to be either x-rayed or have a bowel movement. The Court refused to charge the government with delays in investigatory detentions attributable to the suspect’s evasive actions. For these reasons, the sixteen-hour detention was reasonable under the Fourth Amendment.



*Almeida-Sanchez v. United States*  
413 U.S. 266, 93 S. Ct. 2535 (1973)

**FACTS:** The defendant was stopped and searched by a roving patrol of the U.S. Border Patrol. He challenged the constitutionality of the Border Patrol's warrantless search of his automobile 25 air miles north of the Mexican border. The search, made without probable cause or consent, uncovered marihuana, which was used to convict the defendant of a federal crime. The government sought to justify the search on the basis of a federal law that provided for warrantless searches of automobiles and other conveyances "within a reasonable distance from any external boundary of the United States." Regulations defined "reasonable distance" as "within 100 air miles from any external boundary of the United States."

**ISSUE:** Whether roving patrols could engage in searches and seizures without probable cause or reasonable suspicion?

**HELD:** No. The warrantless search of the defendant's automobile, made without probable cause or consent, violated the Fourth Amendment.

**DISCUSSION:** The government could not justify the search on the basis of any case law applicable to automobile searches, as probable cause was lacking. Nor could the government justify the search by analogy with a border inspection, as the officers had no reason to believe that the defendant had crossed the border (nexus with the border). Nor did the government have the defendant's consent to conduct the search. The Court explained that travelers may be stopped in crossing an international boundary (nexus) because of national self-protection. However, the search of the defendant's automobile on a road lying at all points at least 20 miles north of the Mexican border, was different. Those lawfully within the country and entitled to the use of public highways have a right of free passage without interruption or search.



*United States v. Martinez-Fuerte*  
428 U.S. 543, 96 S. Ct. 3074 (1976)

**FACTS:** The U.S. Border Patrol operated a fixed checkpoint on a major highway directly north of the Mexican border. They stopped vehicles there with no suspicion to determine if the occupants were lawfully in the United States.

**ISSUE:** Whether the government must demonstrate reasonable suspicion to engage in fixed checkpoint seizures?

**HELD:** No. The government's seizures are reasonable as they are limited in scope and justified by compelling need.

**DISCUSSION:** The Court held that the Border Patrol's routine stopping of vehicles at a permanent checkpoint located on a major highway away from the Mexican border for brief questioning of the vehicle's occupants is consistent with the Fourth Amendment. These stops and subsequent questioning may be made at reasonably located checkpoints with no individualized suspicion that the particular vehicle contains illegal aliens. To require that such stops always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car necessary to identify it as a possible carrier of illegal aliens. The Court based its conclusion on the fact that while the need to make routine checkpoint stops is great, the intrusion on privacy interests is limited. The Court contrasted the level of intrusion at a checkpoint stop (none required) with that of a roving patrol (reasonable suspicion required) and cited relatively low expectation of privacy in an automobile.



*United States v. Brignoni-Ponce*  
422 U.S. 873, 95 S. Ct. 2574 (1975)

**FACTS:** Two Border Patrol agents in Southern California were observing northbound traffic from their vehicle parked on the side of an interstate highway. They stopped the defendant's car because "its three occupants appeared to be of Mexican descent." After determining that the defendant had entered the country illegally, the officers arrested him.

**ISSUE:** Whether a "roving" patrol can stop a vehicle in an area near the border and question its occupants when the only ground for suspicion is that the occupants appear to be of Mexican ancestry?

**HELD:** No. Except at the border and its functional equivalents, Border Patrol agents in "roving" patrols may stop vehicles only if they have reasonable suspicion that the vehicles contain illegal aliens.

**DISCUSSION:** The government's substantial interest in effectively deterring illegal aliens from entering this country outweighs the minimal intrusion of a brief stop and questioning of a vehicle and its occupants at the border. However, the Court held that stops made by "roving" patrols on a random basis were unreasonable under the Fourth Amendment. Only "when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, may he stop the car briefly and investigate the circumstances that provoke suspicion." Similarly, the Fourth Amendment prohibits detaining individuals for questioning about their citizenship unless reasonable suspicion exists that the individual is an illegal alien.

Here, the only basis for stopping the vehicle and questioning the occupants was the fact the occupants appeared to be of Mexican ancestry. Standing alone, this does not furnish reasonable suspicion to believe the occupants were illegal aliens. Facts that Border Patrol agents may rely upon to establish reasonable suspicion include (1) the location of the

area where the vehicle was encountered, including its proximity to the border, the usual patterns of traffic on the road, and previous experience with alien traffic; (2) information about recent border crossings in the area; (3) the driver's behavior, such as erratic driving or obvious attempts to evade officers; and (4) aspects of the vehicle itself, such as its size, the number of passengers, and whether it appears heavily loaded.



### III. LEVELS OF SUSPICION

#### A. Probable Cause

*Ornelas v. United States*  
517 U.S. 690, 116 S. Ct. 1657 (1996)

**FACTS:** The defendant's challenged the officer's claims of reasonable suspicion to stop and probable cause to search their vehicle.

**ISSUE:** Whether a uniform definition of reasonable suspicion and probable cause exists?

**HELD:** No. These terms are "fluid concepts" requiring interpretation from judicial officers.

**DISCUSSION:** The Court flatly stated "[A]rticulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act (underline added).'" Therefore, these terms are not "not readily, or even usefully, reduced to a neat set of legal rules."

The Court has described (though not defined) reasonable suspicion as "a particularized and objective basis" for suspecting the person stopped of criminal activity (quoting United States v. Cortez, 449 U.S. 411 (1981)). Probable cause

has been described (not defined) as known facts and circumstances sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found. Each case must be determined on its own facts. “The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause (underline added).”



*Henry v. United States*  
361 U.S. 98, 80 S. Ct. 168 (1959)

**FACTS:** Two officers were investigating the theft of an interstate shipment of whiskey. On two separate occasions, they witnessed the defendant and another man drive into an alley, enter a residence, and return with cartons that were placed in a vehicle. Prior to this time, the defendant was not suspected of any criminal activity. The officers were too far away to determine the size, number, or contents of the cartons. Following the second observation, the officers seized the vehicle without a search or arrest warrant. The vehicle was searched, and both the cartons and the defendant were placed in the officers’ vehicle and taken to the agents’ office. Once the officers learned the cartons contained stolen radios, the defendant was formally arrested.

**ISSUE:** Whether the officers had probable cause when they searched the defendant’s vehicle?

**HELD:** No. The officers could not articulate facts to indicate a probability that the defendant was involved in criminal activity or that they would find evidence of criminal activity.

**DISCUSSION:** While packages had been stolen, that fact did not make every person seen carrying a package subject to arrest

and search. It also did not make every package subject to seizure. The acts of driving a car in an alley, walking inside residential premises, picking up cartons, and carrying the cartons away, were, without more, not indications of criminal activity. There was no evidence that the defendant and the other man were acting secretly or in an evasive manner. The officers had no idea what was in the cartons when they seized the car. Therefore, their observations did not amount to probable cause.



*Draper v. United States*  
358 U.S. 307, 79 S. Ct. 329 (1959)

**FACTS:** On September 7, a Federal narcotics agent in Denver received information from a reliable source that the defendant would be traveling to Denver from Chicago with three ounces of heroin. The source provided a detailed physical description of the defendant, as well as a description of the clothing he would be wearing. The source stated the defendant would be returning to Denver on a train on either September 8th or 9th, would be carrying “a tan zipper bag,” and that he habitually “walked real fast.” On September 9, the agent observed the defendant get off an incoming Chicago train, who began walking “fast” toward the exit. The defendant had the exact physical attributes, and was wearing the clothing predicted by the source. He was carrying a tan zipper bag in his right hand. The agent then approached and arrested the defendant. The officers found heroin and a syringe during the search incident to the arrest.

- ISSUES:**
1. Whether hearsay evidence that is not legally admissible in a criminal trial can be used in developing probable cause for an arrest?
  2. Whether the officer established probable cause to arrest the defendant?

- HELD:**
1. Yes. Probable cause for an arrest can be established through hearsay evidence.
  2. Yes. The information given to the agent was sufficient to establish probable cause.

**DISCUSSION:** It is well settled that an arrest may be made upon hearsay evidence. There is a significant difference between what is required to prove guilt in a criminal case and what is required to substantiate the existence of probable cause. While hearsay evidence may not be admissible in a criminal trial, it may be used to establish probable cause.

Here, the agent received information from a reliable source. In pursuing that information, the agent “personally verified every facet of the information given him by the reliable source, except whether the defendant had three ounces of heroin with him.” The Court also stated that “with every other bit of the reliable source’s information being personally verified, the agent had probable cause to believe that the remaining bit of unverified information - that the defendant had the heroin with him - was likewise true.”



*Sibron v. New York*  
392 U.S. 40, 88 S. Ct. 1889 (1968)

**FACTS:** Throughout the course of a day and night, an officer observed the defendant with 9 to 11 known narcotics addicts. At no time did the officer hear any conversation between the defendant and these persons, nor did he witness any exchange between them. After seeing the defendant in a restaurant with three of the known addicts, the officer approached. They went outside. There was nothing in the record to determine whether the defendant went outside with the officer voluntarily or was ordered out to the street. Once outside, the officer said to the defendant, “you know what I am after.” The defendant mumbled something and reached into his pocket. At the same time, the officer reached into the



defendant's pocket and found a controlled substance. The defendant was convicted of unlawful possession of heroin. At trial, there was nothing to show that the officer's safety was a potential justification for the intrusion into the defendant's pocket.

**ISSUE:** Whether the officer established probable cause to believe the defendant was in possession of a controlled substance?

**HELD:** No. The officer's observations did not meet the criteria to establish probable cause.

**DISCUSSION:** While the officer had seen the defendant in conversation with known drug addicts, he was unaware of the topics being discussed. Further, he saw nothing pass between the defendant and any of the addicts. The officer could not articulate facts that demonstrated probable cause. Therefore, the search could not be justified as incident to that arrest. The officer also could not justify the search on the grounds that he reasonably suspected the defendant to be armed and dangerous. At no time could the officer claim that his actions were taken in order to protect himself from potential weapons carried by the defendant. Additionally, the scope of the search exceeded the allowable limits of Terry v. Ohio. The officer did not pat-down the defendant's outer garments searching for weapons, but instead inserted his hand directly into the defendant's pocket to search for a controlled substance.



*Peters v. New York*  
392 U.S. 40, 88 S. Ct. 1889 (1968)

**FACTS:** An off-duty officer was in his apartment when he heard his front door knob rattle. He looked into the hallway through the door's peephole and observed "two men tiptoeing out of the alcove toward the stairway." Although he had lived in the apartment for approximately 12 years, he did not recognize either person. After calling the police and arming himself, the

officer again looked through the peephole and saw both men tiptoeing. Believing that the two men were attempting to commit burglary, the officer left his apartment, slamming the door as he went into the hallway. Upon hearing the door slam, the men began to run down the stairs. The officer chased them. He caught the defendant, who claimed to be visiting a girlfriend. The officer then frisked the defendant and discovered a hard object in his pocket. Believing the object may be a knife he retrieved it. It was an envelope containing burglar tools.

**ISSUE:** Whether the officer had probable cause to arrest the defendant?

**HELD:** Yes. Based on the totality of the circumstances, the officer had probable cause to make the arrest.

**DISCUSSION:** The officer heard strange noises outside his apartment that lead him to believe someone was trying to get inside. When he investigated, he observed two men engaged in stealth in the hallway. Although he had lived in the apartment for 12 years, he did not recognize either man. When he entered the hallway, the men fled. “Deliberately furtive actions and flight at the approach of strangers or law officers” are highly indicative of criminal intent. Considering these facts, by the time the officer seized the defendant fleeing down the stairway, he had probable cause to arrest him for attempted burglary.



*Maryland v. Pringle*  
540 U.S. 366, 124 S. Ct. 795 (2003)

**FACTS:** After stopping a vehicle for speeding in an early morning hour, a police officer obtained consent from the owner-operator to search. The officer found \$763 in the glove compartment and five small bags containing a controlled substance behind the back-seat armrest. The officer asked all three occupants of the vehicle who owned the drugs and money. When all three denied ownership he placed them under arrest. Ultimately, the defendant admitted to committing the crime.

**ISSUE:** Whether the officer had probable cause to believe that the defendant committed the crime?

**HELD:** Yes. Based on the totality of the circumstances, the officer established probable cause that a crime had been committed and the defendant was involved in the crime.

**DISCUSSION:** The Court held that “[I]t is uncontested in the present case that the officer, upon recovering the five plastic glassine baggies containing suspected cocaine, had probable cause to believe a felony had been committed.” The more difficult issue is whether the officer had probable cause that the defendant committed the crime. The Court has held on several previous occasions that the probable cause is a “practical, nontechnical conception.” See Illinois v. Gates (1983) (quoting Brinegar); see, e.g., Ornelas v. United States (1996); United States v. Sokolow (1989). It is futile to assign a precise definition or attempt to quantify by percentages probable cause as its exactness depends on the totality of the circumstances.

In this case, the defendant was understandably assumed to be involved in criminal activity. He was one of three occupants, out very early in the morning, in a vehicle that contained a large amount of cash and a controlled substance (packaged in a manner to indicate drug dealing), both located where the defendant had easy access, and all three failed to provide information about the ownership of these incriminating items. The Court found it reasonable that all three had knowledge of and exercised control over the controlled substance based on these circumstances. Therefore, the officer had probable cause to arrest any or all of the three, including the defendant.



*Florida v. Harris*  
568 U.S. \_\_\_, 133 S. Ct. 1050 (2013)

**FACTS:** An officer pulled the defendant’s truck over due to an expired license plate. During this encounter, the officer

observed that the defendant was “visibly nervous” in that he could not sit still, was shaking and breathing rapidly. He asked the defendant for permission to search the vehicle, which the defendant declined. The officer retrieved his drug-sniffing dog from his patrol vehicle and walked him around the defendant’s truck. The dog alerted to the presence of controlled substances in the truck. The officer, believing he had probable cause, began a mobile conveyance search of the truck, resulting in his discovery of precursor materials for the manufacturing of controlled substances.

**ISSUE:** Whether a trained drug-sniffing dog’s alert can establish probable cause?

**HELD:** Yes. The reliability of a well-trained drug dog is such that a court is entitled to base a finding of probable cause on its alert.

**DISCUSSION:** The defendant asked the Supreme Court to install a greater hurdle for the government before using evidence created by drug-sniffing dogs. The Court has previously “rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach”...in probable cause determinations. In doing so, the Court held that reviewing courts are entitled to find probable cause exists on the signal of a certified, trained drug-sniffing dog.



## **B. Reasonable Suspicion**

*Adams v. Williams*  
407 U.S. 143, 92 S. Ct. 1921 (1972)

**FACTS:** In the early morning hours in a high crime neighborhood, a reliable informant told an officer the defendant, who sitting in a nearby car, possessed narcotics and a weapon. The officer approached the car and asked the defendant to get out. The defendant rolled down the window instead. When he

did so, the officer reached into the car and removed the gun from the defendant's waistband. While the gun was not visible from outside the car, it was in the specific location identified by the reliable source. The defendant was arrested for unlawful possession of a firearm. The subsequent search incident to the arrest uncovered a substantial quantity of heroin.

**ISSUE:** Whether the information provided by the reliable informant justify the stop of the defendant and the seizure of the gun?

**HELD:** Yes. In Terry v. Ohio, the Court recognized that an officer making an investigatory stop may frisk a suspect when the officer reasonably believes that the suspect is armed and dangerous.

**DISCUSSION:** Citing Terry, the Court reiterated "so long as [an] officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose." Here, the officer relied upon information personally provided to him by a reliable informant. While the information may have been insufficient for an arrest or search warrant, it was reliable enough for the officer's investigatory stop of the defendant. The defendant was sitting alone, late at night, in a high crime area, and was reportedly carrying narcotics and a weapon by a reliable source. When asked to get out of the vehicle, the defendant remained inside in a position where his movements could not be clearly seen. These facts gave the officer ample reason to fear for his safety and justified the limited intrusion required to obtain the weapon.



*Brown v. Texas*  
443 U.S. 47, 99 S. Ct. 2637 (1979)

**FACTS:** A Texas statute made it a crime for any person to refuse to give his name and address to an officer "who has lawfully stopped him and requested the information." Two

officers observed the defendant and another man walk away from one another in an alley located in an area known for drug trafficking. While the men were separated when first observed, both officers believed the two had been meeting, or were about to meet, until the officers approached. Because the situation “looked suspicious” and the officers had never seen him in that area before, the defendant was stopped to ascertain his identity. The defendant was not suspected of any specific misconduct, nor were there any facts to indicate the defendant was armed. Upon being stopped, the defendant refused to identify himself. He was arrested and convicted for violating the Texas statute.

**ISSUE:** Whether the investigatory stop of the defendant was lawful under the Fourth Amendment?

**HELD:** No. The officers did not have facts equating to reasonable suspicion that criminal activity was afoot. The defendant was not “lawfully stopped” as required by the Texas statute.

**DISCUSSION:** When the defendant was stopped by the officers for the purpose of obtaining his identity, he was “seized” within the meaning of the Fourth Amendment. Whether this seizure was reasonable depends on a balancing between society’s interest and an individual’s interest in being free from random interference by law enforcement officers. In order for an investigatory stop to be lawful, the officer must have reasonable suspicion, based on articulable facts, that the suspect is involved in criminal activity. Here, the officers did not have reasonable suspicion. While the defendant may have “looked suspicious,” the officers could not articulate facts to support this conclusion. The officer conceded that the purpose of the stop was simply to ascertain the defendant’s identity. Standing alone, the fact that the defendant was in a drug trafficking area is insufficient to conclude he was engaged in criminal conduct. Because the stop was unlawful, application of the Texas statute to these facts was unconstitutional.

**NOTE:** The Court did not decide whether an individual who was lawfully stopped could be compelled to identify himself.



*United States v. Sokolow*  
490 U.S. 1, 109 S. Ct. 1581 (1989)

**FACTS:** DEA agents developed the following facts concerning the defendant: (1) he paid \$2,100 for two airplane tickets from a roll of \$20 bills; (2) he was traveling under a name that did not match the name for the telephone number he had given to the ticket agent (which was legal at that time); (3) his original destination was Miami, Florida, a known source city for controlled substances; (4) he stayed in Miami for a total of 48 hours; (5) a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he did not check his luggage. Based on these facts, the DEA agents decided to stop the defendant. His shoulder bag was removed from him and a narcotics detection dog signaled that controlled substances were inside. The agents obtained a search warrant, and found controlled substances in his luggage.

**ISSUE:** Whether the DEA agents who stopped the defendant had reasonable suspicion that he was involved in criminal activity at the time of the stop?

**HELD:** Yes. Based on the totality of the circumstances known to the agents at the time of the stop, they had a reasonable suspicion that criminal activity was afoot.

**DISCUSSION:** “Reasonable suspicion,” like probable cause, is difficult to define. In determining the legality of a Terry stop, the totality of the circumstances is considered. None of the factors known to the agents at the time of the stop, standing alone, was proof of illegal activity. However, when considered together, the facts amounted to reasonable suspicion. The Court emphasized that “there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot.”



*Alabama v. White*  
496 U.S. 325, 110 S. Ct. 2412 (1990)

**FACTS:** Officers received an anonymous telephone tip that the defendant would be leaving an apartment complex at a certain time, driving a brown Plymouth station wagon with a broken right taillight lens. The anonymous source stated the defendant would drive to a specific motel and would be in possession of approximately one ounce of cocaine in a brown attaché case. The officers did not know if the anonymous caller was reliable or how the caller knew this information. The officers went to the apartment complex and located a Plymouth station wagon with a broken right taillight in the parking lot. The officers observed the defendant leave the building and enter the station wagon. The officers followed her as she drove to the motel identified by the anonymous source. The officers stopped her. After obtaining the defendant's consent to search the vehicle, the officers found a locked brown attaché case. The defendant provided the combination to the case and upon opening it the officers found marijuana. The defendant was arrested. During processing, the officers found cocaine in her purse.

**ISSUE:** Whether the anonymous tip, as corroborated by independent government observations, was sufficiently reliable so as to give the officers reasonable suspicion for the stop of the defendant?

**HELD:** Yes. The corroboration of the anonymous tip by independent police work furnished reasonable suspicion for the stop.

**DISCUSSION:** The Court held that "the totality of the circumstances" approach for determining probable cause is also relevant for determining reasonable suspicion. While the tip provided in this case does not, by itself, give rise to reasonable suspicion, the corroboration of significant aspects of the tip by independent investigation provided the indicia of reliability. The Court found it to be critical that the tipster was able to predict the defendant's future behavior. This showed the tipster



possessed “inside information - a special familiarity with the defendant’s affairs” that most members of the general public would not have. The corroboration of much of the tipster’s information gave reason to believe that he was “honest” and “well informed.” Based on these facts, “it is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer’s predictions imparted some degree of reliability to the other allegations made by the caller.”



*Florida v. J. L.*  
529 U.S. 266, 120 S. Ct. 1375 (2000)

**FACTS:** The police received a tip from an anonymous caller, who reported that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. Officers went to the bus stop and saw three black males, one of whom, the defendant, was wearing a plaid shirt. The officers had no reason to suspect any of the three of illegal conduct other than the anonymous report. One officer frisked the defendant and seized a gun from his pocket. The officers arrested the defendant for carrying a concealed firearm without a license and possessing a firearm while under the age of 18.

**ISSUE:** Whether law enforcement officers can base reasonable suspicion solely on an anonymous tip?

**HELD:** No. Reasonable suspicion must be based on something more than an anonymous tip.

**DISCUSSION:** An officer, for the protection of himself and others, may conduct a frisk for weapons of persons engaged in unusual conduct where the officer reasonably suspects the person is armed and presently dangerous. Here, the officer’s suspicion that the defendant was carrying a weapon did not develop from his own observations but solely from a call made from an unknown location by an unknown caller. The Court held that this tip lacked sufficient indicia of reliability to provide

reasonable suspicion to conduct a frisk. The tip did not provide predictive information that left the government without means to test the informant's knowledge or credibility. Reasonable suspicion to conduct stops and frisks requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a person.



*Navarette v. California*  
572 U.S. \_\_\_, 134 S. Ct. 1683 (2014)

**FACTS:** A police dispatcher received an anonymous call from a woman stating a silver Ford pickup truck had just run the woman's vehicle off the roadway. The woman provided the pickup truck's license plate number, approximate location and direction of travel. The dispatcher broadcast the woman's information and a few minutes later police officers saw a silver Ford pickup truck with the same license plate number, near the location and traveling in the same direction reported by the woman. The officer conducted a traffic stop, and as he and a back-up officer approached the pickup truck, the officers smelled the odor of marijuana. The officers searched the pickup truck, found four large bags of marijuana and arrested the driver, Navarette, and his brother, who was a passenger.

Navarette moved to suppress the marijuana, arguing the anonymous 911 call did not provide the officers reasonable suspicion to conduct the traffic stop.

**ISSUE:** Whether the Fourth Amendment requires an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate dangerous driving before stopping the vehicle.

**HELD:** No. In this case, the traffic stop did not violate the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable

suspicion that the driver of the truck was intoxicated.

**DISCUSSION:** The court held the 911 call was sufficiently reliable to credit the woman's claim that Navarette's truck had run her vehicle off the road. First, the woman described the truck, provided its license plate information and gave the truck's location to the 911 dispatcher. Second, the police officer located the truck approximately 19 miles away from the scene of the incident, approximately 18 minutes after the 911 call. Third, the woman's use of the 911 system was a factor to take into account when determining the reliability of the information she provided. The 911 system had features that allowed for identifying and tracing callers, which would allow a reasonable officer to believe that a person might think twice before calling in a false report. Consequently, the woman's detailed, firsthand description of Navarette's truck and dangerous driving along with the timeline of events suggested the woman called 911 shortly after she was run off the road, which entitled her tip to be considered reliable by the police officer.

Next, the court recognized a reliable tip will justify an investigative stop only if the tip creates a reasonable suspicion that "criminal activity may be afoot." In this case, the court held the woman's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving. The court stated that running another vehicle off the road suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of recognized drunk-driving cues. Because the 911 call established reasonable suspicion to stop Navarette, the officer did not need to follow Navarette to personally observe suspicious driving before conducting the traffic stop.



*Illinois v. Wardlow*  
528 U.S. 119, 120 S. Ct. 673 (2000)

**FACTS:** The defendant fled upon seeing a caravan of police vehicles converge on an area known for heavy narcotics trafficking. Seeing the defendant run, officers pursued him. They caught the defendant and conducted a frisk. The officers testified that in their experience there were usually weapons near narcotics transactions. They discovered a handgun on the defendant and arrested him.

**ISSUE:** Whether the officers had reasonable suspicion to stop the defendant?

**HELD:** Yes. Based on the type of area the officers were approaching and the behavior of the suspect, the officers established reasonable suspicion.

**DISCUSSION:** Where officers have a reasonable, articulable suspicion that criminal activity is afoot, they may conduct a brief, investigatory stop. There must exist at least a minimal level of objective justification for the stop. The Court held that an individual's presence in a "high crime area," standing alone, is not enough to support reasonable suspicion. However, a location's characteristics are worthy of evaluation. When coupled with the defendant's unprovoked flight, the officers' aroused suspicion became reasonable. An individual has a right to ignore officers and go about his business. However, the Court stated that unprovoked flight is the exact opposite of "going about one's business."



*United States v. Arvizu*  
534 U.S. 266; 122 S. Ct. 744 (2002)

**FACTS:** A Border Patrol Agent received information that a vehicle sensor had been triggered in a remote area. The agent suspected that the vehicle could be attempted to evade a checkpoint as the timing corresponded with a shift change,

leaving the area unpatrolled. The agent located the vehicle, a minivan. He obtained a visual vantage point by pulling off to the side of the road at an angle so he could see the oncoming vehicle as it passed by. The agent observed (1) the vehicle slow considerably as it approached his position, (2) the driver appear stiff and rigid, (3) the driver seemed to pretend the agent was not there, (3) the knees of the passengers (children) in the very back seat were unusually high (as if their feet were elevated by something on the floor). The agent followed the vehicle for a short distance and observed (4) the children, while facing forward, wave at the agent in an abnormal fashion, (5) the strange waving continued intermittently for four to five minutes, (6) the driver signaled for a turn, turned the signal off, then suddenly signaled and turned the vehicle, (7) the turn was the last that would allow the vehicle to avoid the checkpoint, (8) the road is rough and usually utilized by four-wheel-drive vehicles, (9) the vehicle did not appear to be part of the local traffic and (10) there were no recreation areas associated with this road. The agent requested vehicle registration information via the radio and learned that (11) the vehicle was registered to an address four blocks north of the border in an area known for alien and narcotics smuggling. At this point, the agent decided to conduct a traffic stop.

**ISSUE:** Whether the agent could articulate reasonable suspicion to conduct a Terry stop considering all observed factors had innocent explanations?

**HELD:** Yes. Reasonable suspicion is determined by the “totality of the circumstances.”

**DISCUSSION:** The Court stated that “[W]hen discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing.” In doing so, it is imperative that the officer be allowed to use “their own experience and specialized training to make inferences” about a circumstance.

Otherwise innocent actions, considered together, may warrant a further look by a law enforcement officer.



#### **IV. SEARCH WARRANTS**

##### **A. Probable Cause**

##### **1. Required**

*Byars v. United States*  
273 U.S. 28, 47 S. Ct. 248 (1927)

**FACTS:** State police officers obtained a search warrant for the defendant's residence from a judge. However, the warrant was invalid as it clearly lacked probable cause. Nonetheless, a search for "intoxicating liquors and instruments and materials used in the manufacture of such liquors" was authorized. A Federal prohibition agent was asked to participate in the search, which he did. During the search, the Federal agent found some counterfeit whiskey stamps, while a State officer found additional counterfeit stamps. The counterfeit stamps were seized and the defendant was arrested.

**ISSUE:** Whether the counterfeit stamps seized during the execution of the invalid State search warrant was admissible against the defendant in his Federal trial?

**HELD:** No. The seizure of the stamps violated the Fourth Amendment and was inadmissible in the defendant's Federal prosecution.

**DISCUSSION:** The warrant lacked probable cause as required by the Fourth Amendment. An unconstitutional search is not validated by the fact that evidence of a crime is discovered.



*Winston v. Lee*  
470 U.S. 753, 105 S. Ct. 1611 (1985)

**FACTS:** The defendant shot a victim during an armed robbery, receiving a gunshot wound in the exchange. Shortly after the victim was taken to a hospital, officers found the defendant near the scene of the shooting. The officers took the defendant to the hospital, where the victim identified him as the assailant. The government asked the court to order the defendant to undergo surgery to remove the bullet lodged under his collarbone. The government asserted the bullet would provide evidence of the defendant's guilt or innocence. Expert testimony suggested the surgery would only entail a minor incision and could be performed under local anesthesia. The court granted the motion. However, X-rays taken just before surgery was scheduled showed that the bullet was lodged much deeper than the surgeon had originally believed.

**ISSUE:** Whether courts can order surgery to remove evidence of a criminal act from a suspect's body?

**HELD:** Yes. However, this is a serious intrusion into the suspect's reasonable expectation of privacy and must be used only in extreme circumstances.

**DISCUSSION:** The Court held that a compelled surgical intrusion into an individual's body for evidence implicates substantial privacy and security issues. Such an intrusion may be unreasonable even if it is likely to produce evidence of a crime. The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach in which the court must weigh the individual's interests against society's interests in obtaining criminal evidence. The uncertainty about the medical risks, and the intrusion on the defendant's privacy interests and body are severe. This must be counterbalanced by the government's need to intrude into the defendant's body to retrieve the bullet. As the government had available substantial additional evidence that the defendant was the criminal, its need to obtain the bullet was diminished.



## 2. Establishing P.C. in the Affidavit

*United States v. Ventresca*  
380 U.S. 102, 85 S. Ct. 741 (1965)

**FACTS:** An affidavit for a search warrant described seven different occasions between July 28 and August 30, when a car was driven into the backyard of the defendant's house. On four occasions the car carried loads of sugar in sixty-pound bags; twice it made two trips loaded with empty tin cans; and once it was observed as being heavily laden. Garry, the car's owner, and Incardone, a passenger, were seen on several occasions loading the car at the defendant's house and later unloading apparently full five-gallon cans at Garry's house. The affidavit went on to state that at about 4 a.m. on August 18, and at about 4 a.m. August 30, "Investigators" smelled the odor of fermenting mash as they walked along the sidewalk in front of the defendant's house. On August 18 they heard, "at or about the same time, . . . certain metallic noises." On August 30, the day before the warrant was applied for, they heard (as they smelled the mash) "sounds similar to that of a motor or a pump coming from the direction of the defendant's house." The affidavit concluded: "The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol, Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation (underline added)."

**ISSUE:** Whether failure to indicate which facts alleged were hearsay and which were within the affiant's own knowledge destroys the affidavit's reliability?

**HELD:** No. Courts must determine if probable cause (and an affiant's reliability) exists through common sense analysis. The failure to indicate which facts alleged were hearsay and which were within the affiant's own knowledge does not destroy the affidavit's reliability.



**DISCUSSION:** An affidavit which shows probable cause for the issuance of a search warrant is not required to clearly indicate which of the facts alleged are hearsay and which are within the affiant's own knowledge. However, probable cause cannot be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists, without detailing any of the underlying circumstances upon which that belief is based. This belief may be based on hearsay evidence. "Affidavits for search warrants... must be tested and interpreted by magistrates and courts in a common sense and realistic fashion . . . A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting. When a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense, manner."



*Aguilar v. Texas*  
378 U.S. 108, 84 S. Ct. 1509 (1964)

**FACTS:** Two officers applied for a warrant to search the defendant's home for narcotics. Their affidavit recited that: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of law." The search warrant was issued and narcotics were found.

**ISSUE:** Whether the affidavit provided a sufficient basis for a finding of probable cause and issuance of a search warrant?

**HELD:** No. The affidavit did not provide reliable and credible facts on which probable cause could be based.

**DISCUSSION:** In determining the validity of a search warrant, a reviewing court may consider only the information brought to a magistrate's attention. A requesting officer must establish facts for a magistrate judge to consider whether probable cause exists or not. The Fourth Amendment does not deny law enforcement the support of usual inferences that reasonable persons may draw from evidence. It does, however, require such inferences be drawn by a neutral and detached magistrate instead of an officer engaged in the competitive enterprise of ferreting out crime.

An affidavit for a search warrant may be based on hearsay information and need not reflect direct personal observations of the affiant. But the magistrate must be informed of some of the underlying circumstances on which the informant based conclusions and some of the underlying circumstances from which an officer concluded that the informant, whose identity need not be disclosed, was "credible" or that his information was reliable. Although the reviewing court will grant substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform a "neutral and detached" function and not serve merely as a "rubber stamp."



*Spinelli v. United States*  
393 U.S. 410, 89 S. Ct. 584 (1969)

**FACTS:** The FBI tracked the defendant, a known bookie and gambler, for five days. The agents saw him drive from East St. Louis into St. Louis and park in an apartment house lot. They observed him enter a particular apartment in that building. The apartment that the defendant entered had two telephone lines. A confidential informant told the agents that the two phone lines were being used for a gambling operation. However, the informant did not personally observe the defendant at work as a bookmaker, nor had the informant ever place any bets with the defendant. The informant came by his information indirectly, and did not explain why his sources were

reliable. The agents obtained a search warrant.

**ISSUE:** Whether the agents established probable cause to search the defendant's apartment?

**HELD:** No. The agents were not able to establish the reliability of their information.

**DISCUSSION:** An informant's tip must be measured against Aguilar's standards so that its probative value can be assessed. If the tip is found inadequate under Aguilar, then the other allegations that corroborate the information contained in the report should be considered. In this case, all the government could show was that the defendant entered an apartment that contained two telephone lines, had knowledge that he may be a bookmaker and gambler, and had an unconfirmed statement that the phone lines were being used for a gambling operation. This did not establish probable cause for the issuance of a search warrant.

**NOTE:** This led to the creation of the Aguilar- Spinelli rule. This is a two-pronged test that courts use to determine the trustworthiness of information derived from anonymous sources in the search for probable cause.



*Illinois v. Gates*  
462 U.S. 213, 103 S. Ct 2317 (1983)

**FACTS:** Officers received an anonymous letter that included statements that the defendants, a husband and wife, were selling drugs. The letter indicated Mrs. Gates would drive the Gates' car to Florida on May 3rd to be loaded with drugs, and Mr. Gates would fly down a few days later to drive the car back; that the car's trunk would be loaded with drugs; and that defendants presently had over \$100,000 worth of drugs in their basement. An officer located the Gates' address and learned that Mr. Gates made a reservation for a May 5th flight to Florida. Arrangements for surveillance of the flight were made

with a DEA agent. The surveillance disclosed that Mr. Gates took the flight, stayed overnight in a motel room registered in Mrs. Gates name, and left the following morning with a woman in a car bearing an Illinois license plate issued to Mr. Gates, heading north on an interstate highway. A search warrant for defendants' residence and automobile was then obtained based upon the anonymous letter and the government's corroboration.

**ISSUE:** Whether the officers' affidavit and the anonymous letter establish sufficient facts to satisfy the Aguilar-Spinelli probable cause test?

**HELD:** No. However, the Supreme Court created a totality-of-the-circumstances test.

**DISCUSSION:** The facts failed to meet the Aguilar-Spinelli "two-pronged test" of (1) revealing the informant's "basis of knowledge" and (2) providing sufficient facts to establish either the informant's "veracity" or the "reliability" of the informant's report. However, the Court held that the overly rigid Aguilar-Spinelli test should be set aside when a common-sense test is more useful in determining whether "probable cause" exists. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. The duty of a reviewing court is to ensure that the magistrate has a substantial basis for concluding that probable cause existed. Therefore, the Court created the "totality of the circumstances" test to replace (or supplement) the Aguilar-Spinelli test. In this case, the totality of the circumstances indicated that the information was truthful and created probable cause for the issuance of a search warrant.



*United States v. Harris*  
403 U.S. 573, 91 S. Ct. 2075 (1971)

**FACTS:** A federal tax investigator and a local police officer

entered the premises of the defendant, pursuant to a search warrant, and seized jugs of whiskey upon which the federal tax had not been paid. The search warrant was issued solely on the basis of the investigator's affidavit, which recited the following:

Roosevelt Harris has had a reputation with me for over 4 years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information [sic] from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their [sic] life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past two weeks, has knowledge of a person who purchased illicit whiskey within the past 2 days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in the outbuilding known as and utilized the 'dance hall' and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons.

**ISSUE:** Whether information from a partner-in-crime can be credible, even though the identity of the informant is confidential?

**HELD:** Yes. Partners-in-crime are presumed credible.

**DISCUSSION:** The affidavit purports to relate the personal observations of the informant and recites prior events within the affiant's own knowledge indicating that the accused had previously trafficked in contraband. A law enforcement officer's knowledge of a suspect's reputation is a practical consideration of everyday life upon which an officer or a magistrate may

properly rely in assessing the reliability of an informant's tip.

For purposes of determining whether an affidavit is sufficient to establish probable cause for a search warrant, the informant's declaration against interest is reason to believe the information. The affidavit recited that the informant feared for his life and safety if his identity was revealed and that over the past two years he had often and recently purchased contraband from the accused. These statements are against the informant's penal interest, for they constitute an admission of major elements of an offense. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility.



*United States v. Grubbs*  
547 U.S. 90, 126 S. Ct. 1494 (2006)

**FACTS:** The defendant purchased contraband from a web site operated by an undercover officer. The government sought an anticipatory search warrant. The contingency of the search was based on probable cause that would exist if "the parcel has been received by a person(s) and has been physically taken into the residence." The magistrate accepted the affidavit and issued a search warrant. The search occurred two days later after the defendant's wife signed for the parcel and took it into the premises.

**ISSUE:** Whether a warrant can be issued based on probable cause that is not yet in existence (but is anticipated)?

**HELD:** Yes. The Fourth Amendment's requirement that "no Warrants shall issue, but upon probable cause" demands probable cause to exist at the time of the search, not the issuance.

**DISCUSSION:** The Supreme Court held that probable cause to sustain a search warrant need only be present at the time the search is conducted. In this light, all search warrants are

“anticipatory” in that the government has established probable cause that the offending items will be present at the time of the search. The Court stated that “[A]nticipatory warrants are, therefore, no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is now probable that (2) contraband, evidence of a crime, or a fugitive will be on the described premises (3) when the warrant is executed.” Anticipatory warrants additionally require a condition to exist before the search warrant can be executed.



### 3. Neutral and Detached Magistrate

*Connelly v. Georgia*  
429 U.S. 245, 97 S. Ct. 546 (1977)

**FACTS:** Under Georgia law, Justices of the Peace were authorized to issue search warrants, obtaining fees for this service. A Georgia Justice of the Peace issued the search warrant used to search the defendant’s house. The defendant was convicted for possession of marihuana. The defendant questioned the constitutional fairness of a system authorizing the issuance of search warrants by interested financial parties.

**ISSUE:** Whether the pecuniary interests of an issuing magistrate violate the defendant’s protection afforded him by the Fourth and Fourteenth Amendments?

**HELD:** Yes. Issuing magistrates must be neutral and detached.

**DISCUSSION:** The justice who issued the warrant was not a “neutral and detached magistrate” because he had a financial interest in issuing the warrant. Georgia Justices of the Peace at that time were not salaried. Their compensation was solely based upon how many warrants they issue within a year. This pecuniary interest in issuing search warrants destroyed their neutrality.



*Lo-Ji Sales, Inc. v. New York*  
442 U.S. 319, 99 S. Ct. 2319 (1979)

**FACTS:** An officer purchased two reels of film from the defendant's "adult" bookstore, and upon viewing them, he concluded they violated local obscenity law. The officer took the film to a town justice who viewed both films in their entirety. The justice concluded the films were obscene.

The officer applied for a search warrant and requested that the town justice accompany him to the defendant's store for its execution. This would allow the town justice to independently see if any other items at the store were possessed in violation of the law. At the time the town justice signed the warrant, the only "things to be seized" that were described in the warrant were copies of the two films the officer had purchased.

The town justice assisted in the execution of the search warrant. He viewed movies and determined which were subject to seizure. He had magazines removed from clear plastic or cellophane wrappings, reviewed them, and determined them to be subject to seizure.

**ISSUE:** Whether the magistrate was neutral and detached?

**HELD:** No. The magistrate's participation in the search destroyed his ability to be neutral and detached.

**DISCUSSION:** By allowing himself to participate in the search, the town justice did not manifest the neutrality and detachment demanded of a judicial officer when presented with an application for a search warrant. The fact that the store invited the public to enter did not constitute consent to a wholesale search and seizure. The town justice viewed the films and magazines in a manner inconsistent with that of a customer. He did not see these items as a customer would ordinarily see them. Therefore, his involvement in the search



led to the loss of his independent stature required of a judicial officer.



#### **4. With Particularity**

*Andresen v. Maryland*  
427 U.S. 463, 96 S. Ct. 2737 (1976)

**FACTS:** A fraud unit began an investigation of suspicious real estate settlement activities. The defendant was an attorney specializing in real estate settlements. During the fraud unit's investigation, his activities came under scrutiny, particularly in connection with a transaction involving Lot 13T in a subdivision. An extensive investigation disclosed that the defendant, acting as the settlement attorney, had defrauded the purchaser of Lot 13T.

The fraud investigators concluded that there was probable cause to believe that the defendant had committed the state crime of false pretenses. They applied for warrants to search the defendant's office and the separate office of Mount Vernon Development Corporation, of which the defendant was incorporator, sole shareholder, resident agent and director. The application sought permission to search for specified documents pertaining to the sale and conveyance of Lot 13T. The warrant was issued.

**ISSUE:** Whether the warrant was specific enough to meet the "particularity" clause of the Fourth Amendment?

**HELD:** Yes. The warrant was specific enough to meet the "particularity" clause of the Fourth Amendment.

**DISCUSSION:** All items in a set of "files" may be examined during a search, provided that a description for identifying the evidence sought is listed in the search warrant - - and followed by the investigators. "We recognize that there are grave dangers

inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable." In searches for papers, it is likely that some innocuous documents will be examined, in order to determine whether they are among those papers authorized to be seized. Similar dangers are present in executing a warrant for the "seizure" of telephone conversations. In both kinds of searches, responsible officials, including judicial officials, must take care to assure that the search is conducted in a manner that minimizes unwarranted intrusions upon privacy.



*Stanford v. Texas*  
379 U.S. 476, 85 S. Ct. 506 (1965)

**FACTS:** The magistrate authorized officers to search the defendant's premises as "a place where books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas are unlawfully possessed . . . and to take possession of same." Several law enforcement officers went to the defendant's home for the purpose of serving this warrant. By the time they finished five hours later, they had seized all books including biographies of Pope John XXIII and Justice Black.

**ISSUE:** Whether the search and seizure amounted to an unconstitutional general search?

**HELD:** Yes. The warrant did not meet the particularity requirements of the Fourth Amendment.

**DISCUSSION:** The Fourth Amendment prohibits general warrants that give the government permission to search wherever it wants and to seize whatever it pleases. The indiscriminate sweep of a search warrant's language renders it

invalid under the Fourth Amendment where the warrant authorizes the seizure of “books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operation of the Communist Party in Texas.” The warrant lacked particularity.



*Groh v. Ramirez*  
540 U.S. 551, 124 S. Ct. 1284 (2004)

**FACTS:** ATF agents constructed a search warrant application to seek “any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers.” The warrant itself, however, was less specific. In the section of the warrant that called for a description of the “person or property” to be seized, the agents provided a description of the home to be searched rather than the weapons listed in the application, in an apparent transfer of information error. The magistrate signed the warrant and the following day the agents executed the warrant.

**ISSUE:** Whether a search warrant that does not particularly describe the things to be seized meets the Fourth Amendment’s standards?

**HELD:** No. The purpose of the Fourth Amendment’s particularity clause is to inform the person whose property is being seized of the bounds of the search.

**DISCUSSION:** The Court held that “[T]he warrant was plainly invalid.” As stated in the Fourth Amendment “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 (underline

added).” While the oversight in the warrant might appear to be superficial, and the items to be seized are clearly described in the application, the search warrant serves an important function for the person whose privacy is being intruded upon. It provides notice. The Court stated that the Fourth Amendment does not prohibit warrants from cross referencing other documents if the warrant “uses appropriate words of incorporation, and if the supporting document accompanies the warrant.” Here, the warrant did not incorporate by reference any other document. The Court held that the purpose of the Fourth Amendment’s particularity requirement is to (1) limit general searches and (2) assure the person whose property is being seized that the officer has authority to conduct a search, the need to search, and the bounds of that search.



*Messerschmidt v. Millender*  
565 U.S. 535, 132 S. Ct. 1235 (2012)

**FACTS:** During a domestic dispute, the defendant became violent over the victim’s contact with the police. He discharged a black, pistol-gripped sawed off shot-gun at the victim as she fled in an automobile. The victim reported the incident to the police, described the shotgun, and explained the defendant was an active member of a local gang. The investigating officer confirmed the defendant’s gang affiliation and that he had been arrested 31 times, 9 times for firearms offenses and 6 times for violent crimes. The officer drafted a search warrant affidavit for:

“[A]ll handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it [sic] to fire ammunition” and

“[A]rticles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to ‘Mona Park Crips’...”

The officer had his supervisor and a prosecuting attorney review his affidavit, and a judge signed his request for the search warrant. The officer executed the warrant and was subsequently sued for enforcing an overly broad search warrant.

**ISSUE:** Whether the officer had qualified immunity in executing a search warrant for “all guns” when he knew specifically what kind of gun was used in the crime?

**HELD:** Yes. The officer was entitled to reasonably rely on the issuing judge’s finding of probable cause.

**DISCUSSION:** The Court found that “[W]here the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in ‘objective good faith.’”

Under the circumstances of this case “it would not have been unreasonable for an officer to conclude that there was a ‘fair probability’ that the sawed-off shotgun was not the only firearm [the defendant] owned” or that the “sawed-off shotgun was illegal.” The Court noted that “[E]vidence of one crime is not always evidence of several, but given [the defendant’s] possession of one illegal gun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police, a reasonable officer could conclude that there would be additional illegal guns among others that [the defendant] owned.” The Court expressed similar reasoning for finding the inclusion of the gang-related material in the search warrant as reasonable. Therefore, the officer was entitled to rely on the issuing judge’s finding of probable cause.



*Maryland v. Garrison*  
480 U.S. 79, 107 S. Ct. 1013 (1987)

**FACTS:** Officers obtained and executed a warrant to search the person of Lawrence McWebb and “the premises known as 2036 Park Avenue third floor apartment.” After an exterior examination and an inquiry of a utility company, the officer who obtained the warrant reasonably concluded that there was only one apartment on the third floor and that it was occupied by McWebb. When officers executed the warrant, they fortuitously encountered McWebb in front of the building and used his key to gain admittance to the first floor hallway and to the locked door at the top of the stairs to the third floor. As they entered the vestibule on the third floor, they encountered the defendant, who was standing in the hallway area. The police could see into the interior of both McWebb’s apartment to the left and the defendant’s to the right. Only after the defendant’s apartment had been entered and heroin, cash and drug paraphernalia had been found, did any of the officers realize that the third floor contained two apartments. As soon as they became aware of that fact, they discontinued their search. All of the officers believed that they were searching McWebb’s apartment.

**ISSUE:** Whether the search warrant was unreasonably vague and ambiguous, requiring suppression of the evidence?

**HELD:** No. The officers’ execution of this warrant was reasonable under the circumstances.

**DISCUSSION:** The Court held the officers acted reasonably when: (1) the warrant authorized a search of “the premises known as 2036 Park Avenue third floor apartment,” (2) the objective facts available to the officers at the time of the search suggested no distinction between the named person’s apartment and the entire third floor premises, (3) the officers discovered that the third floor was in fact divided into two separate apartments--only after they entered and found contraband in the apartment of the tenant not named in the warrant, and (4) they discontinued the search as soon as they

made this discovery. Under these circumstances, the officers' failure to realize the ambiguity of the warrant is objectively reasonable, and their execution of the warrant was proper whether the warrant is interpreted as authorizing a search of the entire third floor or a search limited to the named person's apartment. The constitutionality of the officers' conduct must be judged in the light of the information available to them at the time they request the warrant.



*Steele v. United States*  
267 U.S. 498, 45 S. Ct. 414 (1925)

**FACTS:** An affidavit for a search warrant authorized by the issuing judge consisted of the following description:

The building to be searched was a four-story building in New York City on the south side of West 46th Street, with a sign on it Indian Head Auto Truck Service--Indian Head Storage Warehouse, No. 609 and 611. It was all under lease to Steele. The building could be entered by three entrances from the street, one on the 609 side on the 611 side, and in the middle of the building is an automobile entrance from the street into a garage. There is no partition between 611 and 609 on the ground or garage floor, and there were only partitions above and none which prevented access to the elevator on any floor from either the 609 or 611 side.

**ISSUE:** Whether a search warrant based on this application was unconstitutional in that the affidavit and the warrant did not particularly describe the place to be searched?

**HELD:** No. The search was constitutional as the affidavit adequately described the place to be searched.

**DISCUSSION:** The Court held that the description of the building indicated the officers intended to search the whole building. The evidence left no doubt that although the building

had two numbers, the garage business covering the first floor, and the storage business above were so related to the elevator that there was no real division of the building. The Court considered the fact that the search did not “go too far.” The places searched were all rooms connected with the garage by the elevator.



## **B. Serving the Warrant**

### **1. Knock and Announce (18 U.S.C. § 3109)**

*Sabbath v. United States*  
391 U.S. 585, 88 S. Ct. 1755 (1968)

**FACTS:** A narcotics carrier was intercepted at the border and agreed to make a controlled delivery to the home of the defendant. The carrier entered the defendant’s apartment and gave the agents the pre-set signal. Without a warrant, agents knocked on the door, received no response, and opened the door. They entered, arrested the defendant and found narcotics.

**ISSUE:** Whether federal agents are required to conform with 18 U.S.C. § 3109 when making a warrantless entry to make an arrest?

**HELD:** Yes. Agents are required to announce their purpose and identity when making a warrantless entry to make an arrest.

**DISCUSSION:** The government had no basis for assuming the defendant was armed or might resist arrest, or that the cooperating carrier was in any danger. The officers made no independent investigation of the defendant prior to setting the stage for his arrest with narcotics in his possession. Therefore, the officers had to comply with § 3109 (requiring the announcement of presence and notice of authority or purpose before the agents may break down any door). The Court



identified the opening of a closed but unlocked door, lifting a latch, turning a door knob, unhooking a chain, pushing open a hasp, or pushing open a closed door of entrance to a house, even a closed screen door, as a “breaking” with respect to § 3109.



*Wilson v. Arkansas*  
514 U.S. 927, 115 S. Ct. 1914 (1995)

**FACTS:** Officers, in executing a search warrant, entered the defendant’s premises through an unlocked screen door without first knocking or announcing their presence. They found contraband inside the premises.

**ISSUE:** Whether the reasonableness in which officers enter a dwelling pursuant to a search warrant is subject to review by a court?

**HELD:** Yes. Failure to enter a dwelling in a reasonable manner, even with a search warrant, can result in liability.

**DISCUSSION:** The Supreme Court held that the common law knock and announce principle forms a part of the Fourth Amendment reasonableness test. An officer’s unannounced entry into a home can be, in some circumstances, unreasonable under the Fourth Amendment. In evaluating the scope of the reasonableness requirement, the Court considers the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing. Given the longstanding common law endorsement of the practice of announcement, and the great number of commentaries, constitutional provisions, statutes, and cases supporting the knock and announce principle, the Court held that whether officers announced their presence and authority before entering a dwelling should be among the factors to be considered in assessing a search’s reasonableness.

**NOTE:** The burden that may result from an entry in

violation of 18 U.S.C. § 3109 is limited to a civil liability claim and not the loss of evidence through the exclusionary rule. See Hudson v. Michigan.



*Hudson v. Michigan*  
547 U.S. 1096, 126 S. Ct. 2159 (2006)

**FACTS:** Officers obtained a search warrant for the defendant’s home to look for controlled substances. Before entering, the officers announced their presence, but waited only three to five seconds before using force to enter.

**ISSUE:** Whether a violation of the “knock-and-announce” rule (18 U.S.C. § 3109) requires the suppression of all evidence found in the search.

**HELD:** No. The Court found the exclusionary rule inapplicable in these kinds of violations.

**DISCUSSION:** The Court commented that “[S]uppression of evidence, however, has always been our last resort, not our first impulse.” It should only be applied when other options are ineffective. The Court also stated that “[T]he interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government’s eyes.” As the statute does not protect one’s reasonable expectation of privacy the Court concluded that the exclusionary rule is inapplicable in cases where this law is violated.

The government obtains little advantage in its endeavors to ferret out criminal activity by ignoring the knock-and-announce requirement. The possible prevention of the destruction of evidence or the avoidance of violence by occupants of the premises are the likely result, but no new evidence. Therefore, the Court found that “civil liability is an effective deterrent” to address violations of the knock-and-announce rule.



*Richards v. Wisconsin*  
520 U.S. 385, 117 S. Ct. 1416 (1997)

**FACTS:** Officers executed a drug search warrant at the defendant's motel room. To gain entry, one officer hoped to fool the defendant by wearing a maintenance uniform. He knocked on the defendant's hotel room door, which the defendant opened. When the defendant saw a uniformed officer in the hallway, he slammed the door shut. The officers immediately kicked the door open and apprehended the defendant, who was attempting to climb out the window. They found contraband in the room.

**ISSUE:** Whether the officers' entry was in compliance with 18 U.S.C. § 3109?

**HELD:** Yes. Officers are not required to announce their status and intentions with every warrant execution.

**DISCUSSION:** The Court held that officers do not have to comply with 18 U.S.C. § 3109 requirements when they develop reason to suspect that doing so would be: (1) dangerous, (2) futile, or (3) allow for the destruction of evidence. The Supreme Court rejected the argument that all felony drug cases are inherently dangerous. However, in this case the Court found that the officers' behavior was reasonable.



*United States v. Ramirez*  
523 U.S. 65, 118 S. Ct. 992 (1998)

**FACTS:** Shelby was a dangerous, escaped convict. An ATF agent learned from a reliable confidential informant that Shelby was probably staying at the defendant's home, also a convicted felon. Based on this information, Deputy U.S. Marshals obtained a search warrant and permission to enter the premises without complying with 18 U.S.C. § 3109 from a magistrate. The informant also stated that the defendant might have a stash of weapons in his garage. Early in the morning, the

Deputy Marshals used a loud speaker to announce that they had a search warrant. At the same moment one Deputy Marshal broke a window in the garage. He pointed a gun at the opening to discourage a rush for the weapons feared to be inside. The defendant believed people were burglarizing his home and fired a shot into the ceiling of his garage. Moments later, he realized that the persons attempting to enter his home were law enforcement officers and he submitted to their authority. Shelby was not found. However, the officers found weapons in the premises. The defendant was charged with possession of firearms by a felon.

**ISSUE:** Whether law enforcement officers are held to a heightened standard of scrutiny when they destroy property pursuant to a “no-knock” entry?

**HELD:** No. Law enforcement officers’ entries during the execution of warrants must only be “reasonable.”

**DISCUSSION:** All searches must be reasonable under the Fourth Amendment. The manner in which the officers entered the premises to conduct the search is subject to review by a court in determining the reasonableness of that search. The Court held that while there is no absolute prohibition against the destruction of property upon entry, it is a factor that should be considered in determining the reasonableness of the search. In the case here, the Court held that the destruction of a single window to provide a deterrent against dangerous individuals that may arm themselves with suspected weapons was reasonable. Therefore, the search met the standards of the Fourth Amendment.



*United States v. Banks*  
540 U.S. 31, 124 S. Ct. 521 (2003)

**FACTS:** Law enforcement officers went to the defendant’s home around 2 P.M. with a search warrant for a controlled substance. It was unclear whether anyone was at home at the

time. The officers called out “police, search warrant” and knocked on the front door loudly enough to be heard by officers at the back door. The officers waited fifteen to twenty seconds and did not obtain a response. They then broke open the front door and entered the home. The defendant was in the shower and later testified that he heard nothing until the breaking of the door.

**ISSUE:** Whether the officers waited a reasonable amount of time before forcing entry into the home?

**HELD:** Yes. Reasonableness in the use of force in gaining entry is determined by the “totality of the circumstances.”

**DISCUSSION:** The Supreme Court has held that how law enforcement officers go about their search must meet the Fourth Amendment’s reasonableness standard. See Wilson v. Arkansas. The length of time an officer must wait before using force to enter a home with a warrant is determined by the “totality of the circumstances.” The Court stated that it has “consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.” There is “no formula for determining reasonableness.”

The Court determined that, under the facts of this case, the officers’ actions of waiting fifteen to twenty seconds before using force was reasonable. The fact that the defendant was in the shower was unknown to the officers and, therefore, immaterial. It is the actions of the officers, based on their knowledge and inferences at the time that the Court examines for reasonableness. The Court noted that in this case the crucial timeframe is not the time it would have taken the defendant to open the door but rather the time it would have taken him to destroy the evidence. After fifteen to twenty seconds, an exigency existed and the officers were justified in using force to gain entry.

**NOTE:** This opinion does not state law enforcement officers must wait fifteen to twenty seconds before using force with a

warrant. The Court's opinion here is that, under these factors, fifteen to twenty seconds was enough time to wait before using force. A shorter amount of time could have been acceptable to the Court. In other circumstances, a longer period may be required.



## **2. Persons at the Premises**

*Michigan v. Summers*  
452 U.S. 692, 101 S. Ct. 2587 (1981)

**FACTS:** As officers were about to execute a warrant to search a house for narcotics, they encountered the defendant descending the front steps. They detained him while they searched the premises. The defendant was not free to leave the premises while the officers were searching his home. After finding narcotics in the basement and confirming the defendant owned the house, the officers arrested him, searched his person, and found a controlled substance in his coat pocket.

**ISSUE:** Whether law enforcement officers may seize the resident of a house during an execution of a search warrant?

**HELD:** Yes. It was reasonable for the officers to detain the residents of a home while executing a search warrant.

**DISCUSSION:** The Court stated three reasons supporting the defendant's detention:

- 1) The law enforcement interest in preventing flight in the event that incriminating evidence is found.
- 2) The interest in minimizing the risk of harm to the officers and occupants. The execution of a search warrant for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to

conceal or destroy evidence.

- 3) The orderly completion of the search may be facilitated if the residents are present, i.e. to open locked doors or locked containers to avoid the use of force that not only is damaging to property but may also delay the completion of the task at hand.

Some seizures constitute such a limited intrusion of those detained and are justified by a substantial law enforcement interest that they may be supported on less than probable cause. The Court found this to be one of those occasions. The seizure here was reasonable under the Fourth Amendment.

**NOTE:** The Supreme Court held the government's substantial interest was enhanced in this situation because the officers had a search warrant for a controlled substance. Some circuit courts (1st Circuit, 3rd Circuit, 4th Circuit and 11th Circuit) have extended the Summers doctrine to situations other than those that included controlled substances.



*Muehler v. Mena*  
544 U.S. 93, 125 S. Ct. 1465 (2005)

**FACTS:** Officers had reasonable grounds to believe that at least one member of a gang resided at the defendant's residence. The gang member was suspected of being armed and dangerous, and a participant in a recent violent crime. The officers obtained a warrant to search the premises for weapons and other evidence. Upon entry to serve the search warrant, the officers located the defendant (not a suspect) and placed her in handcuffs at gunpoint. Three other individuals found at the premises were also handcuffed.

**ISSUE:** Whether the defendant was detained for an unreasonable amount of time, in an unreasonable manner?

**HELD:** No. The Summers doctrine permits officers to detain occupants of a searched premises where the search involves an element of danger. The use of handcuffs can be a reasonable means of accomplishing this detention.

**DISCUSSION:** In Michigan v. Summers, the Supreme Court authorized the detention of “occupants of the premises while a proper search is conducted” where the search was for a controlled substance. The detention of the defendant here was permissible under the standards set out in Summers. The Court also held the Summers’ “authorization to detain an occupant of the place to be searched carries with it the authority to use reasonable force to effectuate the detention.” In this case, the officers’ use of handcuffs and placing the defendant in the garage of the premises was reasonable because the governmental interest outweighed the marginal intrusion upon the defendant. A search warrant for weapons involves inherently dangerous situations, but also the need to control “multiple occupants made the use of handcuffs all the more reasonable.” The fact that the defendant was not a suspect in the investigation was not significant to the Court.



*Bailey v. United States*  
568 U.S. \_\_\_, 133 S. Ct. 1031 (2013)

**FACTS:** Officers obtained a search warrant for a basement apartment residence. As the search team prepared to execute the warrant, two officers, were conducting surveillance in an unmarked car outside the residence. The officers observed two men, including the defendant, depart the gated area above the basement apartment and get into car parked in the driveway. It did not appear to the officers that the defendant and his companion were aware of the impending intrusion or their presence. The officers observed the car leave the driveway and followed it for approximately one mile before pulling it over. The officers got the men out of the stopped vehicle, placed both in handcuffs and had them taken back to the apartment. The



search team found contraband in the apartment and the defendant was placed under arrest. His keys were seized and found to be capable of opening the door to the apartment.

**ISSUE:** Whether the Summers doctrine permitted the defendant to be seized more than one mile away from the location of the search?

**HELD:** No. The Summers doctrine rests on three important law enforcement interests, none of which were prompted in this case.

**DISCUSSION:** The Supreme Court noted the Summers Doctrine permits law enforcement officers to seize persons at the scene of a search warrant for the execution of that warrant. The Summers Court created this authority for three reasons: (1) officer safety, (2) facilitating the completion of the search, and (3) preventing flight. There was no evidence that any of these interests were placed in jeopardy by the defendant's actions in this case in that his absence from the premises did not interfere with the execution of the warrant. Summers provided guidance regarding how the government was to handle occupants found at the scene of a search warrant rather than create an opportunity to introduce otherwise occupied persons to the search warrant process. The Summers Court noted the detention of a current occupant "represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant" as compared to the defendant's seizure here, which was beyond the bounds anticipated by the Court.



*Los Angeles County v. Rettele*  
550 U.S. 609, 127 S. Ct. 1989 (2007)

**FACTS:** The government conducted a four-month investigation of four African-Americans, suspected of committing fraud and identity theft. One of the suspects was known to be armed. The officers obtained search warrants for

two homes where the suspects were believed to be living. Unknown to the officers, three months earlier, one of the homes had been sold to Mr. Rettele, who occupied the premises with his girlfriend and her son. They were all Caucasian. The officers executed the search warrant and, with guns drawn, encountered the three new occupants of the home. Mr. Rettele and his girlfriend were unclothed and not permitted to cover themselves for the first two minutes of the encounter. Within five minutes, the officers realized their mistake, apologized for the error and departed the premises. Mr. Rettele brought a lawsuit for the deprivation of his Fourth Amendment protections.

**ISSUE:** Whether the officers were reasonable in how they conducted the search of the home?

**HELD:** Yes. Officers are entitled to take reasonable precautions against acts of violence during the execution of search warrants.

**DISCUSSION:** The Court found the search reasonable because the officers had knowledge that one of the suspects was armed. Also, the officers had no way of knowing that, despite the fact that they discovered three persons not suspected of any crime, that dangerous persons were not within the premises as well. The Court has long held that “in executing a search warrant officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search.” The fact that the officers were in error in conducting the search did not make that search unreasonable. The Court noted “valid warrants will issue to search the innocent, and people like Rettele and Sadler unfortunately bear the cost. Officers executing search warrants on occasion enter a house when residents are engaged in private activity; and the resulting frustration, embarrassment, and humiliation may be real, as was true here. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.”



*Ybarra v. Illinois*  
444 U.S. 85, 100 S. Ct. 338 (1979)

**FACTS:** A search warrant was issued for the Aurora Tap Tavern and the person of Greg, the bartender. Upon entering the tavern, the officers announced their purpose and advised all those present that they were going to conduct a “cursory search for weapons.” One of the officers patted down each of the nine to thirteen customers present in the tavern, while the remaining officers engaged in an extensive search of the premises.

The officer who frisked the patrons felt what he described as “a cigarette pack with objects in it” on the defendant. He did not remove this pack from the defendant’s pocket. Instead, he moved on and proceeded to frisk other customers.

After completing this process the officer returned to the defendant and frisked him once again. The officer relocated and retrieved the cigarette pack from the defendant’s pants pocket. Inside he found six tin foil packets containing a brown powdery substance that was later determined to be heroin.

**ISSUE:** Whether the frisk of the defendant was justified based on the fact that he was at the scene of a search warrant?

**HELD:** No. Frisks are only authorized if the officer has reason to suspect that the person being frisked is armed and dangerous.

**DISCUSSION:** Search warrants do not authorize frisks of persons who, at the commencement of the search, are on the premises subject to a search warrant. A person’s proximity to others independently suspected of criminal activity does not, without more, justify a frisk.

The officer’s justification for the search of the defendant rested on a state statute permitting an officer, in the execution of a search warrant, to reasonably detain and search any person on the premises to either protect himself from attack, or to prevent

the disposal or concealment of anything particularly described in the warrant. This statute offends the Fourth Amendment where:

- 1) No probable cause existed at the time the search warrant was issued for the authorities to believe that any person found in the tavern other than the employee would be violating the law;
- 2) There was no probable cause to search the defendant at the time the warrant was executed;
- 3) The customers in the tavern maintained their own protection against an unreasonable search or seizure which was separate and distinct from that possessed by the proprietor of the tavern or by the employee, and;
- 4) The initial frisk of the customer was not supported by a reasonable suspicion that he was armed and dangerous.



*Illinois v. McArthur*  
531 U.S. 326, 121 S. Ct. 946 (2001)

**FACTS:** Officers developed probable cause the defendant had marijuana in his home. While some of the officers sought a search warrant with this information, others prevented the defendant from entering his home unless accompanied by a law enforcement officer. This prohibition lasted for approximately two hours. Once a warrant was secured, the officers entered the home and found drug paraphernalia and marijuana.

**ISSUE:** Whether the officers' denial of the defendant access to his home without the accompaniment of an officer was an unreasonable seizure of the dwelling?

**HELD:** No. The brief seizure, given the circumstances, was

reasonable under the Fourth Amendment.

**DISCUSSION:** The Court found that the warrantless seizure was reasonable since it involved exigent circumstances. The restraint employed by the officers was adapted to the circumstances, avoiding significant intrusion into the home itself. The Court balanced the privacy-related and law enforcement-related concerns. The officers had probable cause to believe the defendant's home contained evidence, and had valid reason to fear that, unless restrained, the defendant would destroy it before other officers could return with a warrant. The officers made reasonable efforts to reconcile their needs with the demands of personal privacy, and imposed the restraint for a limited period, two hours. Given the nature of the intrusion and the law enforcement interest at stake, the brief seizure of the premises was permissible.



### 3. Associated Issues

*United States v. Van Leeuwen*  
397 U.S. 249, 90 S. Ct. 1029 (1970)

**FACTS:** At about 1:30 p.m., March 28, two 12-pound packages, each insured for \$10,000, were deposited "airmail registered" at a post office in Mount Vernon, WA, near the Canadian border. The mailer declared that they contained coins. One package was addressed to a post office box in Van Nuys, CA, and the other to a post office box in Nashville, TN. The postal clerk told a policeman that he was suspicious of the packages. The policeman at once noticed that the return address on the packages was a vacant housing area and the license plates of the mailer's car were from British Columbia. The policeman contacted the Canadian police, who called Customs in Seattle. Ninety minutes later, Customs learned that one addressee was under investigation in Van Nuys for trafficking in illegal coins. Due to the time differential, Customs was unable to reach Nashville until the following morning when they were advised that the second addressee was also being

investigated for the same crime. A search warrant was issued at 4 p.m. and executed at 6:30 p.m., on the following day. The packages were opened, inspected, resealed, and promptly sent on their way.

**ISSUE:** Whether the twenty-nine hour delay in obtaining a search warrant for the packages was unreasonable under the Fourth Amendment?

**HELD:** No. Under the circumstances of coordination with officials in a distant location and time difference, 29 hours was reasonable.

**DISCUSSION:** The nature and weight of a 12-pound “airmail registered” package, the mailer’s fictitious return address and Canadian license plates, and the knowledge that the addressee is under investigation for trafficking in illegal coins, constituted probable cause for the issuance of a warrant to search the packages. Twenty-nine hours is not “unreasonable” within the meaning of the Fourth Amendment, where officials in the distant destination could not be reached sooner because of the time differential.



*Segura v. United States*  
468 U.S. 796, 104 S. Ct. 3380 (1984)

**FACTS:** Officers arrested two people for possessing cocaine. They told the officers that they had purchased the cocaine from the defendant. A U.S. Attorney told the officers to arrest the defendant but that a search warrant for the defendant’s apartment probably could not be obtained until the following day. The officers were to secure the apartment in the meantime to prevent the destruction of evidence.

The officers arrested the defendant in the lobby of his apartment building, took him to the apartment, knocked on his door, and when it was opened by Colon, entered the apartment without requesting or receiving permission. The officers

conducted a limited security check of the apartment and in the process, observed in plain view various drug paraphernalia. Colon was arrested and he and the defendant were taken into custody. Two officers remained in the apartment awaiting the warrant, but because of administrative delay, the warrant was not issued until nineteen hours after the initial entry. In the search pursuant to the warrant, the agents discovered cocaine and records of narcotics transactions.

**ISSUE:** Whether the initial entry by the officers was lawful?

**HELD:** Yes. When officers, having probable cause, enter a premises, and secure the premises while others, in good faith, are in the process of obtaining a search warrant, they do not offend the Fourth Amendment.

**DISCUSSION:** A seizure affects possessory interests. A search affects privacy interests. Therefore, a warrantless seizure of a person's property can be reasonable on the basis of probable cause but a warrantless search might be unreasonable.

In this case, the officers had probable cause in advance that there was a criminal enterprise being conducted in the defendant's apartment. Securing the premises from within was no greater an interference with the defendant's possessory interests (a seizure) than a perimeter stakeout. Under either method, officers control the apartment pending the arrival of a search warrant. Further, there was no evidence that the officers exploited the defendant's privacy interests while in the apartment. They simply awaited issuance of the warrant.

As a secondary point, the exclusionary rule suppresses evidence not only obtained as a direct result of an illegal search or seizure, but also evidence later found to be derivative of that illegal venture. However, evidence is not to be excluded if the connection between the government conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the illegal taint. Therefore, whether the initial entry was legal is irrelevant to the admissibility of the challenged evidence

because there was an independent source for the warrant under which that evidence was seized. None of the information on which the warrant was secured was based on the initial entry into the defendant's apartment.



*Sgro v. United States*  
287 U.S. 206, 53 S. Ct. 138 (1932)

**FACTS:** A magistrate issued a search warrant that was not executed until after the ten day limit (which was the limit at the time) had expired.

**ISSUE:** Whether the warrant was still valid?

**HELD:** No. Search warrants must be served within the timeframe of their limitations.

**DISCUSSION:** The proof of probable cause that must be made before a search warrant can be issued must be closely related in time to the issuance of the warrant. Whether the proof meets this test is determined by the circumstances of each case.

“While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case. It is in the light of the requirement that probable cause must properly appear when the warrant issues that we must read the provision which in explicit terms makes a warrant void unless executed within ten days after its date. That period marks the permitted duration of the proceeding in which the warrant is issued. There is no provision which authorizes the commissioner to extend its life or to revive it.” Issuing judges may not extend the 10-day time limit (or the current 14-day time limit) for search warrants. The rules permit judges to



issue new warrants if probable cause still exists at a later time.

**NOTE:** Federal Rules of Criminal Procedure 41(e)(2)(A)(i) permits the issuing judge to allow the executing officer to serve a search warrant for up to 14 days.



*Gooding v. United States*  
416 U.S. 430, 94 S. Ct. 1780 (1974)

**FACTS:** The government secured a search warrant for the defendant's apartment to search for evidence of controlled substances. The warrant stated that the officers could make the search "at any time in the day or night." The officers executed the warrant at nighttime and they uncovered a substantial quantity of contraband.

**ISSUE:** Whether the government must make any special showing for a nighttime entry with a search warrant to search for a controlled substance?

**HELD:** No. The government may rely on 21 U.S.C. § 879, which allows for nighttime entry to search for controlled substances without any special showing.

**DISCUSSION:** Federal Criminal Procedure Rule 41 specifically requires that search warrants be served in the daytime (6 a.m. to 10 p.m.) unless a special need to search at night is shown. The government did not make that showing here. However, the Supreme Court ruled that 21 U.S.C. § 879 governed this search as it involved a controlled substance. This statute permits a nighttime search without any special showing by the government. The statute provides that officers may serve a warrant at any time of the day or night if the issuing judge is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time. Title 21 U.S.C. § 879(a) requires no special showing for need of a nighttime search, other than a showing that the contraband is likely to be on the property or person to be searched. The

government meets this showing where an affidavit submitted by an officer suggests there was a continuing traffic of drugs from the suspect's apartment, and a prior purchase through an informant had confirmed that drugs were available.



*Dalia v. United States*  
441 U.S. 238, 99 S. Ct. 1682 (1979)

**FACTS:** A federal court authorized a Title III order after finding probable cause that an individual was a member of a conspiracy to violate federal law. The defendant and others were using his office in the alleged conspiracy. Officers entered the defendant's office secretly at night and spent three hours in the building installing an electronic interception device. Several weeks later they returned to the office and removed the device.

**ISSUE:** Whether a Title III order also entails the authority to enter a premises to install the necessary equipment to engage in surreptitious recordings?

**HELD:** Yes. Without specifically stating this authority, a Title III order implies the authority to surreptitiously enter the target premises to install the necessary equipment.

**DISCUSSION:** The Supreme Court held that the Fourth Amendment did not prohibit per se a law enforcement officer's covert entry into a private premises. The Fourth Amendment's requirement is that such entry be reasonable. Although Title III of the Omnibus Crime Control and Safe Streets Act did not refer explicitly to covert entry, the language, structure, and history of the statute indicated that Congress had conferred power upon the courts to authorize covert entries for enforcement of the law. The Court stated that the Fourth Amendment does not require that an electronic surveillance order issued by a court under Title III include a specific authorization to enter covertly the premises described in the order.



*Franks v. Delaware*  
438 U.S. 154, 98 S. Ct. 2674 (1978)

**FACTS:** Officers obtained a search warrant to search the defendant's premises for clothing worn during a rape. The defendant claimed the affidavit for the search warrant contained untrue statements. He moved to suppress the search warrant based on the untruthfulness of the affidavit.

**ISSUE:** Whether the defendant is entitled to a hearing when he makes specific allegations of recklessly used material false statements in an affidavit upon which a search warrant was issued?

**HELD:** Yes. The defendant is entitled to challenge the affidavit upon which a search warrant has been issued.

**DISCUSSION:** "Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. . ."



*Wilson v. Layne*  
526 U.S. 603, 119 S. Ct. 1692 (1999)

**FACTS:** Deputy U.S. Marshals attempted to execute an arrest warrant for Dominic Wilson at his last known place of residence. Unbeknownst to the Deputy Marshals, the address was actually that of his parents. The arrest team invited a newspaper photographer and reporter to accompany them on the execution of the arrest warrant. The Deputy Marshals entered Wilson's parents' home in a futile effort to arrest him. The reporter and photographer also entered the home, and the photographer took many pictures of the event. After learning

that the subject of the warrant was not at the premises, the Deputy Marshals and the newspaper reporter and photographer left the premises. The Wilsons sued the Deputy Marshals in a Bivens action for violating their Fourth Amendment right to be free from unreasonable searches and seizures.

**ISSUE:** Whether the inclusion of third parties on the arrest team that do not assist in the execution of a warrant is unreasonable?

**HELD:** Yes. A warrant only authorizes third parties to enter a premises that will assist in the purpose of the intrusion.

**DISCUSSION:** The Court found no problem with the Deputy Marshals' entry into the dwelling to execute an arrest warrant. However, the intrusion that an arrest warrant allows is limited in scope to making an arrest. The government could not state a valid claim for the intrusion into the private home of a newspaper reporter and photographer as they in no way assisted in the objective of the arrest warrant. Therefore, the Court held their participation to be an unreasonable intrusion, and prohibited by the Fourth Amendment.



*Hanlon v. Berger*  
526 U.S. 808, 119 S. Ct. 1706 (1999)

**FACTS:** The defendants lived on a 75,000-acre ranch. A magistrate issued a warrant authorizing the search of "The Paul W. Berger ranch with appurtenant structures, excluding the residence" for evidence of "the taking of wildlife in violation of Federal laws." About a week later, a multiple-vehicle caravan consisting of government agents and a crew of photographers and reporters from CNN proceeded to a point near the ranch. The agents executed the warrant and explained that "Over the course of the day, the officers searched the ranch and its outbuildings pursuant to the authority conferred by the search warrant. The CNN media crew accompanied the officers and

recorded the officers' conduct in executing the warrant." The defendants sued federal agents for violating their Fourth Amendment rights.

**ISSUE:** Whether the officers can be held liable under Bivens for allowing persons not assisting in the execution of the warrant to intrude on the defendant's privacy?

**HELD:** Yes. Courts granted the government permission to intrude on privacy with the use of a search warrant for the singular purpose of obtaining items expressed in the warrant. Allowing a search warrant to be used for other, additional purposes is unreasonable.

**DISCUSSION:** The Supreme Court held in Wilson v. Layne that Fourth Amendment rights of homeowners were violated when officers allow members of the media to accompany them during the execution of a warrant. The inclusion of personnel that are not necessary for the successful completion of the search warrant is an unreasonable intrusion into the privacy of the defendants.



## **V. SEARCH WARRANT EXCEPTIONS - P.C. Needed**

### **A. Plain View**

*Horton v. California*  
496 U.S. 128, 110 S. Ct. 2301 (1990)

**FACTS:** An officer determined that there was probable cause to search the defendant's home for evidence of a robbery. His affidavit for a search warrant referred to the weapons used in the crime as well as the proceeds, but the search warrant issued by the Magistrate only authorized a search for the proceeds.

During the execution of the warrant, the officer did not find the stolen property. However, he discovered the weapons in the course of searching for the proceeds and seized them. The officer testified that while he was searching for the proceeds, he was also interested in finding other evidence connecting the defendant to the robbery. The seized evidence was not discovered “inadvertently.”

**ISSUE:** Whether the warrantless seizure of evidence of crime in plain view must be inadvertent?

**HELD:** No. The plain view doctrine does not require evidence of crime to be discovered inadvertently.

**DISCUSSION:** An essential and initial predicate to a valid plain view seizure is that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence was plainly viewed. The officer must be lawfully present in the area in which the item is seized. Second, the incriminating character of the object must also be “immediately apparent.”

The items seized from the defendant’s home were discovered during a lawful search authorized by a valid warrant. The officer was legally present. When the items were discovered, it was immediately apparent to the officer that they constituted incriminating evidence. In this case, the seizure was reasonable.



*Arizona v. Hicks*  
480 U.S. 321, 107 S. Ct. 1149 (1987)

**FACTS:** A bullet was fired through the floor of Hicks’s apartment, injuring a man in the apartment below. Police officers arrived and lawfully entered Hicks’s apartment without a warrant to search for the shooter, victims, and weapons. The officers found and seized three weapons.

While inside, one of the officers noticed some expensive

stereo equipment, which seemed "out of place" in the apartment. Suspecting that the equipment was stolen, the officer moved some of the components to read and record their serial numbers. The officer then contacted his headquarters with this information and was told that some of the components had been taken in an armed robbery. The officer immediately seized these components.

**ISSUE:** Whether the stereo components were validly seized under the plain view doctrine?

**HELD:** No. The officer did not have probable cause to believe the components were stolen when he moved them to record their serial numbers.

**DISCUSSION:** The officer's moving of the stereo components to determine their serial numbers constituted a Fourth Amendment search. This search was separate and apart from the search for the shooter, victims, and weapons that justified the officer's warrantless entry into the apartment. The state conceded that the officer did not have probable cause to believe the stereo components were stolen when he moved them to read and record their serial numbers. Any search not related to the original exigency that justified the officer's warrantless entry into the apartment, unless supported by some "special operational necessity," needed to be supported by probable cause to justify a plain view seizure. As the officer did not have probable cause to believe that the stereo components were stolen when he searched them, he could not lawfully seize them under the plain view doctrine.



*Texas v. Brown*  
460 U.S. 730, 103 S. Ct. 1535 (1983)

**FACTS:** An officer stopped the defendant's automobile at night at a routine driver's license checkpoint. The officer asked the defendant for his license, and shined his flashlight into the

car. He saw an opaque, green party balloon, knotted near the tip, fall from the defendant's hand to the seat beside him. Based on his experience in drug offense arrests, the officer was aware that narcotics were frequently packaged in this way. While the defendant was looking in the glove compartment for his license, the officer shifted his position to obtain a better view and noticed small plastic vials, loose white powder, and an open bag of party balloons in the glove compartment. After the defendant stated that he did not have a driver's license in his possession, he complied with the officer's request to get out of the car. The officer picked up the green balloon, which appeared to contain a powdery substance within its tied-off portion. He placed the defendant under arrest and searched the car. Other items were seized.

**ISSUE:** Whether the evidence was obtained in plain view?

**HELD:** Yes. "Plain view" is an expression used to describe the legal seizure of evidence obtained by an officer intruding into an area in which he or she has a right to be and observes something in which he or she has probable cause ("immediately apparent") to believe is evidence of a crime.

**DISCUSSION:** The Court held the officer did not violate the Fourth Amendment in seizing the balloon. The "plain view" doctrine provides grounds for a warrantless seizure of a suspicious item when the officer's access to the item has some prior justification under the Fourth Amendment. Here, the officer's initial stop of the defendant's vehicle was valid, and his actions in shining his flashlight into the car and changing his position to see what was inside did not violate any privacy rights. The "immediately apparent" requirement of the "plain view" doctrine does not mean that a police officer "know" that certain items are contraband or evidence of a crime. The officer must only have probable cause at the moment of seizure. Probable cause is a flexible, common sense standard, merely requiring that the facts available to the officer would warrant a person of reasonable caution to believe that certain items may be contraband or stolen property or useful as evidence of a



crime. The officer had probable cause to believe that the balloon contained a controlled substance.



## **B. Mobile Conveyance**

*Carroll v. United States*  
267 U.S. 132, 45 S. Ct. 280 (1925)

**FACTS:** Undercover prohibition agents met with the defendant and two accomplices to buy illegal whiskey. The defendant left to get the whiskey but could not do so because his source was not in. One of his accomplices informed the undercover agents they would deliver it the next day. The officers observed the vehicle and registration number the defendant and his accomplices were using during these negotiations.

The defendant did not make the arranged delivery the following day. A week later, while patrolling a highway commonly used to smuggle whiskey into the country the agents saw the defendant in the same car as before. They gave pursuit but lost the car. Two months after that, the agents again saw the defendant in the same car on the same road. The agents believed they had probable cause as the highway was often used in the illegal transportation of liquor, and they had information that the car and its occupants were engaged in the illegal business of “bootlegging.” The agents stopped the defendant, searched the car, and found sixty-eight bottles of illegal whiskey.

**ISSUE:** Whether the search of the defendant’s automobile without a warrant violated the Fourth Amendment?

**HELD:** No. If an officer stops a car based on probable cause and conducts a search in order to preserve evidence due to the automobile’s mobility, the search may be conducted without a warrant.

**DISCUSSION:** The guarantee of freedom from unreasonable

searches and seizures by the Fourth Amendment has been construed as recognizing a necessary difference between a search of a structure (whereby a warrant can readily be obtained) and a search of a vehicle (where it is not practical to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought). Therefore, contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant if the agent has probable cause to believe the vehicle contains contraband.



*Chambers v. Maroney*  
399 U.S. 42, 90 S. Ct. 1975 (1970)

**FACTS:** Officers established probable cause that four men in a blue station wagon committed an armed robbery. Within an hour, officers stopped a blue station wagon containing four men approximately two miles from the crime scene. Officers arrested the men and drove their vehicle to the police station where it was searched without a warrant. Inside the vehicle, officers found evidence connected to the robbery.

**ISSUE:** Whether the warrantless search of the automobile and the seizure of the evidence was lawful?

**HELD:** Yes. A warrantless search of a vehicle is valid despite the fact that a warrant could have been procured without endangering the preservation of evidence.

**DISCUSSION:** Automobiles and other conveyances may be searched without a warrant, provided there is probable cause to believe the vehicle contains articles that the officers are entitled to seize. Having established that contraband concealed in a vehicle may be searched for without a warrant, the Court considered the circumstances under which such search may be made.

The Court saw no distinction in seizing and holding a car before presenting probable cause to a magistrate, and carrying out an immediate search without a warrant. Given probable cause to search, the Court held that either course is reasonable under the Fourth Amendment. The light blue station wagon could have been searched on the spot where it was stopped since there was probable cause to search. Therefore, the warrantless search that took place was reasonable.



*United States v. Ross*  
456 U.S. 798, 102 S. Ct. 2157 (1982)

**FACTS:** Officers developed probable cause the defendant was selling controlled substances out of his parked car. The officers approached the defendant, ordered him out of the car and searched the passenger compartment. The officers found a bullet on the front seat and a pistol in the glove compartment. An officer arrested and handcuffed the defendant while other officers searched the trunk of the car. Inside the trunk, officers found a closed brown paper bag that contained heroin. The officers moved the car to the police station and searched it again, finding a closed leather pouch that contained \$3,200 in cash.

**ISSUE:** Whether officers, who have lawfully stopped an automobile and have probable cause to believe that contraband is concealed somewhere within it, may conduct a search of compartments and containers that are not openly visible?

**HELD:** Yes. If probable cause justifies the search of a lawfully stopped automobile, it justifies the search of every part of the vehicle and its contents that might conceal the object of the search.

**DISCUSSION:** Because the officers lawfully detained the defendant and established probable cause his vehicle contained contraband, the officers could conduct a warrantless search of

the vehicle. The search could be as thorough as one authorized by a warrant issued by a magistrate. Every part of the vehicle where the contraband might be stored could be searched. This included all receptacles and packages that could possibly contain the object of the search.



*Michigan v. Thomas*  
458 U.S. 259, 102 S. Ct. 3079 (1982)

**FACTS:** The defendant was the front-seat passenger of a lawfully stopped vehicle. The officers noticed a bottle of alcohol between the defendant's feet and arrested him for being in possession of open intoxicants in a motor vehicle. The driver of the car was cited for not having an operator's license. A tow truck was summoned and an officer, pursuant to departmental policy, searched the vehicle as it was being impounded. He found marijuana in the glove compartment. Based on this discovery, he continued his search and found a gun in an air vent.

**ISSUE:** Whether the officer was entitled to search under the mobile conveyance exception after conducting an inventory search?

**HELD:** Yes. The officer was reasonable in conducting a mobile conveyance search even after conducting an inventory search.

**DISCUSSION:** It was reasonable for the officers to search the motor vehicle under the inventory policy, as they were responsible for the contents therein. This led to the discovery of marijuana, giving the officers probable cause that other contraband could be found in the car. The Court held that once the officers established probable cause, they were entitled to search despite the fact that the car had previously been searched through the inventory policy. This led to the lawful discovery of the handgun in the air vent. The fact that the car was immobilized for want of an operator was inconsequential.



*Florida v. Myers*  
466 U.S. 380, 104 S. Ct. 1852 (1984)

**FACTS:** Officers arrested the defendant in his automobile, searched it and seized several items. The officers had the defendant's automobile towed to a secure, locked impound lot. Eight hours later, an officer went to the impound lot and, without obtaining a warrant, searched the defendant's automobile for a second time and seized additional evidence.

**ISSUE:** Whether a search conducted under the mobile conveyance doctrine, conducted after a search incident to an arrest and after the automobile was impounded and in police custody, violates the Fourth Amendment?

**HELD:** No. A warrantless search of an automobile impounded and in police custody conducted eight hours after a valid initial search is proper as a mobile conveyance search if the officers have probable cause.

**DISCUSSION:** In Michigan v. Thomas, the Court upheld a warrantless search of an automobile even though the automobile was in government custody and a prior inventory search of the car had already been made. That case specifically rejected the argument that the justification to conduct a warrantless search vanishes once the car has been taken into custody and impounded. The justification for the initial warrantless search did not vanish once the car had been immobilized. To conduct a mobile conveyance search, the government only needs to establish probable cause that the evidence sought is located in the mobile conveyance.



*United States v. Johns*  
469 U.S. 478, 105 S. Ct. 881 (1985)

**FACTS:** Pursuant to an investigation of a suspected drug smuggling operation, officers observed two pickup trucks as they traveled to a remote, private landing strip, and the arrival and departure of two small airplanes. The officers smelled the odor of marijuana as they approached the trucks and observed packages wrapped in dark green plastic and sealed with tape, a common method of packaging marijuana. The officers arrested the defendant, took the pickup trucks to their headquarters, and secured the vehicles. Three days later, without obtaining a search warrant, the agents opened some of the packages and took samples that proved to be marijuana.

**ISSUE:** Whether a warrantless search of the packages three days after they were removed from vehicles is justified under the mobile conveyance exception to the warrant requirement?

**HELD:** Yes. The Supreme Court held that if the officers have probable cause to look for evidence in a mobile conveyance, they do not need to obtain a warrant.

**DISCUSSION:** The warrantless search of the packages was reasonable even though it occurred three days after the packages were seized. The Ross case established that the officers could have searched the packages when they were first discovered in the trucks at the airstrip. Moreover, there is no requirement that a Carroll search of a vehicle occur contemporaneously with its lawful seizure.



*Pennsylvania v. Labron*  
518 U.S. 938, 116 S. Ct. 2485 (1996)

**FACTS:** Officers observed the defendant engage in a drug transaction. They pulled him over, arrested him, searched his car and found cocaine in the trunk. The Supreme Court of

Pennsylvania suppressed the cocaine because the officers could have obtained a search warrant before they searched the defendant's car under the Carroll doctrine.

**ISSUE:** Whether the officers need to establish exigent circumstances before searching a car under the mobile conveyance exception to the Fourth Amendment's warrant requirement?

**HELD:** No. Once the officers establish probable cause to search a car under the mobile conveyance exception, they do not need to obtain a warrant.

**DISCUSSION:** The Supreme Court established the mobile conveyance exception to the warrant requirement of the Fourth Amendment because of the necessity of coping with rapidly disappearing objects. However, the Court has shifted the focus of this exception from the exigency of the speed of the vehicle to the fact that persons have only a reduced expectation of privacy in an automobile. The Court discarded the original requirement that the government establish that the automobile searched was in immediate danger of disappearing. The Court stated "if a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more."



*Maryland v. Dyson*  
527 U.S.465, 119 S. Ct. 2013 (1999)

**FACTS:** A Deputy Sheriff received a tip from a reliable informant that the defendant was about to transport cocaine from New York. The informant stated that the defendant had rented a red Toyota Corolla and provided the license plate number for the transportation. The deputy verified that the defendant, a known drug dealer, rented such a vehicle. Several hours later, law enforcement officers stopped this vehicle and searched it. They found cocaine in the trunk. The Maryland appellate court found the officers had probable cause but

suppressed the evidence because the officers had time to secure a search warrant but failed to do so.

**ISSUE:** Whether officers must obtain a search warrant for a mobile conveyance, after developing probable cause, if they have the time to secure one?

**HELD:** No. Officers are not required to obtain a search warrant for a mobile conveyance even if they have time to secure one.

**DISCUSSION:** Generally, the Court requires a search warrant to conduct a search under the Fourth Amendment. However, the Supreme Court has offered a variety of exceptions to the warrant requirement. One of these exceptions is the mobile conveyance, or automobile, exception. The Supreme Court originally created the automobile exception to the warrant requirement because of the exigency caused by their mobility. In an earlier line of cases, the Supreme Court held that if the government had time to secure a warrant, it must do so. However, in 1982 (United States v. Ross) the Supreme Court discarded this principle. Under this principle of law, the government may conduct a search of an automobile if it has probable cause and the item searched is immediately mobile.



*California v. Carney*  
471 U.S. 386, 105 S. Ct. 2066 (1985)

**FACTS:** Officers received information that the defendant was exchanging marijuana for sex in a motor home parked in a lot in downtown San Diego. Officers stopped a youth, who had entered and then left the motor home. The youth told the officers he had received marijuana in return for allowing the defendant sexual contact. The youth, at the officer's request, went back to the motor home, knocked on the door, and the defendant stepped out. The officer went inside and observed marijuana. A subsequent search of the motor home revealed additional marijuana. The motor home was the defendant's



residence.

**ISSUE:** Whether a motor home used as a residence is a motor vehicle for purposes of the motor vehicle exception?

**HELD:** Yes. A motor home is treated as a vehicle, rather than a dwelling, if it is immediately mobile.

**DISCUSSION:** When a vehicle is being used on highways or is capable of that use and is found stationary in a place not regularly used for residential purposes, two justifications for the vehicle exception to the warrant requirement came into play. First, that the vehicle is readily mobile. Second, there is a reduced expectation of privacy stemming from the pervasive regulation of vehicles. Under these circumstances, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become mobile.

In this case, the defendant's vehicle possessed many attributes of a home. However, the vehicle falls clearly within the scope of the automobile exception since the defendant's motor home was readily mobile. While the vehicle is capable of functioning as a home, to distinguish between a motor home and a typical car would require that the mobile conveyance exception be applied depending upon the size of the vehicle and the quality of its appointments. The Court was not willing to make this distinction. Therefore, under the mobile conveyance exception to the warrant requirement, the search of the defendant's motor home was reasonable.



*California v. Acevedo*  
500 U.S. 565, 111 S. Ct. 1982 (1991)

**FACTS:** Officers made a controlled delivery of marijuana. The dealer took the packages to his apartment. The officers then observed the defendant enter the dealer's apartment,

where he stayed for about ten minutes. The defendant then reappeared carrying a brown paper bag that appeared full. The bag was the size of one of the wrapped marijuana packages. The defendant placed the package in the trunk of his car and began to drive away. Fearing the loss of evidence, officers, without a warrant, stopped him, opened the trunk and the bag, and found the marijuana.

**ISSUE:** Whether the Fourth Amendment requires the officers to obtain a warrant to open a container found in a vehicle?

**HELD:** No. In a search extending to a container located in a mobile conveyance, officers may search the container without a warrant where they have probable cause to believe that it holds contraband or evidence.

**DISCUSSION:** The Court in Ross took the critical step of holding that closed containers in vehicles can be searched without a warrant because of their presence within that vehicle. The Court saw no principled distinction between the paper bag found by the officers in Ross and the paper bag found by the officers here.

Ross now applies to all searches of containers found in an automobile; i.e., the government may search an automobile and the containers within it if they have probable cause to believe that contraband or evidence is located inside. “The scope of a warrantless search of an automobile . . . is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.” However, the Court reaffirmed the principle that “probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.”



*Wyoming v. Houghton*  
526 U.S. 295, 119 S. Ct. 1297 (1999)

**FACTS:** The defendant was one of two female passengers in a lawfully stopped automobile. While the officer was questioning the driver, David Young, he noticed a syringe in Young's shirt pocket. The officer asked Young to step out of the car and asked why he had a syringe. Young stated the syringe was used to take drugs. The officer entered the automobile in search of contraband. On the back seat of the automobile, he found a purse, which was claimed by the defendant. Inside the purse the officer located a wallet containing her driver's license, a brown pouch and a black, wallet-type container. The defendant admitted that the black wallet belonged to her but denied ownership of the brown pouch. The officer found contraband in both containers.

**ISSUE:** Whether an officer is justified in searching passengers' containers under the mobile conveyance exception to the Fourth Amendment's warrant requirement?

**HELD:** Yes. The mobile conveyance exception to the Fourth Amendment's warrant requirement allows the officers to search wherever the items they seek could be located in the mobile conveyance.

**DISCUSSION:** The Supreme Court stated that the officer's probable cause to search the automobile was incontestable. Once the Court found probable cause existed, it limited its discussion to determining the scope of the search. Citing United States v. Ross (1982), the Supreme Court stated that "[I]f 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." In the case at hand, the Court held that this includes containers that belong to passengers. In doing so, the Court rejected ownership as a factor to be considered by the officer before conducting an automobile search. While the Court held that the containers of passengers were subject to a search of the mobile conveyance,

this same rationale could not be applied to the body of the passengers because of the significantly heightened protection traditionally provided to one's person.



### **C. Destruction of Evidence**

*Kentucky v. King*  
563 U.S. 452, 131 S. Ct. 1849 (2011)

**FACTS:** Officers followed a suspected drug dealer to an apartment complex but lost sight of him as he entered the breezeway. Upon entering the breezeway officers saw two apartments, one on the left and the other to the right. The officers detected the very strong odor of burnt marijuana outside the apartment door on the left. Approaching the apartment door on the left, the officers knocked loudly and announced their presence. As the officers began knocking, they heard noises coming from the apartment; the officers believed these noises were consistent with the destruction of evidence. The officers then announced their intent to enter the apartment and forced entry by kicking in the door. The defendant and others were found inside the apartment. During a protective sweep officers saw drugs in plain view. The suspected drug dealer was later found in the other apartment on the right side of the breezeway.

**ISSUE:** Whether the exigent circumstances exception to the warrant requirement applies when officers' presence causes the occupants to attempt to destroy evidence by knocking on the door of a residence and announcing their presence?

**HELD:** Yes. The exigent circumstances exception applies when the government does not create the exigency by engaging in, or threatening to engage in, conduct that violates the Fourth Amendment.

**DISCUSSION:** The Court applied a two part test for the

“police created exigency” doctrine whereby the trial court must determine (1) whether exigent circumstances existed; and (2) whether the officers impermissibly created the exigency by violating or threatening to violate the Fourth Amendment. By merely knocking on the door to the apartment the officers did no more than any private citizen might do. The officers were not responsible for the occupants’ reaction to their presence at the door. The occupants could have chosen to not answer the door instead of destroying evidence. Therefore, because the officers did not violate or threaten to violate the Fourth Amendment, the exigency justified the warrantless search of the residence.

The exigent circumstances rule justifies a warrantless search when the conduct of the officers preceding the exigency is objectively reasonable under the Fourth Amendment. Warrantless entry to prevent the destruction of evidence is reasonable and is therefore allowed where the officers do not create the exigency by engaging in or threatening to engage in conduct (such as announcing they would break the door down if the occupants do not open the door voluntarily) that violates the Fourth Amendment.



*Cupp v. Murphy*  
412 U.S. 291, 93 S. Ct. 2000 (1973)

**FACTS:** The defendant’s wife was murdered by strangulation. Soon thereafter, the defendant and his attorney voluntarily went to the police station for questioning. The officers noticed a dark spot on the defendant’s finger. Suspecting the spot might be dried blood and knowing that evidence of strangulation is often found under an assailant’s fingernails, an officer asked the defendant if he could take a scraping sample from the defendant’s fingernails. The defendant refused, put his hands behind his back and appeared to rub them together. The defendant then put his hands in his pockets and appeared to be cleaning them. Without a warrant, officers forcefully took the samples, which contained traces of

skin, blood, and fabric from the victim's nightgown.

**ISSUE:** Whether the warrantless search of the defendant's fingernails was an unreasonable search?

**HELD:** No. The Court found that the existence of probable cause and the very limited intrusion undertaken at the station to preserve the readily destructible evidence was a reasonable search.

**DISCUSSION:** The search of the defendant's fingernails went beyond observing the physical characteristics constantly exposed to the public. It constituted the type of severe, though brief, intrusion upon personal security that is subject to the Fourth Amendment.

Even though the defendant was not arrested, he was sufficiently apprised of his suspected role in the crime to motivate him to attempt to destroy what evidence he could. His actions of putting his hands behind his back and then into his pockets were a sufficient indication of the likelihood of the destruction of evidence. While a full Chimel search incident to arrest would not be justified (the defendant had not been placed under arrest) the Court held that a limited intrusion to preserve evidence is reasonable. These actions by the defendant, along with the existence of probable cause, justified the limited intrusion undertaken by the government to preserve the evidence under the defendant's fingernails.

**NOTE:** This case is often cited as a "search incident to arrest" case, and justifiably so. However, it is placed in this section to serve as an example of the urgency brought about by the possibility of the destruction of evidence. As the Court stated "On the facts of this case, considering the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence, we cannot say that this search violated the Fourth and Fourteenth Amendments (underline added)."



*Schmerber v. California*  
384 U.S. 757, 86 S. Ct. 1826 (1966)

**FACTS:** The defendant was involved in an accident and transported to the hospital. At the hospital, officers arrested him for driving an automobile while under the influence of intoxicating liquor. At the direction of an officer, a physician took a blood sample from the defendant's body. The chemical analysis of the sample indicated the defendant was intoxicated at the time of the accident.

**ISSUE:** Whether the warrantless, nonconsensual blood sample taken from the defendant violated the Fourth Amendment right to be free from unreasonable searches and seizures?

**HELD:** No. The Fourth Amendment does not prohibit the government from conducting minor intrusions into an individual's body under stringently limited conditions.

**DISCUSSION:** The officers had probable cause to arrest the defendant and charge him with driving an automobile while under the influence of intoxicating liquor. The officer who arrived at the scene shortly after the accident smelled liquor on the defendant's breath and testified that the defendant exhibited symptoms of intoxication. The officer believed that he was confronted with an exigency. The Court stated "[T]he officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,'" citing Preston v. United States, (1964). Therefore, the attempt to secure evidence of blood-alcohol content in this case was appropriate.

The test chosen to measure the defendant's blood-alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. The quantity of blood

extracted is minimal and the procedure involves virtually no risk, trauma, or pain. Finally, the test was performed in a reasonable manner. The blood was taken by a physician at a hospital according to accepted medical practices. Therefore, there was no violation of the defendant's rights under the Fourth Amendment.



*Missouri v. McNeely*  
569 U.S. \_\_\_, 133 S. Ct. 1552 (2013)

**FACTS:** An officer stopped the defendant's vehicle for speeding and repeatedly crossing the center line. The officer made several observations that led him to suspect the defendant was intoxicated. After performing poorly on several field sobriety tests, the officer asked the defendant to use a portable breath-test device. The defendant refused and the officer placed him under arrest. During transportation to the station house, the defendant again indicated he would not provide a breath sample. The officer changed course and took the defendant to a local hospital. There, the defendant refused to participate in a blood test. A lab technician drew blood from the defendant, which was used as evidence in a subsequent prosecution.

**ISSUE:** Whether the government was justified in the warrantless taking of evidence from the defendant's person that was being destroying his body?

**HELD:** No. The government must demonstrate in each instance the difficulties in obtaining a warrant before an exigency is created.

**DISCUSSION:** "To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances." In doing so, the Court rejected a standard rule that would have excused the government from the warrant requirement in all drunk driving cases. The Court held that "while the natural



dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in Schmerber, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.” Exceptions may be granted where the government can demonstrate that exigent circumstances exist in a particular case because a warrant could not have been obtained within a reasonable amount of time. The government made no such showing here.



#### **D. Hot Pursuit**

*Warden v. Hayden*

387 U.S. 294, 87 S. Ct. 1642 (1967)

**FACTS:** A man robbed the office of a cab company and fled. Two cab drivers, attracted by the shouts of “holdup,” followed the man to a residence. One driver notified the company dispatcher by radio, giving a description of the man and the address he entered. The dispatcher relayed this information to the police who arrived at the scene within five minutes. The officers entered the house without a warrant, and spread out through the first and second floors and the cellar in search of the robber. The defendant was found in an upstairs bedroom feigning sleep, and placed under arrest.

Meanwhile, an officer was attracted to an adjoining bathroom by the noise of running water, and discovered a shotgun and a pistol in a flush tank. Another officer who “was searching the cellar for a man or the money” (and the Court said it should be noted that he was also looking for weapons), found a jacket and trousers in a washing machine of the type the fleeing man was said to have worn. A clip of ammunition for the pistol and a cap were found under the mattress of the defendant’s bed. Ammunition for the shotgun was found in a bureau drawer in the defendant’s room. At the time these searches were made, the officers did not know that the defendant had been arrested. All these items of evidence were introduced against the

defendant at his trial.

**ISSUE:** Whether the entry into the house, without a warrant, and the search for the robber and for weapons, was reasonable?

**HELD:** Yes. The hot pursuit doctrine allows officers to make warrantless entries into zones of privacy for suspected persons and weapons.

**DISCUSSION:** The officers acted reasonably when they entered the house and began to search for a man and for weapons that might be used against them. Neither the entry without a warrant to search for the robber, nor the search for him or his weapons was invalid as there were exigent circumstances. The officers acted reasonably when they entered the house and began to “search for the man... and for weapons which he had used in the robbery and might use against them (emphasis added).” “Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.” “The permissible scope of search must, therefore, at the least, be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape.”



*Welsh v. Wisconsin*  
466 U.S. 740, 104 S. Ct. 2091 (1984)

**FACTS:** A witness observed a car driving erratically that swerved off the road and came to a stop in an open field. No damage to any person or property occurred and the driver walked away from the scene. Officers arrived a few minutes later and were told by the witness that the driver was either inebriated or sick. The officers checked the car’s registration then went to the defendant’s house. After entering his home, the officers arrested the defendant for driving under the

influence of an intoxicant. The penalty for a first offense under this statute was a non-criminal violation subject to a civil forfeiture proceeding for a maximum fine of \$200.

**ISSUE:** Whether the Fourth Amendment allows the government to make a warrantless entry of a person's house in order to arrest the person for a non-jailable traffic offense?

**HELD:** No. The exigent circumstances exception in the context of a home entry is limited to the investigation of serious crimes. Misdemeanors typically do not justify a warrantless entry.

**DISCUSSION:** Before officers may invade the sanctity of the home, the government must demonstrate exigent circumstances that overcome the presumption of unreasonableness that is inherent in all warrantless entries. An important factor to be considered is the gravity of the underlying offense for which the arrest is being made.

Probable cause to believe that a serious crime has been committed does not, by itself, create an exigency. Even a finding of an exigency rarely sanctions an intrusion if only a minor offense has been committed.

The defendant's warrantless arrest in his home for a non-criminal traffic offense cannot be justified on the basis of the hot pursuit doctrine because there was no immediate or continuous pursuit of the defendant from the scene of the crime. Also, his arrest cannot be justified on the basis of public safety because the defendant had already arrived home and had abandoned his car at the scene of the accident. Finally, the defendant's warrantless arrest cannot be justified as an emergency simply because evidence of the defendant's blood-alcohol level might have dissipated while the police obtained a warrant. Therefore, the defendant's arrest was invalid.



*United States v. Santana*  
427 U.S. 38, 96 S. Ct. 2406 (1976)

**FACTS:** Officers had probable cause to believe that the defendant possessed marked money that had earlier been used in an undercover heroin buy. Upon arriving at the defendant's residence, but without a warrant, officers observed her standing in the doorway to her home holding a paper bag. They got out of their vehicle, shouted "police," and displayed their identification. The defendant turned and ran into the entryway of her home, where the officers pursued and seized her. The defendant struggled to escape the officers, at which time "two bundles of glazed paper packets with a white powder" fell out of the paper bag onto the floor. During a search of the defendant's person, some of the marked money was discovered. The powder was later identified as heroin.

**ISSUE:** Whether the officers' warrantless entry into the defendant's home was justified under the Fourth Amendment?

**HELD:** Yes. The officers' entry into the defendant's home was justified because the officers were in "hot pursuit" of the defendant.

**DISCUSSION:** The Fourth Amendment is not violated when officers make a warrantless arrest in a public place for a felony offense. The question here is whether the defendant was in a public place. She was standing in her doorway when the officers first attempted to arrest her. "She was not merely visible to the public, but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." Once the defendant ran into her home, the officers were in "hot pursuit" of her. Had the officers failed to act quickly in this case, "there was a realistic expectation that any delay would result in the destruction of evidence." For that reason, the warrantless entry into the defendant's home was reasonable under the Fourth Amendment. After her lawful arrest, the search that produced the drugs and the marked money was incident to that arrest and, therefore, lawful.



## **E. Emergency Scenes**

*Michigan v. Tyler*

436 U.S. 499, 98 S. Ct. 1942 (1978)

**FACTS:** A fire broke out in the defendant's furniture store and the local fire department responded. When the fire chief arrived two hours later, firefighters reported the discovery of plastic containers of flammable liquid. The chief summoned a detective to investigate possible arson. The detective took pictures but stopped the investigation because of the smoke. Two hours later, the fire was extinguished and the firefighters departed. The fire chief and detective removed the containers and left. There was neither consent nor a warrant for any of these entries or for the removal of the containers. Four hours later, the chief and his assistant returned for a cursory examination of the building and removed more pieces of evidence. Three weeks later, a state police officer took pictures at the store and made an inspection where further evidence was collected. Further entries were also made, all without warrants.

**ISSUE:** Whether all warrantless governmental intrusions were reasonable?

**HELD:** No. Official entries to investigate the cause of a fire must adhere to the warrant procedures of the Fourth Amendment, unless the entry falls within one of the exceptions to the warrant requirement.

**DISCUSSION:** A Fourth Amendment search occurs whenever the government intrudes on a reasonable expectation of privacy. All entries are presumed illegal if no warrant is obtained. The Court has recognized several exceptions to this rule. A burning building presents an emergency of sufficient proportions to render a warrantless entry under the Fourth Amendment. Once firefighters are inside a building, they may remain there for the duration of the emergency. While there,

the government may investigate the cause of the fire and may seize evidence of arson that is in plain view. In this case, no Fourth Amendment violation occurred by the firefighters' entry to extinguish the fire at the defendant's store, nor by the chief's removal of the plastic containers. Similarly, no warrant was required for the re-entries into the building and for the seizure of evidence after the departure of the fire chief and other personnel since these were a continuation of the first entry that was temporarily interrupted by smoke.

However, if investigating officials require further access after the emergency concludes, they must obtain a warrant. To secure a warrant to investigate the cause of a fire, an official must show more than the bare fact that a fire has occurred. The government must establish probable cause that arson was committed. As this was not done for the non-emergency entries, they were considered unreasonable under the Fourth Amendment.



*Michigan v. Clifford*  
464 U.S. 287, 104 S. Ct. 641 (1984)

**FACTS:** The defendant's house caught fire. Local firefighters went to his house and extinguished the blaze. The fire had been doused and all fire officials and police left the premises at 7:04 a.m. Arson investigators entered the defendant's residence without consent or a warrant about 1:30 p.m. When the investigators arrived at the scene, a work crew was boarding up the house and pumping water out of the basement. Firefighters who fought the blaze found a fuel can in the basement and placed it in the driveway where the arson investigators seized it. In the basement, where the fire had originated, the arson investigators found two more fuel cans and a suspiciously positioned crock-pot. The investigators then made an extensive and thorough search of the rest of the house, calling in a photographer to take pictures.

**ISSUE:** Whether the arson investigators needed a warrant

to search the contents of the dwelling?

**HELD:** Yes. Once the emergency presented by the fire was terminated, the government needed consent or a warrant to intrude.

**DISCUSSION:** Non-consensual entries onto fire-damaged premises normally turns on several factors, including whether there are legitimate privacy interests in the fire-damaged property, whether exigent circumstances justify the government intrusion regardless of any reasonable expectations of privacy, and whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity. In this case, the defendant retained reasonable privacy interests in his fire-damaged home.

The firefighters' initial entry was valid as an emergency scene exception to the warrant requirement of the Fourth Amendment. However, by the time the arson investigators arrived at the dwelling, the emergency was no longer in existence. This was not merely a continuation of the earlier valid entry by firefighters.

Where a warrant is necessary to search a fire-damaged premises, an administrative warrant suffices if the primary object of the search is to determine the cause and origin of the fire. A criminal search warrant, obtained with probable cause, is required if the primary object of the search is to gather evidence of criminal activity. While the evidence found inside the home by the arson investigators was unreasonably seized, the fuel can seized in the driveway by the arson investigators was admissible whether seized in the basement by firefighters or in the driveway by arson investigators.



*Mincey v. Arizona*  
437 U.S. 385, 98 S. Ct. 2408 (1978)

**FACTS:** Officers raided the defendant's apartment for controlled substances. During the raid, an officer was shot and killed. The officers, pursuant to an agency directive, which stated that officers should not investigate incidents in which they are involved, conducted no further investigation. A short time later, homicide detectives arrived on the scene and conducted a four-day warrantless search of the defendant's apartment in which they seized numerous items of evidence.

**ISSUE:** Whether the evidence from the warrantless search of the defendant's apartment was lawfully obtained under a "murder scene" exception?

**HELD:** No. The "murder scene" exception does not exist. The fact that a homicide occurs does not, by itself, give rise to exigent circumstances to justify a warrantless search.

**DISCUSSION:** When the government comes upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. The officers may also seize any evidence that is in plain view during the course of their legitimate emergency activities. But such a warrantless search must be strictly limited by the emergency that justifies its initiation.

In this case, all the persons in the defendant's apartment had been located before the investigating homicide officers arrived and began their search. There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Therefore, the four-day search of the defendant's apartment was unreasonable under the Fourth Amendment.





*Thompson v. Louisiana*  
469 U.S. 17, 105 S. Ct. 409 (1984)

**FACTS:** The defendant shot her husband and ingested a quantity of pills in a suicide attempt. She then called her adult daughter, informed her of the situation and requested help. The daughter immediately called emergency services. Several deputies arrived at the defendant's home in response to this information. The deputies entered the house, made a cursory search and discovered the defendant's deceased husband. The defendant was lying unconscious in another room due to an apparent drug overdose.

The officers immediately transported the defendant to the hospital and secured the scene. Thirty-five minutes later, two members of the homicide unit arrived and conducted a follow-up investigation of the homicide and attempted suicide.

The deputies conducted a search of the house and found, among other things, a pistol inside a chest of drawers in the same room as the deceased body, a torn up note in a wastepaper basket in an adjoining bathroom, and another letter (alleged to be a suicide note) folded up inside an envelope containing a Christmas card on the top of a chest of drawers.

**ISSUE:** Whether these discoveries are admissible under the "murder scene" exception to the search warrant?

**HELD:** No. There is no "murder scene" exception to the Fourth Amendment's warrant requirement.

**DISCUSSION:** Although the homicide investigators in this case had probable cause to search the premises, they did not have a warrant. Therefore, for the search to be valid, it must fall within one of the narrowly and specifically delineated exceptions to the warrant requirement. In Mincey v. Arizona, the Supreme Court unanimously rejected the existence of a murder scene exception. The Court noted the government may make warrantless entries onto premises where it reasonably believes a person within is in need of immediate aid, and that

the government may make a prompt warrantless search of the area to see if there are other victims or a killer is on the premises.

Likewise, the warrantless search and seizure conducted at the home of the defendant by investigators who arrived at the scene thirty-five minutes after the woman was sent to the hospital is not valid on the ground that there was a diminished expectation of privacy in the woman's home. The woman's call for medical help cannot be seen as an invitation to the general public that would have converted her home into the sort of public place for which no warrant to search would be necessary. Therefore, the warrantless search after the defendant was taken to the hospital was unreasonable.



*Flippo v. West Virginia*  
528 U.S. 11, 120 S. Ct. 7 (1999)

**FACTS:** In response to an emergency telephone call, officers went to a state park where they found the defendant sitting outside a cabin with apparent injuries. The officers went into the cabin and found the body of a woman with fatal head wounds. Some officers took the defendant to a hospital while other officers closed off the area and searched the cabin and the area around it. The officers spent more than 16 hours inside the cabin, took photographs, collected evidence, and searched through the contents of the cabin. During the search, the officers found a briefcase and opened it. The briefcase contained evidence that incriminated the victim's husband, the defendant.

**ISSUE:** Whether the discovery of a body authorized the officers to engage in the warrantless search of the defendant's cabin?

**HELD:** No. After a homicide crime scene is secured for investigation, the officers are not entitled to make a warrantless search of anything within the crime

scene area.

**DISCUSSION:** The Court held that after a homicide crime scene is secured for investigation, the officers may not make a warrantless search of the crime scene area. The Court reaffirmed its long held position that there is no such “homicide crime scene” exception. In Mincey v. Arizona, the Court noted that officers may make warrantless entries into premises if they reasonably believe a person is in need of immediate aid and may make prompt warrantless searches of a homicide scene for possible other victims or a killer on the premises. However, the Court explicitly rejected any general “murder scene,” “homicide scene,” or “crime scene” exception to the Fourth Amendment’s warrant requirement. The officers would have been entitled to remove the victims for medical attention, secure the premises, and then obtain a warrant to conduct a search.



*Brigham City v. Stuart*  
547 U.S. 398, 126 S. Ct. 1943 (2006)

**FACTS:** Officers responded to a complaint regarding a loud party at a residence. At the scene, they heard shouting from inside and observed juveniles drinking alcohol in the backyard. The officers went into the backyard and observed a physical disturbance occurring in the kitchen of the home. A juvenile suspect punched an adult victim in the face. An officer opened the screen door to the kitchen and announced his presence, though nobody noticed. The officer entered the kitchen and again stated his presence, at which time the altercation ceased. The officers arrested several adults for contributing to the delinquency of a minor, disorderly conduct, and intoxication.

**ISSUE:** Whether the officers may gain access to the premises under the emergency scene exception if their subjective intent was to enter for the purposes of effecting an arrest?

**HELD:** Yes. The officers’ subjective intent for entering the

premises is irrelevant.

**DISCUSSION:** It is a “basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.” However, this rule is subject to a set of narrowly defined exceptions. “One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury.” The Court, therefore, held that “law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” The officers’ intent in obtaining access to the premises is irrelevant in determining the reasonableness of the entry. “It therefore does not matter here--even if their subjective motives could be so neatly unraveled--whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence.” The Court stated that “[T]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties...”



*Michigan v. Fisher*  
558 U.S. 45, 130 S. Ct. 546 (2009)

**FACTS:** Officers responded to a disturbance complaint. One officer testified that, “as he and his partner approached the area, a couple directed them to a residence where a man was ‘going crazy.’” Upon their arrival, the officers found a truck in the driveway with its front smashed, damaged fence posts, and three broken house windows. The officers also noticed blood on the hood of the truck, on clothes inside of it, and on one of the doors to the house. The officers saw the defendant inside the house, screaming and throwing things. The officers knocked, but the defendant refused to answer. They could see that he had a cut on his hand, and they asked him whether he needed medical attention. The defendant demanded that the officers go to get a search warrant. One of the officers then pushed the front door partway open and entered the house. He saw the

defendant pointing a rifle at him and he retreated. Eventually, the defendant was arrested and charged with threatening the officer.

**ISSUE:** Whether the officer’s observations of the defendant with the rifle were made in violation of the Fourth Amendment?

**HELD:** No. The officer was entitled to enter the home under the “emergency aid exception” to the Fourth Amendment’s warrant requirement.

**DISCUSSION:** The Supreme Court affirmed the principle in Brigham City v. Stuart, in that an officer may enter a premises to render assistance to a person that is seriously injured or threatened with such injury. The Court stated “[T]his ‘emergency aid exception’ does not depend on the officers’ subjective intent or the seriousness of any crime they are investigating when the emergency arises. It requires only ‘an objectively reasonable basis for believing,’ that ‘a person within [the house] is in need of immediate aid,’ [quoting Brigham City and Mincey v. Arizona].”



*Ryburn v. Huff*  
565 U.S. 469, 132 S. Ct. 987 (2012)

**FACTS:** Officers received a report there was a rumor circulating that a particular student had threatened to “shoot up” his school. The officers went to the school and discovered the student had been absent the last two days and had been a bullying victim. The officers went to the student’s home, knocked on the door several times, but received no response. The officers then made phone calls to the home, but no one answered. Eventually, the student’s mother answered her cell phone and told the officers that she was inside the home with her child. When the officer asked to speak to her and the child, the mother hung up. Moments later, she and her child came out of the house and stood on the front steps. The officers told

the mother why they were there and requested to go inside the house to discuss the matter. When the mother refused, one of the officers asked if there were any guns in the house. Instead of answering the question, the mother turned around and ran into the house. The officers followed the mother inside the house. After discussing the matter with her, the officers discounted the rumor concerning her child “shooting up” the school and left the house. The mother sued the officers, claiming they violated the Fourth Amendment by entering her house without consent, a warrant or an exigency.

**ISSUE:** Whether the officers were reasonable in making an entry into the home?

**HELD:** Yes. Several articulable factors indicated that the officers should have been concerned for their safety as well as other persons.

**DISCUSSION:** Courts take special caution when officer safety requires prompt entry into a home; however, the court added, “No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case.” Here, the officers could articulate several factors that could reasonably lead them to believe there was an imminent threat of violence: the unusual behavior of the mother in not answering the door or the telephone; the mother did not inquire about the reason for the officers’ visit; she hung up the telephone on the officer; she refused to tell the officers whether there were guns in the house; she ran back into the house while being questioned; her son was the victim of bullying; he had been absent from school for two days; and he supposedly threatened to “shoot up” the school. Based on these facts, the Court found the officers’ warrantless entry into the home was reasonable.



## **VI. SEARCH WARRANT EXCEPTIONS - P.C. NOT NEEDED**

### **A. Frisks**

*Arizona v. Johnson*  
555 U.S. 323, 129 S. Ct. 781 (2009)

**FACTS:** Officers of a gang task force stopped a car for a suspended registration. While one officer was obtaining information from the driver, the other two officers each spoke with one of the two passengers. The rear-seat passenger looked back and kept his eyes on the officers as they approached. He was wearing clothing consistent with Crips gang membership, and he was from a town known to be home to a Crips gang. He told police that he had served time in prison for burglary and had been out for a year. He had a scanner in his pocket. Scanners are not normally carried in that way except to evade the police. An officer asked him to step from the car to speak with him away from the other passenger in hopes of gaining gang-related intelligence. She frisked the defendant and felt the butt of a gun near the defendant's waist.

**ISSUE:** Whether officers can frisk a passenger in a car stopped for a traffic violation if that passenger is suspected of being armed and dangerous?

**HELD:** Yes. Officers may frisk a passenger, provided they have a reasonable suspicion that the passenger is armed and dangerous.

**DISCUSSION:** During a traffic stop, passengers, like the driver, are seized because a reasonable passenger would not feel free to leave until the traffic stop is concluded. Given concerns for officer safety, officers may order passengers to step from a car during a traffic stop, and they may frisk any passenger reasonably believed to be armed and dangerous. Government inquiries into anything other than the reason for the stop do not convert the stop into an unlawful seizure so long as they do not measurably extend the duration of the stop.



*Michigan v. Long*  
463 U.S. 1032, 103 S. Ct. 3469 (1983)

**FACTS:** Officers observed a vehicle driving erratically and speeding. They watched as the vehicle swerved off the road into a ditch. As the officers stopped to investigate, the defendant got out, leaving the driver's side door open, and met the officers near the rear of the vehicle. The officers noted that the defendant appeared to be under the influence of either alcohol or drugs. The defendant initially failed to provide his license, although he complied following a second request. When asked to produce the vehicle's registration, the defendant again failed to comply and, after a second request, began walking towards the open door of the vehicle. Both officers followed him and observed a large knife on the floorboard of the vehicle. Stopping the defendant, the officers conducted a frisk of his person, although no weapons were recovered. One of the officers shined his flashlight into the vehicle's passenger compartment to search for other weapons. When the officer noticed something sticking out from under the armrest, he lifted it and found an open pouch containing what appeared to be marijuana inside. The defendant was arrested for possession of marijuana.

**ISSUE:** Whether officers can conduct a frisk of the passenger compartment of a vehicle following a lawful investigatory stop of the vehicle?

**HELD:** Yes. Officers may frisk the passenger compartment of a vehicle, limited to those areas in which a weapon may be found, if the officers reasonably believe that the suspect is dangerous and may gain immediate control of weapons.

**DISCUSSION:** The Court's decision in Terry v. Ohio does not restrict frisks to the body of the suspect. "Past cases indicate that (1) the protection of police officers, as well as others, may justify protective searches when police have a reasonable belief that the suspect poses a danger; (2) roadside encounters



between police and suspects are especially hazardous; and (3) danger may arise from the possible presence of weapons in the area surrounding a suspect.” The frisk of a passenger compartment of an automobile, restricted to those areas in which a weapon may be placed or hidden, is reasonable if the officers can articulate a reasonable belief that the suspect is armed and dangerous.



*Minnesota v. Dickerson*  
508 U.S. 366, 113 S. Ct. 2130 (1993)

**FACTS:** Officers developed reasonable suspicion the defendant was recently involved in a drug transaction. They frisked him but did not find any weapons. However, the officer conducting the frisk felt a small lump in the defendant’s jacket pocket. Upon examining the lump further with his fingers, the officer believed the lump to be crack cocaine. The officer then reached into the defendant’s pocket and retrieved a small amount of cocaine.

**ISSUE:** Whether the intrusion into the defendant’s pocket was reasonable?

**HELD:** No. Officers may seize contraband detected through the sense of touch during frisks only if the evidence is immediately apparent to be such at the moment it was touched.

**DISCUSSION:** In Terry v. Ohio the Supreme Court permitted officers to conduct brief stops of persons whose suspicious conduct leads an officer to conclude that criminal activity may be afoot. The Supreme Court authorized a frisk for weapons if the officer reasonably suspects that the person may be armed and presently dangerous. Frisks are not meant to discover evidence of crime, but must be strictly limited to that which is necessary for the discovery of weapons. If the protective search intrudes beyond what is necessary to learn if the suspect is armed, it is no longer valid under Terry and its fruits will be

suppressed.

However, once an officer has lawfully frisked a suspect, and the officer feels an object whose contour or mass makes its identity “immediately apparent,” there has been no invasion of the suspect’s privacy beyond that already authorized by the officer’s search for weapons. If the object is contraband, its warrantless seizure is justified.

Application of these principles to this case does not demonstrate the officer conducting the frisk had probable cause (immediately apparent) to believe the lump in the defendant’s jacket was contraband. The officer decided the lump was contraband only after he squeezed, slid, and otherwise continued to manipulate the pocket’s contents. While Terry entitled the officer to place his hands on the defendant’s jacket and to initially feel the lump in the pocket, the officer’s continued manipulation of the pocket after he concluded it did not contain a weapon was unrelated to the Terry frisk. Therefore, the officer’s intrusion into the defendant’s jacket was unreasonable.



## **B. Searches Incident to Arrest**

*United States v. Chadwick*  
433 U.S. 1, 97 S. Ct. 2476 (1977)

**FACTS:** Officers developed probable cause the defendant was transporting a controlled substance in a footlocker. They placed him under arrest and seized the footlocker. The footlocker remained under the exclusive control of the officers at all times. The agents did not have any reason to believe that the footlocker contained explosives or other inherently dangerous items or that it contained evidence that would lose its evidentiary value unless the footlocker was opened immediately. An hour and a half after the men were arrested, the officers opened the footlocker without a search warrant or consent. Large amounts of marijuana were found in the

footlocker.

**ISSUE:** Whether a search incident to an arrest is reasonable significantly after the arrest?

**HELD:** No. Searches incident to arrest must occur at about the same time as the arrest.

**DISCUSSION:** The search cannot be justified as a search incident to an arrest if the search is remote in time or place from the arrest. When an arrest is made, it is reasonable for the government to conduct a prompt, warrantless search of the arrestee's person and the area in which the arrestee might gain possession of a weapon or destructible evidence. However, warrantless searches of a footlocker or luggage seized at the time of an arrest cannot be justified as incident to that arrest if the search is remote in either time or place from that arrest or no exigency exists. Here, there were no exigent circumstances.



## 1. Premises

*Go-Bart Importing Co. v. United States*  
282 U.S. 344, 51 S. Ct. 153 (1931)

**FACTS:** Government agents obtained an arrest warrant for the defendants. In serving the warrant, the agents entered the defendants' business premises, falsely claiming they possessed a search warrant. The agents then secured a series of papers through these searches located throughout the business.

**ISSUE:** Whether the government is reasonable in conducting a search of the premises in which a lawful arrest has occurred?

**HELD:** No. The Court does not recognize a general right of the government to search the premise in which an arrest takes place.

**DISCUSSION:** The Court found the government’s search ancillary to the arrests to be “a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found.” This illegal search was not to be confused with one in which officers secured evidence that was “visible and accessible and in the offender’ immediate custody. There was no threat of force or general search or rummaging of the place.”



*Chimel v. California*  
395 U.S. 752, 89 S. Ct. 2034 (1969)

**FACTS:** Three officers arrived at the defendant’s home with an arrest warrant. They knocked on the door, identified themselves to the defendant’s wife, and asked if they could come inside. She let the officers in the house where they waited for the defendant to return home from work. When the defendant entered the house, an officer handed him the arrest warrant. One of the officers asked the defendant if he could look around. The defendant said no, but was advised that on the basis of the lawful arrest the officers would nonetheless conduct a search.

The officers, accompanied by the defendant’s wife, searched the entire house. In the master bedroom, the officers directed the wife to open drawers and to physically move their contents from side to side so that they might view any items that would have come from the crime. The officers seized numerous items that constituted evidence of the crime.

**ISSUE:** Whether the warrantless search of the defendant’s entire house can be conducted incident to his arrest?

**HELD:** No. The warrantless search of the defendant’s entire house, incident to his arrest, was unreasonable as it extended beyond the defendant’s person and the area under his immediate control.

**DISCUSSION:** When an arrest is made, it is reasonable for an officer to search the person arrested to remove any weapons that the arrestee might use to resist arrest. It is also reasonable for an officer to search and seize any evidence on the arrestee's person to prevent its concealment or destruction and for the means of committing an escape.

The area that an officer may search is that area within an arrestee's immediate control. That is the area that the person might gain possession of a weapon, means of escape, or destructible evidence. There is, however, no justification for routinely searching any room other than that in which an arrest occurs, or for that matter, for searching through desk drawers or other closed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.

The search in this case went beyond the defendant's person and the area that he might have obtained a weapon, a means of escape, or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond the area from which the defendant was arrested.



*Agnello v. United States*  
269 U.S. 20, 46 S. Ct. 4 (1925)

**FACTS:** The defendant was arrested after retrieving controlled substances from his home and selling them to an agent of the government. The defendant was transported to the police station and several officers entered his home. They searched for, and found, other controlled substances.

**ISSUE:** Whether the defendant's home could be entered and searched incident to his arrest?

**HELD:** No. The officers exceeded the lawful scope of a

search incident to arrest.

**DISCUSSION:** The lawful scope of a search incident to an arrest is limited to the body and “the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody.” However, the Court refused to extend this search to other areas. The Court stated “[T]he search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws.” The existence of probable cause alone does not permit the search of a home. The Court held “[B]elief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.”



*Shipley v. California*  
395 U.S. 818, 89 S. Ct. 2053 (1969)

**FACTS:** Officers learned that the defendant was involved in a robbery and went to his residence. The defendant was not at home but his wife allowed the officers to enter the home and examine her possessions. They found some rings taken in the theft. The officers then “staked out” the house. When the defendant arrived he parked 15 or 20 feet from the house. The officers arrested him as he got out of his car. They searched the defendant’s car, and without permission or a warrant, again searched the house. They found a jewelry case stolen in the robbery, which was admitted into evidence at the defendant’s trial.

**ISSUE:** Whether the second search of the defendant’s house was authorized as a search incident to arrest?

**HELD:** No. The public arrest of the defendant does not justify a search of his home.

**DISCUSSION:** The Court has consistently held that a search “can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.” Stoner v. California (1964). The Court has never construed the Fourth Amendment to allow the government, in the absence of an exigency, to arrest a person outside his home and then take him inside for the purpose of conducting a warrantless search. On the contrary, “it has always been assumed that one’s house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein.” Agnello v. United States.



*Vale v. Louisiana*  
399 U.S. 30, 90 S. Ct. 1969 (1970)

**FACTS:** Officers, armed with an arrest warrant for the defendant, were watching the house where he resided. They observed what they suspected was a narcotics exchange between a known addict and the defendant outside the house. They arrested the defendant at the front steps and announced that they would search the house. Their search of the then-unoccupied house disclosed narcotics in a bedroom.

**ISSUE:** Whether the house could be searched incident to the defendant’s arrest?

**HELD:** No. The arrest of the defendant does not automatically justify a full search of his home.

**DISCUSSION:** The Court stated that even if holding that the warrantless search of a house can be justified as incident to a lawful arrest, the search must be confined to the area within the arrestee’s reach (the area from within which he might gain possession of a weapon or destructible evidence). A search may be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. If a search of a house is to be

upheld as incident to an arrest, that arrest must take place inside the house, not somewhere outside. Belief, however well founded, that evidence sought is concealed in a dwelling furnishes no justification for a search of that place without a warrant. A warrantless search of a dwelling is constitutionally valid only in “a few specifically established and well-delineated exceptions,” none of which the government had shown here.



## 2. Persons

*United States v. Robinson*  
414 U.S. 218, 94 S. Ct. 467 (1973)

**FACTS:** An officer learned that the defendant’s license had been revoked. Four days later, he observed the defendant driving an automobile. He stopped the car and informed the defendant that he was under arrest for driving with a revoked license. The officer conducted a search incident to arrest. During the search, he felt an object in the defendant’s coat but could not determine what it was. The officer reached into the pocket and pulled out the object, a crumpled up cigarette package. He opened the package and found capsules he believed to be heroin.

**ISSUE:** Whether a full body search of a suspect for items other than evidence of the crime for which a suspect is arrested is within the scope of the search incident to an arrest?

**HELD:** Yes. During a lawful arrest, a full search of the person may be made by virtue of the lawful arrest.

**DISCUSSION:** A lawful arrest establishes an authority to search. It is immaterial that the officer did not fear or suspect the defendant was armed. Having discovered the crumpled package of cigarettes, the officer was entitled to search it as well as to seize it when the search revealed the heroin capsules.





*United States v. Edwards*  
415 U.S. 800, 94 S. Ct. 1234 (1974)

**FACTS:** Shortly after 11 p.m. the defendant was lawfully arrested and placed in jail for attempting to break into a post office. The attempted entry into the post office had been made through a window, leaving paint chips on the windowsill and wire mesh screen. Because the defendant was arrested late at night, no clothing was available to replace what he was wearing. The following morning, trousers and a shirt were purchased for him to replace the clothing he had been wearing since his arrest. The clothing removed from him contained paint chips matching samples that had been taken from the post office window. The clothing was seized and held as evidence.

**ISSUE:** Whether the clothing seized from the defendant on the morning following his arrest was obtained lawfully as a search incident to his arrest?

**HELD:** Yes. The delay in seizing the defendant's clothes under the circumstances was reasonable.

**DISCUSSION:** One of the exceptions to the warrant requirement of the Fourth Amendment is the warrantless search incident to a lawful arrest. There is no doubt "that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis or that the test results are admissible at trial. In taking the defendant's clothing, the police did no more than take from him the effects in his immediate possession that constituted evidence of a crime." Such action is incidental to custodial arrest. A reasonable delay [the defendant did not have replacement clothing] in conducting the search does not change the fact that the defendant was no more imposed upon than he could have been at the time and place of the arrest. "When it became apparent that the articles of clothing were evidence of the crime for which the defendant was being held, the police were entitled to take, examine, and preserve them for use as evidence, just as they are normally permitted to seize

evidence of crime when it is lawfully encountered.”



*Virginia v. Moore*  
553 U.S. 164, 128 S. Ct. 1598 (2008)

**FACTS:** Two officers confirmed information that the defendant was driving with a suspended license. They arrested him for the misdemeanor of driving on a suspended license, which is punishable under state law by a year in jail. Under state law, the officers should have issued the defendant a summons instead of arresting him. The officers searched the defendant and found 16 grams of crack cocaine and \$516 in cash.

**ISSUE:** Whether an officer can conduct a search incident to an arrest after making an arrest based on probable cause but prohibited by state law?

**HELD:** Yes. The Fourth Amendment’s edict is met if the officer based the arrest on probable cause. If probable cause exists to conduct an arrest, the officer is entitled to conduct a search incident to that arrest.

**DISCUSSION:** The Court analyzes search or seizure in light of traditional standards of reasonableness “by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” Wyoming v. Houghton.

“In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable.”

States are free to provide greater privacy protection through

statute than that required by the Fourth Amendment. However, failure on behalf of the officers to comply with that statute does not render their actions unreasonable under the Fourth Amendment. “[W]hether or not a search is reasonable within the meaning of the Fourth Amendment,” we said, has never “depend[ed] on the law of the particular State in which the search occurs” quoting California v. Greenwood (1988).



*Florence v. County of Burlington*  
566 U.S. 318, 132 S. Ct. 1510 (2012)

**FACTS:** The defendant was arrested based on an outstanding warrant that should have been removed from a computer database. The officer took the defendant to a local detention center, where he was required to shower with a delousing agent, was visually examined for scars, marks, gang tattoos, and contraband, he was instructed to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. The defendant shared a cell with at least one other person and interacted with other inmates following his admission. Six days later the defendant was moved to another detention center, in which he had to undergo a similar process. These examinations took place regardless of the “circumstances of the arrest, the suspected offense, or the detainee’s behavior, demeanor, or criminal history.”

**ISSUE:** Whether the government could conduct close visual inspections only if it had reason to suspect a particular inmate of concealing a weapon, drugs, or other contraband of persons arrested for minor offenses?

**HELD:** No. Due to the nature of and uncertainties in detention facilities, it is reasonable for the government to conduct close visual inspections of all incoming persons.

**DISCUSSION:** “The difficulties of operating a detention

center must not be underestimated by the courts.” The Court found that “[I]t is not surprising that correctional officials have sought to perform thorough searches at intake for disease, gang affiliation, and contraband. Jails are often crowded, unsanitary, and dangerous places. There is a substantial interest in preventing any new inmate, either of his own will or as a result of coercion, from putting all who live or work at these institutions at even greater risk when he is admitted to the general population.” Therefore, it is reasonable for the government to design “procedures...to uncover contraband that can go undetected by a patdown, metal detector, and other less invasive searches.”



*Maryland v. King*  
569 U.S. \_\_\_, 133 S. Ct. 1958 (2013)

**FACTS:** The defendant was arrested for first and second-degree assault. At the jail, pursuant to state statute, officers used a cheek swab to collect a DNA sample from inside the defendant’s mouth. This evidence caused the defendant to be identified as the perpetrator in an unsolved sexual assault.

**ISSUE:** Whether the Fourth Amendment prohibits the collection of a DNA sample from persons arrested, but not yet convicted, on felony charges?

**HELD:** No. When the defendant’s arrest upon probable cause for a serious offense results in detention, the government is reasonable in conducting a DNA swabbing is consistent with traditional identification procedures under the Fourth Amendment.

**DISCUSSION:** The Court held that, though this was the first case it examined the DNA swab procedure, “the framework for deciding the issue is well established.” “In some circumstances, such as [w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the

like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable.” Citing Illinois v. McArthur.

The Court found that such a reasonable search occurred in this case, as the government has long been empowered to collect identifying information from lawfully arrested persons. “A DNA profile is useful to the police because it gives them a form of identification to search the records already in their valid possession. In this respect the use of DNA for identification is no different than matching an arrestee’s face to a wanted poster of a previously unidentified suspect; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee’s fingerprints to those recovered from a crime scene.”



### 3. Cell Phones

*Riley v. California* (consolidated with *United States v. Wurie*)  
573 U.S. \_\_\_, 134 S. Ct. 2473 (2014)

**FACTS:** Officers arrested Riley and searched the cell phone he was carrying incident to his arrest. The officers discovered photographs and videos on Riley’s cell phone that were admitted into evidence against him at trial.

Officers arrested Wurie for distribution of crack cocaine and seized two cell phones from him. Incident to Wurie’s arrest, officers searched the call log on one of the cell phones and determined the phone number labeled “my house” was associated with a nearby apartment. Officers went to the apartment and saw the name “Wurie” written on the mailbox. The officers obtained a warrant, searched the apartment and found drugs and firearms.

**ISSUE:** Whether police officers may conduct a warrantless search of a person’s cell phones incident to arrest.

**HELD:** No. The Supreme Court consolidated the cases, holding that police officers generally may not search digital information on a cell phone seized from an individual who has been arrested, without first obtaining a warrant.

**DISCUSSION:** Previously, the court held officers could conduct warrantless searches of arrestees and possessions within the arrestees' control, incident to a custodial arrest. The court concluded such searches were reasonable in order to discover weapons or any evidence on the arrestee's person so that evidence could not be concealed or destroyed.

The court concluded this rationale does not apply to modern cell phones. First, digital data stored on a cell phone cannot be used as a weapon to harm an arresting officer or aid an arrestee in escaping. The court emphasized that police officers may still examine the physical aspects of phone to ensure that it will not be used as a weapon. For example, the court noted a police officer may examine a cell phone to determine whether there is a razor blade hidden between the phone and its case. However, once an officer has secured a phone and eliminated any potential threats the data on the phone cannot harm anyone.

Second, the court stated the government provided little evidence to believe that loss of evidence from a seized cell phone, by remote wiping of the data on the phone, was a common occurrence. Even if remote wiping were a concern, the court listed two ways remote wiping could be prevented. First, the officer could turn the phone off or remove its battery. Second, the officer could put the phone inside a device, called a Faraday bag, that would isolate the phone from radio waves. The court added that Faraday bags are cheap, lightweight, and easy to use and a number of law enforcement agencies already encourage their use. In addition, the court commented that if a police officers are truly confronted with individualized facts suggesting that a defendant's phone will be the target of an imminent remote wiping attempt, they may be able to rely on exigent circumstances to search that phone immediately.

The court further recognized that cell phones are different from other objects that an arrestee might have on his person. Before cell phones existed, a search of an arrestee generally constituted a small intrusion on the arrestee's privacy. However, modern cell phones are, in essence, mini-computers that have immense storage capacity on which many people keep a digital record of nearly aspect of their lives. Consequently, the warrantless search of a cell phone constitutes a significant intrusion upon a person's privacy. If police officers wish to search a cell phone incident to arrest, they need to obtain a warrant.



#### **4. Vehicles**

*Arizona v. Gant*  
556 U.S. 332, 129 S. Ct 1710 (2009)

**FACTS:** The defendant was arrested for driving with a suspended license. He was handcuffed and locked in the back of a patrol car. There were five officers at the scene and two other suspects who had already been arrested, handcuffed, and locked in patrol cars. The officers searched the defendant's vehicle incident to his arrest and found a gun and cocaine in the pocket of a jacket in the back seat.

**ISSUE:** Whether the government may automatically search a vehicle incident to arrest when the arrestee has been secured and no longer has access to weapons or evidence?

**HELD:** No. The justifications for searching a vehicle incident to arrest are (1) officer safety, and (2) evidence preservation. Once an arrestee is secured and can no longer access his vehicle, there is no longer any risk that he will access weapons or evidence contained therein.

**DISCUSSION:** Officer safety and evidence preservation have

been the long-standing rationales behind the search-incident-to-arrest exception to the Fourth Amendment warrant requirement. Although it had become commonplace for officers to search a vehicle incident to the arrest of one of its occupants regardless of whether the suspect had been secured, the Supreme Court in this case held that such searches are unconstitutional when the suspect can no longer access the vehicle. If the suspect is secured and he can no longer access weapons or evidence contained in the vehicle then the rationales for the exception do not apply. The Court further clarified that circumstances unique to the vehicle context justify a search incident to arrest when it is “reasonable to believe” that evidence of the crime of arrest may be found within. When the defendant is secured in a locked police car, and the crime of arrest is driving on a suspended license for which no evidence could reasonably be found in the vehicle, none of the exceptions justify a search incident to arrest. However, the government may search a vehicle incident to arrest after the arrestee has been secured when it is reasonable to believe that evidence related to the crime of arrest may be found within.



*New York v. Belton*  
453 U.S. 454, 101 S. Ct. 2860 (1981)

**FACTS:** An officer stopped a car for speeding in which the defendant and four other men were riding. None of the men owned the car or were related to its owner. The officer smelled marijuana and saw an envelope on the floor of the car that he suspected contained marijuana. The officer picked up the envelope and found marijuana inside. He ordered the men out of the car and arrested them. He searched the men and the passenger compartment of the car. On the back seat of the car the officer found a black jacket that belonged to the defendant. He unzipped one of the pockets of the jacket and discovered cocaine.

**ISSUE:** Whether the scope of a search incident to an arrest includes the containers located in the passenger



compartment of the automobile in which the arrestee was riding?

**HELD:** Yes. Once a lawful arrest of an occupant of an automobile is made, and the officer reasonably believes he may find more evidence of the crime in the vehicle, the officer may examine the contents of any containers found within the passenger compartment.

**DISCUSSION:** When an officer makes a lawful arrest, the officer may, incident to that arrest, search the arrestee and the immediate surrounding area. Such searches are valid because of the need to remove any weapons the arrestee might access to resist arrest and to prevent the destruction or concealment of evidence. However, the scope of the search may not stray beyond the area within the immediate control of the arrestee.

Articles inside the relatively narrow area of the automobile passenger compartment are generally within the area into which an arrestee might reach in order to grab a weapon or evidentiary item. Therefore, an officer has made a lawful arrest of the occupant of an automobile, the officer may, incident to that arrest, search the passenger compartment of that automobile if the arrestee has access to its contents.

It follows that an officer may examine the contents of any containers found within the passenger compartment. If the passenger compartment is within the reach of the arrestee, so are containers within it. Such a container may be searched whether it is open or closed. The justification for the search is not that the arrestee has no privacy interest in the container. It is the lawful arrest that justifies the infringement of any privacy interest the arrestee may have.

In Arizona v. Gant, the U.S. Supreme Court held that the safety and evidentiary justifications underlying Chimel's (1969) reaching-distance rule limit the holding in Belton to circumstances when a vehicle search incident to arrest is justified by those concerns. Accordingly, the majority in Gant

clarified that Belton does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle, unless, due to circumstances unique to the automobile context, it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.



*Preston v. United States*  
376 U.S. 364, 84 S. Ct. 881 (1964)

**FACTS:** The defendant, along with two others, was arrested while sitting in a parked vehicle. He was searched for weapons and taken to the police station. The vehicle, which was not searched at the time of the arrest, was towed to a garage. Shortly after the defendant had been booked at the police station, officers went to the garage, without a warrant, to search the car. They found evidence indicating that the defendant and his companions were preparing for a robbery. All three individuals were convicted of conspiracy to rob a bank, largely on evidence obtained from the search of the vehicle.

**ISSUE:** Whether the search of the vehicle at the garage was reasonable under the Fourth Amendment as a “search incident to arrest?”

**HELD:** No. The evidence obtained from the car was inadmissible because the warrantless search was too remote in time or place to be treated as incidental to the arrest.

**DISCUSSION:** The Fourth Amendment permits searches that are reasonable. “When a person is lawfully arrested, the police have the right, without a warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. This rule is justified by the need to seize weapons and other things that might be used to effect an arrest, as well as by the need to prevent the destruction of evidence of the crime.

However, these justifications are absent where a search is remote in time or place from the arrest. Once a defendant is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest (underline added).”



*Thornton v. United States*  
541 U.S. 615, 124 S. Ct. 2137 (2004)

**FACTS:** Before an officer had the opportunity to stop the defendant for a license plate violation, the defendant pulled into a parking lot, parked, and got out of his vehicle. He was walking away from his vehicle as the officer pulled in behind him. The officer stopped him and asked for his driver’s license. During this encounter, the officer obtained the defendant’s consent to pat him down for weapons and narcotics. He found a controlled substance and placed the defendant, a convicted felon, under arrest. The officer then opened the defendant’s vehicle and searched. There he found a weapon.

**ISSUE:** Whether the officer can search the passenger’s compartment of a vehicle the arrestee has walked away from?

**HELD:** Yes. The law enforcement officer has the same safety concerns about a suspect either in or near a motor vehicle.

**DISCUSSION:** The Court held that the arrest of a defendant who is near a vehicle presents the same safety and destruction of evidence concerns as an arrest of a defendant who is inside a vehicle. The stresses associated with an arrest, the Court determined, are not lessened by the fact that the arrestee exited the vehicle before an officer initiated the contact.



*Knowles v. Iowa*  
525 U.S. 113, 119 S. Ct. 484 (1998)

**FACTS:** The defendant was lawfully stopped and issued a citation for speeding. Under Iowa law, the officer could have either arrested him or followed the more traditional route of issuing a traffic citation. Another section of Iowa law stated that the issuance of a citation in lieu of an arrest does not defeat the officer's authority to conduct an otherwise lawful search as if the arrest had occurred. The Iowa Supreme Court interpreted this statute as providing law enforcement officers the ability to search any automobile that has been lawfully stopped for a traffic violation. The search conducted pursuant to the defendant's traffic stop yielded contraband.

**ISSUE:** Whether officers are justified in conducting searches of automobiles based solely on the fact that it has been stopped for a traffic violation.

**HELD:** No. Law enforcement officers are not justified in conducting searches incident to traffic citations.

**DISCUSSION:** The Supreme Court called the Iowa Supreme Court's interpretation of its statute a "search incident to citation," a derivative of a search incident to arrest. The Supreme Court stated that a search incident to arrest was a valid exception to the Fourth Amendment's warrant requirement because of the need to disarm the suspect and to preserve evidence for later use at trial.

The Court dismissed the consideration of officer's safety in allowing a search incident to citation because it did not believe the issuance of a citation is as dangerous as an arrest. The officer will not spend as much time with the defendant while issuing a citation, stress levels are not as great and the outcome is not as uncertain as during an arrest. The Supreme Court also held that the second rationale for a search incident to arrest, to secure evidence for later use, is not logical because it is unlikely the officer will find additional evidence of the traffic violation by searching the automobile.



## 5. Compelled Breath / Blood Tests (DUI)

*Birchfield v. North Dakota*  
579 U.S. \_\_\_, 136 S. Ct. 2160 (2016)

**FACTS:** In this opinion, the Court consolidated three cases in which the defendants, Birchfield, Bernard, and Beylund were arrested on separate drunk-driving charges.

1. Birchfield was arrested by a state trooper and advised of his obligation under North Dakota law to undergo blood alcohol concentration (BAC) testing. The trooper told Birchfield that if he refused to submit to a blood test, he could be charged with a separate criminal offense. After Birchfield refused to submit to a blood test, he was charged with violating the State refusal statute, a misdemeanor.

2. Bernard was arrested and transported to the police station. There, officers read him Minnesota's implied consent advisory, which stated that it was a crime to refuse to submit to a breath test to determine his blood alcohol concentration (BAC). Bernard refused to take a breath test and was charged with a violating the State refusal statute.

On appeal, Birchfield and Bernard argued the State refusal statutes violated the *Fourth Amendment*.

3. Beylund was arrested and taken to a hospital. The officer read him North Dakota's implied consent advisory, informing him that if he refused to submit to a blood test he could be charged with a separate crime under the State refusal statute. Under these circumstances, Beylund consented to have his blood drawn. The test revealed a BAC of more than three times the legal limit.

On appeal, Beylund argued that his consent to the blood test was coerced because the officer informed him that refusal to

submit to the blood test could result in his being charged under the State refusal statute.

**ISSUE:** Whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream.

**HELD:** Because breath tests are significantly less intrusive than blood tests, and in most cases amply serve law enforcement interests, the court concluded that a breath test, but not a blood test may be administered as a search incident to a lawful arrest for drunk driving. The court added that, as in all cases involving reasonable searches incident to arrest, a warrant is not required in this situation.

**DISCUSSION:** First, Birchfield was prosecuted for refusing a warrantless blood draw; therefore, the court held the search he refused could not be justified as a search incident to his arrest, or on the basis of the implied consent. As a result, the court held Birchfield had been threatened with an unlawful search and reversed his conviction.

Second, Bernard was prosecuted for refusing a warrantless breath test. That test was a permissible search incident to Bernard's arrest for drunk driving. Consequently, the *Fourth Amendment* did not require officers to obtain a warrant before demanding the test, and Bernard had no right to refuse it.

Finally, Beylund was not prosecuted for refusing a test. He submitted to a blood test only after the officer told him the law required his submission. The North Dakota Supreme Court held that Beylund's consent was voluntary on the erroneous assumption that the State could lawfully compel both blood and breath tests. The Court remanded Beylund's case to the state court to reevaluate the voluntariness of Beylund's consent given the partial inaccuracy of the officer's advisory to him.



### **C. Consent**

*United States v. Mendenhall*  
446 U.S. 544, 100 S. Ct. 1870 (1980)

**FACTS:** A woman arrived at the Detroit airport from Los Angeles. As the woman disembarked, she was observed by two DEA agents to fit a “drug courier profile.” The agents approached the woman, identified themselves as federal agents, and asked to see her identification and airline ticket. The woman’s driver’s license identified her as Sylvia Mendenhall. Her airline ticket, however, was issued to “Annette Ford.” (It was not illegal to travel under an assumed name during this time.) The woman explained that she just felt like using that name and that she had been in California for two days. After one agents specifically identified himself as a federal narcotics agent, the woman became shaken, extremely nervous and had difficulty speaking.

After returning her airline ticket and driver’s license, the agent asked the woman if she would accompany him to the airport DEA office located about fifty feet away. Without a verbal response, the woman did so. The agent then asked the woman if he could search her person and handbag and told her that she had the right to decline the search if she so desired. The woman responded, “go ahead.” The agent found an airline ticket issued to “F. Bush” three days earlier for a flight to Los Angeles. The woman acknowledged this was the ticket she used for her flight to California. A policewoman, who had been summoned, asked the woman to consent to a search of her person, and the woman agreed. The policewoman asked the woman to disrobe; however the woman said she had to catch her plane. The policewoman assured her that if she were not carrying narcotics, there would be no problem. The woman disrobed without further comment, gave the policewoman two small packets, one of which contained heroin.

**ISSUE:** Whether the defendant voluntarily consented to the search?

**HELD:** Yes. Consent is based on the voluntary actions of the person granting the consent.

**DISCUSSION:** Not every encounter between a law enforcement officer and a citizen is an intrusion requiring justification. A person is seized only when, by means of physical force or a show of authority, his freedom of movement is restrained. As long as the person remains free to disregard the questions and walk away, there has been no constitutional intrusion upon the person's liberty.

Some examples of circumstances that might indicate a seizure are: the threatening presence of several officers, the display of a weapon by an officer, some physical touching of a person, or the use of language or tone of voice indicating that compliance might be compelled. In this case no seizure occurred. The events took place in the public concourse; the agents wore no uniforms and displayed no weapons; they did not summons the defendant to their presence, but instead, approached her and identified themselves as federal agents; they requested, but did not demand, to see her identification and ticket.

The final question is whether the defendant acted voluntarily. The Court considered the facts that she was twenty-two years old, had not graduated from high school, was a black female, and the officers were white males. While the facts were relevant, they were not decisive. The Court found her consent to be voluntarily granted.



*Schneckloth v. Bustamonte*  
412 U.S. 218, 93 S. Ct. 2041 (1973)

**FACTS:** An officer stopped a car when he observed that its license plate light and a headlight were inoperable. Six men, including the defendant, were in the car. After the driver failed to produce a driver's license, the officer asked if any of the other five men had any identification. One of men produced a license



and explained that he was the brother of the car's owner, from whom the car had been borrowed. After the six men stepped out of the car at the officer's request, and after two more officers arrived, the officer who had stopped the car asked the owner's brother if he could search the car. He replied "Sure, go ahead." The owner's brother helped in the search by opening the trunk and the glove compartment. The officers found stolen checks under a seat.

**ISSUE:** Whether the owner's brother could grant consent to the search of the car?

**HELD:** Yes. The validity of consent to search is determined by the totality of the circumstances.

**DISCUSSION:** For consent to be valid, it must be proven from the totality of the circumstances that the consent was freely and voluntarily given. Consent cannot result from duress or coercion, either expressed or implied. The consentor's ignorance of his right to refuse consent is only one factor to be considered in ascertaining the validity of the consent. The Fourth Amendment requires that consent to search not be coerced, by explicit or implicit means, by implied threat or covert force.



*Ohio v. Robinette*  
519 U.S. 33, 117 S. Ct. 417 (1996)

**FACTS:** The defendant was lawfully stopped for a speeding violation. After the officer gave the defendant a verbal warning, the officer asked him if he had any illegal drugs in his car. The defendant said no and gave the officer consent to search the car. The officer found a controlled substance in a film container located inside the automobile.

**ISSUE:** Whether the officer must inform the detainee that he had a right to leave before attempting to obtain his voluntary consent to search the automobile?

**HELD:** No. Whether the detainee knew that he had a right to leave is only one factor in determining if his consent was voluntary.

**DISCUSSION:** The key to all Fourth Amendment issues is whether the officer acted in a reasonable manner. The Court stated that this question is usually answered after reviewing the facts that surround the situation at hand. Therefore, the Court prefers to avoid the establishment of bright-line rules in Fourth Amendment areas. In Schneckloth v. Bustamonte, the Supreme Court rejected a comparable bright-line rule that would have required a consentor to be informed of their right to refuse consent before their choice would be considered voluntary. While a reviewing court should consider whether a detainee knew of his right to leave at the time his consent is requested, the Court did not find this fact alone to be decisive. The voluntariness of consent is to be determined by a consideration of all the circumstances.



*Frazier v. Cupp*  
394 U.S. 731, 89 S. Ct. 1420 (1969)

**FACTS:** The defendant and co-defendant were arrested for murder. An officer asked the co-defendant for consent to search a duffle bag used by both defendants. He consented and evidence was found incriminating the defendant.

**ISSUE:** Whether a joint user of a container has the authority to consent to a search?

**HELD:** Yes. Persons with a reasonable expectation of privacy in a container can grant consent to search it.

**DISCUSSION:** The defendant and the co-defendant were using the duffle bag jointly. Since the co-defendant was a co-user of the bag, he had authority to consent to its search. The

defendant, in allowing the co-defendant to use the bag and in leaving it in his house, assumed the risk that the co-defendant would allow someone else to look inside.



*Georgia v. Randolph*  
547 U.S. 103, 126 S. Ct. 1515 (2006)

**FACTS:** Officers went to the defendant's home to investigate a domestic dispute. The defendant and his wife accused each other of abusing controlled substances. The defendant's wife told the officers that criminal evidence could be found within the premises that would substantiate her claims. An officer asked the defendant for permission to search the house. He refused. The officer then asked the defendant's wife for consent. She readily agreed. The ensuing search revealed evidence of the defendant's criminal activity.

**ISSUE:** Whether the officers may rely on consent obtained in the face of a co-tenant's present refusal to grant that consent?

**HELD:** No. Consent obtained from one co-tenant refuted by another co-tenant who is present destroys the consent.

**DISCUSSION:** The Court held that a co-tenant "wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant...." The officers, then, have "no better claim to reasonableness in entering than the officer would have in the absence of any consent at all." The presence and objection of the defendant in this case preclude the government's use of the co-tenant's consent to enter the premises. "[I]f a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out."

The Court also stated that “this case has no bearing on the capacity of the police to protect domestic victims.” The police may make entry “to protect a resident from domestic violence.” The nature of the intrusion (to quell an emergency) validates a co-tenant’s consent despite the defendant's objection.



*Fernandez v. California*  
571 U.S. \_\_\_, 134 S. Ct. 1126 (2014)

**FACTS:** Officers investigating an assault and robbery saw Fernandez run into an apartment building. Once inside the building, the officers heard screams coming from one of the apartments. The officers knocked on the apartment door and Rojas opened it. Rojas had a bump on her nose, fresh blood on her shirt and appeared to be crying. Rojas told the officers she had been in a fight. When the officers asked her if anyone else was in the apartment, Rojas told them that she and her four-year old son were the only individuals present. When the officers asked Rojas to step outside so they could conduct a protective sweep of the apartment, Fernandez stepped forward and told the officers not to enter. The officers arrested Fernandez for assaulting Rojas. The officers transported Fernandez to the police station for booking. One-hour later, an investigator returned to the apartment and Rojas gave the investigator oral and written consent to search the apartment. The investigator seized evidence that was admitted against Fernandez.

**ISSUE:** Whether a defendant must be personally present and objecting for his refusal to a consent search to be valid.

**HELD:** Yes. A defendant must be present and objecting for his objection to a consent search to be valid.

**DISCUSSION:** In Georgia v. Randolph, the U.S. Supreme Court held officers may not conduct a warrantless search of a home over the express refusal of consent by a physically present

resident, even if another resident consents to the search. Even though he was not present and objecting when Rojas gave the investigator consent to search the apartment, Fernandez argued his previously stated objection to the search of the apartment was still valid after he had been taken into custody.

The court reiterated that a person's objection to a consent search is only valid when the person is present and objecting. If a person is present, objects to the search, but is then lawfully removed from the scene, a person with common authority, such as Rojas in this case, can give the officers valid consent to search. A person's objection does not remain in place after his lawful arrest.

In addition, the court noted officers cannot remove a person who might validly refuse consent to search in order to avoid that person's objection. When officers remove a person who might validly object to a search, the court will determine if the person's removal was objectively reasonable under the circumstances. Here, Fernandez's removal was objectively reasonable.



*United States v. Matlock*  
415 U.S. 164, 94 S. Ct. 988 (1974)

**FACTS:** An officer arrested the defendant in front of the home in which he rented a room and removed him from the immediate area. Several people lived in the home, including Graff. The officers approached Graff, who stated she shared a bedroom with the defendant in the home. The officers obtained Graff's consent to search the house for money and a gun. The officers found these items in the bedroom shared by Graff and the defendant.

**ISSUE:** Whether Graff had the ability to grant consent to the search?

**HELD:** Yes. If a third party and the defendant have joint

authority over the premises, then the third party has the ability to grant consent.

**DISCUSSION:** When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it may show that permission was obtained from a third party who possessed common authority over the area or item. Common authority cannot be implied from the mere property interest that a third-party has in the property. The authority that justifies the third-party consent rests on mutual use of the property by persons having joint access or control. Any of the co-inhabitants have the right to permit an inspection and that the others have assumed the risk that any of their co-inhabitants might permit the common area to be searched. But see the limitations imposed by Georgia v. Randolph.



*Chapman v. United States*  
365 U.S. 610, 81 S. Ct. 776 (1961)

**FACTS:** The defendant's landlord summoned the police after detecting the odor of whiskey mash on the premises. Officers, acting without a warrant but with the consent of the landlord, entered the defendant's rented house in his absence through an unlocked window. The officers found an unregistered still and a quantity of mash.

**ISSUE:** Whether the landlord had the authority to grant consent to search the house?

**HELD:** No. The landlord, while owner of the property, may not authorize law enforcement officers to enter the defendant's home.

**DISCUSSION:** Belief, however well founded, that an article sought is concealed in a dwelling is not justification for a search of that place without a warrant, consent or exigency. Such searches are unreasonable even with undeniable facts establishing probable cause. The officers did not obtain a

warrant, despite having time to do so. The landlord did not have authority to forcibly enter the property without the defendant's consent. No exigency was engaged. Therefore, the intrusion was unreasonable and the evidence suppressed.



*Stoner v. California*  
376 U.S. 483, 84 S. Ct. 889 (1964)

**FACTS:** Officers suspected the defendant had committed a robbery and was presently located in a hotel room. They went to the hotel. The officers had neither search nor arrest warrants. They obtained the consent of the hotel clerk to enter and search the defendant's room. After doing so, they located evidence of the defendant's participation in the robbery.

**ISSUE:** Whether the hotel clerk had the authority to grant consent to search the defendant's hotel room?

**HELD:** No. The clerk did not have the authority to waive the defendant's constitutional protection of the Fourth Amendment.

**DISCUSSION:** The Court held that it was important to remember it was the defendant's constitutional right which was at stake here, not the night clerk's nor the hotel's. It was a right, therefore, which only Stoner could waive by word or deed, either directly or through an agent. While the night clerk clearly and unambiguously consented to the search, there was nothing to indicate the government had any basis to believe that Stoner authorized the night clerk to allow the officers to search his room.



*Illinois v. Rodriguez*  
497 U.S. 177, 110 S. Ct. 2793 (1990)

**FACTS:** A woman told officers the defendant had beaten her. She also told the officers the defendant was in “our” apartment, and that she had clothes and furniture located there. Officers went with the woman to the apartment without an arrest or search warrant. The woman opened the door with a key and gave officers consent to enter. Once inside, the officers saw drugs and paraphernalia in plain view. At that time, the defendant was asleep in the apartment. The officers soon discovered the woman no longer lived in the apartment and that she had moved out weeks earlier.

**ISSUE:** Whether a warrantless entry is valid under the Fourth Amendment when it is based upon the consent of a third party that the government reasonably believes possesses authority over the premises, but in fact does not?

**HELD:** Yes. A consent search will be valid if a person whom the government reasonably, but mistakenly, believes has the authority to grant consent.

**DISCUSSION:** The Fourth Amendment generally prohibits the warrantless entry of a person’s home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched, or from a third party who possesses common authority over the premises.

The Fourth Amendment prohibits “unreasonable” searches and seizures. Where the government makes a factual determination about a search, its reasonable mistake on the issue of authority to consent does not transform the search into an unreasonable one. To satisfy the reasonableness requirement of the Fourth Amendment, law enforcement officers must not always be correct, but they must always act reasonably.



This is not to state that the government may always act on someone's invitation to enter the premises. Even if the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could be such that a reasonable person would doubt its truth.

In this case, the witness did not have the common authority over the apartment that was necessary to give the officers valid permission to enter or search the apartment. She was an "infrequent visitor" rather than a "usual resident." However, the officers were reasonably mistaken in their belief that the witness had the authority to consent. The officer's search based on that apparent authority was reasonable.



*Bumper v. North Carolina*  
391 U.S. 543, 89 S. Ct. 1788 (1968)

**FACTS:** Officers went to the house of a grandmother to investigate a rape in which her grandson was suspected. The officers falsely asserted that they had a search warrant and the grandmother consented to a search. The officers did not tell her anything about the crime they were investigating or that her grandson was suspected. The officers found a rifle used in the crime.

**ISSUE:** Whether the grandmother's consent was voluntarily given if the officers falsely stated that they had a search warrant?

**HELD:** No. Where officers falsely assert that they have a search warrant and then procure "consent," the consent is invalid.

**DISCUSSION:** The government has the burden of proving that consent was freely and voluntarily given. The grandmother's consent was not voluntarily given because it had been procured through a wrongful claim of authority. A search cannot be justified as lawful on the basis of consent where that

consent has been given only after the official conducting the search has wrongfully asserted that he possessed a warrant. When a law enforcement officer claims authority to search a home pursuant to a warrant, they announce in effect that the occupant has no right to resist the search.



*Lewis v. United States*  
385 U.S. 206, 87 S. Ct. 424 (1966)

**FACTS:** An undercover narcotics agent telephoned the defendant's home about the possibility of purchasing marijuana. The agent misrepresented his identity to the defendant and was invited to the defendant's home on two occasions where he subsequently bought marijuana.

**ISSUE:** Whether the consent granted was voluntary when a government agent, by misrepresenting his identity, is invited into a defendant's home?

**HELD:** Yes. Where a defendant invites an undercover government agent into his home for the specific purpose of executing a crime, the agent's misrepresentation of his identity does not offend the Fourth Amendment.

**DISCUSSION:** The government is entitled to use decoys and to conceal the identity of its agents in the detection of many types of crimes. A rule prohibiting the use of undercover agents in any manner would severely hamper the government in ferreting out those organized criminal activities that are characterized by crimes that involve victims who either cannot or do not protest.

The home is accorded the full range of Fourth Amendment protection. However, when the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater protection than if it were carried on in a store, garage,

car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises as long as it is for the purpose contemplated by the occupant and the entry is not used to conduct a general search for incriminating materials.

In this case, the defendant invited the undercover agent into his home for the purpose of executing a felonious sale of narcotics. The agent did not commit any acts that were beyond the scope of the business, such as conducting a surreptitious search, for which he had been invited into the house. The defendant's Fourth Amendment rights were not violated.



*Florida v. Jimeno*  
500 U.S. 297, 111 S. Ct. 1801 (1991)

**FACTS:** An officer overheard the defendant arrange what appeared to be a drug transaction over a public telephone. The officer followed the defendant and observed his failure to obey a traffic control device. The officer pulled the defendant over to the side of the road to issue him a traffic citation. The officer told the defendant he had been stopped for a traffic infraction, but went on to explain that he had reason to believe the defendant was transporting narcotics in the car, and asked permission to search. The officer told the defendant that he did not have to consent to a search of the car. The defendant told the officer he had nothing to hide, and gave consent to search the car. The officer found a folded brown paper bag on the floorboard on the passenger side of the car. The officer opened the bag and found cocaine inside.

**ISSUE:** Whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine containers therein?

**HELD:** Yes. The officer's request to search the car for narcotics reasonably included containers in which narcotics could be found.

**DISCUSSION:** The Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open a particular container within the automobile. The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all searches, only those which are unreasonable.

The Court has long approved consensual searches because it is reasonable for law enforcement officers to conduct a search once they have been permitted to do so. However, the scope of a search is generally limited by its expressed object. A suspect may limit the scope of the search to which he consents. In this case, the terms of the authorization to search were simple. The defendant granted the officer permission to search his car and did not place any express limitation on the scope of the search. The officer had informed the defendant that he would be looking for narcotics in the car. Therefore it was reasonable for the officer to conclude that the general consent to search the car included consent to search containers within that car that might contain drugs.



*Florida v. Jardines*  
569 U.S. \_\_\_, 133 S. Ct. 1409 (2013)

**FACTS:** Officers received an unverified tip that the defendant was growing marijuana in his home. The officers went near the address but did not observe any unusual activity. They decided to approach the home to see if they could learn more. They brought a trained drug-sniffing dog with them, who alerted to the presence of marijuana as it approached the front porch of the home. The dog energetically searched for the strongest indication of the marijuana, ultimately settling on the threshold of the front door of the home. The officers departed the scene and obtained a search warrant for the home, based in part on evidence generated by the dog.

**ISSUE:** Whether the officers were implicitly invited onto the

defendant's front porch?

**HELD:** No. The officers intruded into the defendant's porch with the intent to conduct a search, which is beyond the anticipated activities of any perceived invitation.

**DISCUSSION:** The Supreme Court has previously "recognized that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds," citing *Breard v. Alexandria*, 341 U.S. 622 (1951). Law enforcement officers are entitled to the same invitation open to the general public. However, this does not extend an offer to engage in activities outside the customary actions anticipated by this implied invitation. The Court asked "whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do." Therefore, the intrusion was unreasonable.



#### **D. Inventories**

*South Dakota v. Opperman*  
428 U.S. 364, 96 S. Ct. 3092 (1976)

**FACTS:** The defendant's car was impounded for violations of municipal parking ordinances. At the impound lot, an officer noticed a watch on the dashboard of the car and other personal items on the backseat and back floorboard. The officer opened the car. Following standard procedures, the officer inventoried the contents of the car including the contents of the unlocked glove compartment. The officer found marijuana in the glove compartment and the defendant was arrested.

**ISSUE:** Whether the Fourth Amendment allows the government to conduct an inventory search of a car

lawfully impounded, without a warrant or probable cause?

**HELD:** Yes. Law enforcement officers are entitled to make an inventory of items in their custody for reasons of accountability.

**DISCUSSION:** When vehicles are impounded, officers routinely follow care-taking procedures by securing and inventorying the car's contents. These procedures developed in response to three distinct needs: (1) to protect the owner's property while it remains in government custody, (2) to protect the government against claims of lost or stolen property, and (3) to protect officers from potential danger posed by the contents of the car.

In this case, the officer was engaged in a caretaking search of a lawfully impounded automobile. The reasonableness of the search was enhanced because the owner was not present at the time of impoundment to claim his property, and because the officer saw a watch through the window before began his search. In addition, the officer followed a standard procedure, making the search reasonable under the Fourth Amendment.



*Harris v. United States*  
390 U.S. 234, 88 S. Ct. 992 (1968)

**FACTS:** The defendant's car was seen leaving the site of a robbery. The car was traced and the defendant was arrested as he was entering the vehicle near his home. After a quick search of the car, an officer took the defendant to the police station and impounded the car as evidence. A department regulation stated that an impounded vehicle had to be searched in order to remove all valuables from it. Pursuant to this regulation and without a warrant, an officer searched the car. While he was securing the window, however, he saw and seized the registration card with the name of the robbery victim on it.

**ISSUE:** Whether the officer discovered the registration card by means of an illegal search?

**HELD:** No. The discovery of the registration card occurred as a result of reasonable measures taken to protect the car while it was in government custody.

**DISCUSSION:** The Fourth Amendment does not require the government to obtain a warrant for standard inventories. Once the door of the car had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure.



*Colorado v. Bertine*  
479 U.S. 367, 107 S. Ct. 738 (1987)

**FACTS:** Officers arrested the defendant for driving under the influence of alcohol. They called a tow truck, searched the defendant's car and inventoried its contents in accordance with agency procedure. An officer opened a closed backpack in which he found a controlled substance, paraphernalia, and a large amount of cash.

**ISSUE:** Whether the government can enter a closed container during an inventory?

**HELD:** Yes. A warrantless inventory search of an impounded vehicle may include places where personal items can be found, including a search of the contents of closed containers found inside the vehicle.

**DISCUSSION:** Inventories are a well-defined exception to the warrant requirement. However, two conditions must be met before an inventory search of an impounded vehicle is lawful. First, the officers must act in good faith; that is, they were not

conducting the inventory to advance a criminal investigation. Second, the officers must follow standardized procedures so that the searching officer does not have unbridled discretion to determine the scope of the search.

In this case, the officers were responsible for the property taken into custody. By securing the property, the officers were protecting the property from unauthorized access. Also, knowledge of the precise nature of the property helped guard against claims of theft, vandalism, or negligence. This knowledge also helped to avert any danger to the officers or others that may have been presented by the potential danger of the property.



*Cooper v. California*  
386 U.S. 58, 87 S. Ct. 788 (1967)

**FACTS:** Officers arrested the defendant and seized his car for a narcotics violation in which the car was used. A state law directed any officer making an arrest for a narcotics violation to seize and deliver any vehicle used to store, conceal, transport, sell, or facilitate the possession of narcotics. “Such vehicle to be held as evidence until a forfeiture has been declared or a release order issued.” A search of the automobile a week later revealed evidence used in trial against the defendant.

**ISSUE:** Whether the warrantless search of the defendant’s automobile, seized by the authority of a forfeiture statute, made a week after his arrest, and not incidental thereto, was reasonable by Fourth Amendment standards?

**HELD:** Yes. Law enforcement officers are permitted to search a car that they are going to retain for a significant period of time.

**DISCUSSION:** Evidence showed that the car had been used to carry on his narcotics possession and transportation



activities. A state statute required police in such circumstances to seize the vehicle and hold it as evidence until forfeiture was declared or a release ordered. A warrantless search of an arrested person's automobile, made a week after his arrest and not incident to that arrest, is reasonable where the vehicle is seized for forfeiture.



*Illinois v. Lafayette*  
462 U.S. 640, 103 S. Ct. 2605 (1983)

**FACTS:** The defendant was arrested for disturbing the peace and taken to the police station. Without obtaining a warrant and in the process of booking him and inventorying his possessions, the officers removed the contents of his shoulder bag. They found amphetamine pills.

**ISSUE:** Whether it is reasonable for the government to inventory the personal effects of a person under lawful arrest as part of the procedure at a police station?

**HELD:** Yes. Consistent with the Fourth Amendment, it is reasonable for the government to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police station incident to booking and jailing the suspect.

**DISCUSSION:** In determining whether an inventory search is reasonable under the Fourth Amendment, government interests are balanced against the intrusion on an individual's Fourth Amendment interests. The government has a legitimate interest in protecting the owner's property from theft or false claims of theft by persons employed in police activities. A standardized procedure for making an inventory as soon as is reasonable after reaching the station house protects the owner's property while it is in police custody. The fact that the protection of an arrestee's property might have been achieved by less intrusive means does not, in itself, render an inventory

search unreasonable.



*Florida v. Wells*  
495 U.S. 1, 110 S. Ct. 1632 (1990)

**FACTS:** The defendant was arrested for DUI. During an inventory search of the car, the officer found a locked suitcase in the trunk. The officer opened the suitcase and found a garbage bag containing marijuana.

**ISSUE:** Whether a container found during an inventory search may be opened where there is no agency policy regarding the opening of containers?

**HELD:** No. Absent a routine agency policy regarding the opening of containers found during an inventory search, a container may not be opened.

**DISCUSSION:** An established routine must regulate inventory searches. This is to ensure that an inventory search is not a ruse for a general rummaging of the car in order to discover incriminating evidence. Policies governing inventory searches should be designed to produce an inventory.

In this case, there was no evidence of any policy on the opening of containers found during inventory searches. Therefore, absent such a policy, the inventory was not sufficiently regulated to satisfy the Fourth Amendment, and the seizure of the marijuana was unlawful. The Court also stated that if a standard inventory policy permitted officers to inventory the contents of locked containers, the inventory of such would be reasonable.



## **E. Inspections**

### **1. Structures**

*See v. City of Seattle*  
387 U.S. 541, 87 S. Ct. 1737 (1967)

**FACTS:** The defendant refused to allow a city representative to enter and inspect the defendant's locked commercial warehouse without a warrant and without probable cause to believe that a violation of any municipal ordinance existed. The inspection was part of a routine, periodic city-wide canvass to obtain compliance with the fire code. After the defendant refused the inspector access, he was arrested.

**ISSUE:** Whether a search warrant is required to conduct inspections of municipal fire, health, and housing inspection?

**HELD:** No. Legitimate government inspections are an exception to the Fourth Amendment's warrant requirement, though an inspection warrant may be required.

**DISCUSSION:** The search of private commercial property, as well as the search of private houses, is presumptively unreasonable if conducted without a warrant. An administrative agency's demand for access to commercial premises for inspection under a municipal fire, health, or housing inspection program is measured against a flexible standard of reasonableness. However, administrative entry, without consent, into areas not open to the public, may only be compelled with an inspection warrant.

Business premises may reasonably be inspected in many more situations than private homes. Any constitutional challenge to the reasonableness of inspection of business premises, such as for licensing purposes, can only be resolved on a case-by-case basis under the Fourth Amendment. While a search warrant is not required, the government must obtain an inspection

warrant or consent to conduct the inspection.



*Camara v. Municipal Court*  
387 U.S. 523, 87 S. Ct. 1727 (1967)

**FACTS:** An inspector entered an apartment building to make a routine annual inspection for possible violations of the city's housing code. The building manager informed the inspector that the defendant, a lessee of the ground floor, was using the rear of his leasehold as a personal residence. The defendant refused to allow the inspector to enter his residence. The defendant was charged with the criminal violation of the code section which punished obstruction to inspect.

**ISSUE:** Whether inspectors can make warrantless entries to carry out their duties?

**HELD:** No. Inspectors must rely on consent, an exigency, or an inspection warrant to enter a premises to conduct an inspection.

**DISCUSSION:** At one time, the Supreme Court authorized the warrantless entries of residences to conduct safety inspections. However, the Court altered its position because: 1) the occupant does not know if his or her premises is covered by the inspection authority, 2) the occupant does not know the inspector's authority, and 3) the occupant does not know if the inspector is acting under proper authority.

Typically, most entries can be obtained with consent from an occupant. Some entries can be justified by the exigency posed to public health (such as putrid food conditions). However, the remaining entries must be supported by a warrant.

The primary principle of the Fourth Amendment was to prohibit unreasonable searches. This usually means that searches must be supported by a warrant. "The warrant procedure is designed to guarantee that a decision to search private property

is justified by a reasonable governmental interest.” In criminal cases, the government must establish probable cause of criminal activity. For inspection warrants, the government’s burden will depend on the type of inspection contemplated. “This is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. . . Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained [citing *Frank v. Maryland*, 359 U.S. 360 (1959)].” In some instances, the passage of time may justify an inspection warrant.



*Marshall v. Barlow’s Inc.*  
436 U.S. 307, 98 S. Ct. 1816 (1978)

**FACTS:** An OSHA inspector entered the customer service area of Barlow’s, Inc., an electrical and plumbing installation business. Barlow, president and general manager, was on hand. The OSHA inspector told Barlow that he wished to conduct a search of the working areas of the business. Barlow inquired whether any complaint had been received about his company. The inspector said no, but that Barlow’s, Inc., had simply turned up in the agency’s selection process. The inspector again asked to enter the nonpublic area of the business. Barlow asked whether the inspector had a search warrant. The inspector did not. Barlow refused the inspector admission to the employee area of his business. Three months later, the Secretary of Labor petitioned the United States District Court to issue an order compelling Barlow to admit the inspector.

**ISSUE:** Whether a District Court order to allow an inspection of nonpublic areas of a business without sufficient reason is reasonable under the Fourth Amendment?

**HELD:** No. The law that authorized inspections without an

inspection warrant or its equivalent was unconstitutional in these circumstances.

**DISCUSSION:** A statute empowered agents of the Secretary of Labor to search the work area of any employment facilities within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations. OSHA inspectors were also given the authority "to review records required by the Act and regulations published in this chapter, and other records which are directly related to the purpose of the inspection," with a warrant.

" . . . [P]robable cause justifying the issuance of a warrant may be based on not only specific evidence of an existing violation, but also on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment; a warrant showing that a specific business has been chosen for a search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of search in any of the lesser divisions of the area, will protect an employer's Fourth Amendment rights."

" . . . [T]he Act is unconstitutional insofar as it purports to authorize inspections without a warrant or its equivalent . . . . Without a warrant the inspector stands in no better position than a member of the public. What is observable by the public is observable, without a warrant, by the government inspector as well." Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861; 94 S. Ct. 2114 (1974).



*Donovan v. Dewey*  
452 U.S. 594, 101 S. Ct. 2534 (1980)

**FACTS:** A federal mine inspector attempted to inspect the premises of a stone quarry operator under authority granted by

federal law. The pertinent statute provided that federal mine inspectors are to inspect all mines at set intervals to insure compliance with health and safety standards and to make follow-up inspections to determine whether previously discovered violations had been corrected. Mine inspectors were authorized to inspect any mine without having to obtain a warrant. In this case, the inspection was a follow-up to one that uncovered numerous safety and health violations. The quarry operator refused to allow the inspection to be completed because the inspector did not have a search warrant.

**ISSUE:** Whether a statute can authorize the government to engage in a non-consensual inspection without a search warrant?

**HELD:** Yes. Under specific circumstances, such intrusions are reasonable.

**DISCUSSION:** The Court held that there are certain situations in which the government can engage in warrantless inspections. The Court stated “[T]he greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual’s home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.”

Determining when an inspection warrant is required to conduct these types of searches rests on whether (1) Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and (2) the regulatory practices are sufficiently comprehensive and defined that the commercial operator cannot help but be aware that his business will be subject to episodic inspections for explicit purposes.

The warrantless inspections here were justified because the statute (1) notified the operator that inspections will be performed on a regular basis, (2) informed the operator of what health and safety standards must be met, thus curtailing the

discretion of government officials to determine what facilities to search and what violations to search for, and (3) prohibited forcible entries. Should entry to perform an inspection be denied, the government was compelled to file a civil action in federal court to obtain an injunction against future refusals.



*New York v. Burger*  
482 U.S. 691, 107 S. Ct. 2636 (1987)

**FACTS:** The defendant operated a wrecking yard that dismantled automobiles and sold their parts. Pursuant to a state statute authorizing warrantless inspections of automobile junkyards, police officers entered his junkyard and asked to see his license and records as to automobiles and parts. The defendant did not have the license. The officers conducted an inspection of the junkyard and discovered stolen vehicles and parts.

**ISSUES:**

1. Whether the warrantless search of an automobile junkyard, conducted pursuant to a statute authorizing such a search, falls within the exception to the warrant requirement for administrative inspections of pervasively regulated industries?
2. Whether an otherwise proper administrative inspection is unconstitutional because the inspection may disclose violations not only of the regulatory statute but also of criminal statutes?

**HELD:**

1. It depends. Business owners do not command the same level of reasonable expectation of privacy that private individuals expect.
2. No. Law enforcement officers are entitled to recover evidence of crime they observe while



lawfully present in a location.

**DISCUSSION:** The warrantless search of an automobile junkyard, conducted pursuant to a statute authorizing such a search, may fall within the exception to the warrant requirement. A business owner's expectation of privacy in commercial property is reduced with respect to commercial property employed in a "closely regulated" industry. Where the owner's privacy interest is weakened and the government's interest in regulating particular businesses is heightened, a warrantless inspection of commercial premises is reasonable. This warrantless inspection, even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met:

- 1) There must be a "substantial" government interest. Because of the auto theft problem, the state has a substantial interest in regulating the auto dismantling industry.
- 2) The warrantless inspections must be "necessary to further [the] regulatory scheme."
- 3) The statute's inspection program, in terms of certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.

The Court found that this statute provided a constitutionally adequate substitute for a warrant. It informed a business operator that regular inspections will be made, and also sets forth the scope of the inspection, notifying him of how to comply with the statute and who is authorized to conduct the inspection. However, the time, place, and scope of the inspection is limited to impose appropriate restraints upon the inspecting officers' discretion. The administrative scheme is not unconstitutional simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes, in addition to violations of regulations.



*United States v. Biswell*  
406 U.S. 311, 92 S. Ct. 1593 (1972)

**FACTS:** The defendant was federally licensed to deal in sporting weapons. An ATF inspector inspected the defendant's books and requested entry into his locked gun storeroom. The defendant asked the inspector if he had a search warrant. The inspector explained that the Gun Control Act, 18 U.S.C. § 921, authorized such searches, known as compliance checks. After the search, the inspector seized two sawed-off rifles that the defendant was not licensed to possess.

**ISSUE:** Whether the search of the business premises was reasonable?

**HELD:** Yes. Compliance checks are reasonable because the defendant chose to engage in "pervasively regulated" business and to accept a federal license. In doing so, he acknowledged that his business records, firearms, and ammunition would be subject to effective inspection.

**DISCUSSION:** It is plain that inspections for compliance with the Gun Control Act, 18 U.S.C. § 923, pose only limited threats to the dealer's justifiable expectations of privacy. When a person chooses to engage in a "pervasively regulated" business such as dealing in firearms and accepts a federal license, he must do so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. The government annually furnishes each licensee with a revised compilation of ordinances that describe his obligations and define the inspector's authority.



*City of Los Angeles v. Patel*  
576 U.S. \_\_\_, 135 S. Ct. 2443 (2015)

**FACTS:** Los Angeles Municipal Code §41.49 required hotel

operators to record and keep specific information about their guests on the premises for 90 days. Section 41.49 also provided that these records “shall be made available to any officer of the Los Angeles Police Department for inspection . . . at a time and in a manner that minimizes any interference with the operation of the business.” A hotel operator’s failure to make records available to an officer upon demand was a criminal misdemeanor.

Patel, a motel owner in Los Angeles, sued the city, asking the court to prevent the continued enforcement of §41.49’s warrantless inspection provision. Patel argued that as written, or on its face, §41.49 violated the Fourth Amendment’s prohibition against unreasonable searches and seizures.

**ISSUE:** Whether §41.49 was unconstitutional on its face, because it did not expressly provide for pre-compliance judicial review before police officers could inspect a motel’s registry.

**HELD:** Yes. The subject of the inspection must be given an opportunity to obtain pre-compliance review regarding the lawfulness of the search.

**DISCUSSION:** First, the United States Supreme Court held that Patel was entitled to challenge the constitutionality of §41.49 on its face, or without first having alleged that his hotel was subjected to an unconstitutional search under §41.49.

The court further held that the provision of §41.49 that required hotel operators to make their registries available to the police upon demand was unconstitutional because it penalized the hotel operators for declining to turn over their records without affording them any opportunity for a pre-compliance review.

The court reiterated the well-settled rule that warrantless searches of homes or commercial premises are *per se* unreasonable, unless they fall within one of the few established exceptions to the Fourth Amendment’s warrant requirement.

One of these exceptions provides for warrantless administrative searches. The primary purpose of an administrative search is to ensure compliance with some type of governmental record keeping, health or safety requirement, and not for the discovery of criminal evidence. Under such circumstances, the court recognized the Fourth Amendment's warrant and probable cause requirements were not practical; therefore, it was reasonable to allow warrantless administrative searches. However, the court held for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain pre-compliance review of the lawfulness of the search before a neutral decision maker.

Without deciding the exact form an opportunity for pre-compliance review must take, the court indicated that an administrative subpoena would be sufficient in most cases. For example, in this case, if a subpoenaed hotel operator believed that an attempted search of his records was unlawful, he could request an administrative law judge quash the subpoena before he suffered any criminal penalties for failure to comply with the subpoena. Conversely, if an officer reasonably suspected a hotel operator might tamper with the requested records while the motion before the judge is pending, the officer would be able to guard the records until the required hearing occurred. Finally, the court stressed that its holding had no bearing on cases where exigent circumstances would allow a warrantless records search or where the record owners consented to the search.



## **2. Vehicles**

*Michigan v. Sitz*  
496 U.S. 444, 110 S. Ct. 2481 (1990)

**FACTS:** The Michigan State Police established a sobriety checkpoint program pursuant to advisory committee guidelines. Checkpoints could be set up at selected sites along state roads. During operation of the checkpoints, all vehicles would be

briefly stopped and the drivers examined for signs of intoxication. If any signs were detected, the individual would be taken out of the flow of traffic and have his driver's license and registration checked. If necessary, additional sobriety tests would be performed. If officers found the driver to be intoxicated, the driver would be arrested. If not, the driver would be immediately allowed to resume his or her journey. A checkpoint was set up under these guidelines. One hundred twenty six vehicles passed through, with an average delay of approximately 25 seconds per vehicle. Two drivers were detained for additional field sobriety testing, and one of the two was arrested. A third driver drove through the checkpoint and was ultimately stopped and arrested for driving under the influence.

**ISSUE:** Whether the government's use of highway sobriety checkpoints violated the Fourth Amendment?

**HELD:** No. In balancing the interests of the state in eradicating drunk driving with the minimal intrusion upon individual motorists, the checkpoint inspections were reasonable under the Fourth Amendment.

**DISCUSSION:** Whenever a vehicle is stopped at a checkpoint, a "seizure" under the Fourth Amendment occurs. In Brown v. Texas, the Court outlined a balancing test that applied in this case. Here, the test consisted of "balancing the State's interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual's privacy caused by the checkpoints." Applying this test, the sobriety checkpoints were constitutional. The States have a substantial interest in eradicating the problem of drunk driving. Alternatively, the intrusion on individual motorists was slight. "In sum, the balance of the State's interest in preventing drunk driving, the extent to which the system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the State program."



*City of Indianapolis v. Edmond*  
531 U.S. 32, 121 S. Ct. 447 (2000)

**FACTS:** The City of Indianapolis operated vehicle checkpoints to interdict unlawful drug use and transportation. At each checkpoint, the officers stopped a predetermined number of vehicles. Pursuant to written directives, an officer advised the driver that he or she was being stopped at a drug checkpoint and asked the driver to produce a license and registration. The officer looked for signs of impairment and conducted an open-view examination of the vehicle from the outside. Meanwhile, a narcotics-detection dog walked around the outside of each stopped vehicle.

**ISSUE:** Whether the checkpoint seizures without any suspicion were reasonable?

**HELD:** No. Previously approved suspicion-less checkpoints were approved for traffic reasons. See Michigan v. Sitz.

**DISCUSSION:** The Court has approved very few warrantless, suspicion-less searches and seizures. When it has done so, it was always with great uneasiness. For example, this Court has upheld brief, suspicion-less seizures at a fixed checkpoint designed to intercept illegal aliens, United States v. Martinez-Fuerte, and at a sobriety checkpoint aimed at removing drunk drivers from the road, Michigan v. Sitz. The Court has also suggested that a similar roadblock to verify drivers' licenses and registrations would be permissible to serve a highway safety interest. Delaware v. Prouse. These checkpoints were designed to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety.

Here, the Court was concerned that this checkpoint program's primary purpose was indistinguishable from the general interest in crime control. In determining whether individualized

suspicion is required to accompany a seizure, the Court considers the nature of the interests threatened and their connection to the law enforcement practice. The Supreme Court is particularly reluctant to create exceptions to suspicion requirements where governmental authorities are primarily pursuing general crime control. As the Court has never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing, they found the seizures here to be unreasonable.



*Illinois v. Lidster*  
540 U.S. 419, 124 S. Ct. 885 (2004)

**FACTS:** Police officers set up a highway checkpoint a week after a fatal hit-and-run accident in an effort to garner information about the perpetrator. As each vehicle approached the checkpoint, an officer would stop the vehicle for 10 to 15 seconds, ask the occupants if they had any information about the offense, and hand the driver an informational flyer. The defendant drove his vehicle in an erratic manner toward the checkpoint. When stopped, the officer detected the odor of alcohol on the defendant's person, asked him to perform a field sobriety test, and arrested him for driving under the influence of alcohol.

**ISSUE:** Whether a checkpoint to gather information from potential witnesses to a crime violates the Fourth Amendment?

**HELD:** No. As the government minimized the disruptive features of a checkpoint seizure and had a compelling reason for seeking the information, their seizure was reasonable.

**DISCUSSION:** In City of Indianapolis v. Edmond, the Supreme Court held that traffic checkpoints designed for general crime control purposes were unconstitutional. However, the checkpoint in this case is appreciably different as

its primary purpose was to seek information from the public about a serious crime that was committed by someone else.

Specialized governmental interests can justify traffic checkpoints that are not supported by individualized suspicion. See *Michigan v. Sitz* and *United States v. Martinez-Fuerte*. In a situation in which the government is seeking information from the public, individualized suspicion is irrelevant to the government's purpose. Also, such brief government-public encounters are unlikely to provoke anxiety or become intrusive. The government is not apt to ask questions that make members of the public uncomfortable or incriminate themselves. The checkpoint "advanced this grave public concern to a significant degree. The police appropriately tailored their checkpoint stops to fit important criminal investigatory needs. The stops took place about one week after the hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night. And police used the stops to obtain information from drivers, some of whom might well have been in the vicinity of the crime at the time it occurred." Based on these factors, the Court held the minimal intrusion of the checkpoint was reasonable.



### 3. Parolees

*United States v. Knights*  
534 U.S. 112, 122 S. Ct. 587 (2001)

**FACTS:** The defendant was on probation for a drug offense. He signed a probation order stating he would "[s]ubmit his ... person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." A police officer became suspicious of the defendant's activities, and, aware of his probation conditions, searched his apartment. He found evidence of criminal activity (arson) inside.



**ISSUE:** Whether the condition of probation limits subsequent searches to the defendant's probation status only?

**HELD:** No. Police officers can conduct criminal evidence searches based on diminished expectations of privacy and conditions of probation.

**DISCUSSION:** Probationers do not enjoy the freedoms that other citizens enjoy. In this particular defendant's probation, the sentencing judge determined the search provision was necessary. This condition effectively diminished the defendant's reasonable expectation of privacy.

To intrude on this diminished expectation of privacy, the government relied on a search condition of probation. The Court stated "[I]t was reasonable to conclude that the search condition would further the two primary goals of probation—rehabilitation and protecting society from future criminal violations." Therefore, an officer is entitled to conduct a search when: (1) the probationer is subject to a search condition and (2) the officer establishes reasonable suspicion the probationer engaged in criminal activity (note that a probation officer may search under less stringent standards for probation-related reasons).



*Samson v. California*  
547 U.S. 843, 126 S. Ct. 2193 (2006)

**FACTS:** The defendant was placed on parole with the condition that he "shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." A police officer observed the defendant walking along a public street. Without suspicion and based solely on defendant's status as a parolee, the officer searched him. The officer found a controlled substance in the defendant's person.

**ISSUE:** Whether a condition of release can reasonably contain the condition that the defendant is subject to warrantless, suspicionless searches?

**HELD:** Yes. Parolees' legal status is such that it is reasonable to subject them to warrantless, suspicionless searches.

**DISCUSSION:** Parolees are effectively serving their terms of incarceration through a system of intensive supervision. As such, the Court noted that a parolee has even less of an expectation of privacy than a probationer (such as the one in *Knights*). Also, parolees accept the condition of their release with a clear understanding of the conditions that they will face. Finally, the government maintains an overwhelming interests in controlling prisoners it has released on parole as they are more likely, statistically, to commit future crimes. Based on these three reasons, warrantless, suspicionless searches of parolees is reasonable under the Fourth Amendment.



#### **4. Special Needs of the Government**

*Skinner v. Railway Labor Executives' Association*  
489 U.S. 602, 109 S. Ct. 1402 (1989)

**FACTS:** Upon learning that alcohol and drug abuse by railroad employees had caused or contributed to a number of significant train accidents, the Federal Railroad Administration (FRA) promulgated regulations under the Secretary of Transportation's authority to adopt safety standards for the industry. The regulations required blood and urine tests of covered employees to be conducted following certain major train accidents or incidents and authorized, but did not require railroads to administer breath or urine tests to covered employees who violate certain safety rules. The Railway Labor Executives' Association and members of labor organizations brought suit in the Federal court to enjoin the regulations.

**ISSUE:** Whether the regulations were so overly intrusive as to constitute an unreasonable search of the employees' persons?

**HELD:** No. The government has a special need in protecting the public from intoxicated operators of the railway system that warrants suspicion-less, warrantless searches.

**DISCUSSION:** Though those conducting the testing were not government employees, the Fourth Amendment is applicable to drug and alcohol testing mandated by federal regulations. A railroad that complies with the regulations does so by compulsion and must be viewed as an agent of the government. Similarly, even though some of the regulations do not compel railroads to test, such testing is not primarily the result of private initiative. Specific features of the regulations combine to establish that the government has actively encouraged, endorsed, and participated in the testing.

The collection and analysis of the samples required or authorized by the regulations constitute searches. The Court has long recognized that a compelled intrusion into the body for blood to be tested for alcohol content constitutes a search. Similarly, subjecting a person to the breath test authorized by the regulations is deemed a search, since it requires the production of "deep lung" breath and thereby implicates concerns about bodily integrity. Although the collection and testing of urine under the regulations do not entail any intrusion into the body, they nevertheless constitute searches since they intrude upon expectations of privacy as to medical information.

The mandate of the Fourth Amendment is that all searches be reasonable. The drug and alcohol tests regulations are reasonable under the Fourth Amendment even though there is no requirement of a warrant or a reasonable suspicion that any particular employee may be impaired, since the government has a compelling interest that outweighs employees' privacy concerns. The government's interest in regulating the conduct

of railroad employees engaged in safety-sensitive tasks in order to ensure the safety of the traveling public and of the employees themselves justifies prohibiting such employees from using alcohol or drugs while on duty or on call for duty. The proposed tests are not an unduly extensive imposition on an individual's privacy. The government's interest presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements.



*National Treasury Employees Union v. Von Raab*  
489 U.S. 656, 109 S. Ct. 1384 (1989)

**FACTS:** A law enforcement agency, which had one of its primary enforcement missions the interdiction and seizure of illegal drugs smuggled into the country, implemented a drug-screening program requiring urinalysis tests of employees seeking transfer or promotion to a position that has either a direct involvement in drug interdiction or requiring the incumbent to carry firearms or to handle "classified" material. Among other things, the program required that an applicant be notified that selection is contingent upon successful completion of drug screening, set forth procedures for collection and analysis of samples, and limited the intrusion on employee privacy. The test results could not be turned over to any other agency, including criminal prosecutors, without the employee's written consent.

**ISSUE:** Whether the government's program constituted and an unreasonable intrusion into its employees' privacy?

**HELD:** No. The program constituted a reasonable effort that met the government's special interests.

**DISCUSSION:** The program's intrusions are searches that must meet the reasonableness requirement of the Fourth Amendment. However, the government's testing program is not designed to serve the ordinary needs of criminal evidence

collection. The purposes of the program are to deter drug use among those eligible for promotion to sensitive positions and to prevent the promotion of drug users to those positions. Therefore, the Court balanced the public interest in the program against the employee's privacy concerns. The government's compelling interest is that certain employees must be physically fit and have unimpeachable integrity and judgment. It also has a compelling interest in preventing the risk to the life of the citizenry posed by the potential use of deadly force by persons suffering from impaired perception and judgment.

The Court held that a warrant is not required here. Such a requirement would serve only to divert valuable agency resources from the government's primary mission that would be compromised if warrants were necessary in connection with routine, yet sensitive, employment decisions. Furthermore, a search or inspection warrant would provide little or no additional protection of personal privacy, since the government's program defines narrowly and specifically the circumstances justifying testing and the permissible limits of such intrusions. Affected employees know that they must be tested, are aware of the testing procedures that the government must follow, and are not subject to the discretion of officials in the field. The government's testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry firearms, is reasonable despite the absence of probable cause or some other level of individualized suspicion.



*Ferguson v. City of Charleston*  
532 U.S. 67, 121 S. Ct. 1281 (2000)

**FACTS:** Staff members at a public hospital became concerned about an apparent increase in the use of cocaine by patients who were receiving prenatal treatment. The staff offered to cooperate with the city in prosecuting mothers whose children tested positive for drugs at birth. A task force

consisting of hospital representatives, police, and local officials developed a policy which set forth procedures for identifying and testing pregnant patients suspected of drug use.

**ISSUE:** Whether the policy-imposed drug tests constituted an unreasonable search?

**HELD:** Yes. These drug tests conducted for criminal investigatory purposes were searches and not justified without consent, exigency or a warrant.

**DISCUSSION:** A state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is a search. The interest in using the threat of criminal sanctions to deter pregnant women from using cocaine does not justify a departure from the general rule that a search is unconstitutional if not authorized by a valid warrant, or warrant exception.

This case differed from the previous cases in which the Court considered whether comparable drug tests fit within the closely guarded category of constitutionally permissible suspicionless searches. Those cases employed a balancing test weighing the intrusion on the individual's privacy interest against the "special needs" of the government that supported the program. In previous cases, there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties (such as prosecutors). The critical difference lies in the nature of the "special need" asserted. In each of the prior cases, the "special need" was one divorced from the government's general law enforcement interest.

While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes. Given that purpose and given the extensive involvement of law enforcement officials at every stage of the policy, this case did not fit within the closely guarded category of "special needs."



*Vernonia School District v. Acton*  
515 U.S. 646, 115 S. Ct. 2386 (1995)

**FACTS:** A school district was experiencing a dramatic increase in student drug use. In particular, many of the students involved in the school's athletic programs were suspected of using controlled substances. The school district imposed a policy, applicable to all students participating in interscholastic athletics, subjecting them to random drug testing. The student and parents were required to sign a testing consent form before participating in an athletics program. The defendant was denied access to an athletics program as his parents refused consent.

**ISSUE:** Whether it is reasonable for a school district to require drug testing to participate in athletics programs?

**HELD:** Yes. Student-athletes have a reduced expectation of privacy and the government has a compelling interest in protecting the students from the associated dangers.

**DISCUSSION:** The Court has previously dispensed with the government's requirement of obtaining a warrant supported by probable cause in the past when a "special need" to conduct the search exists. The Court has found a "special need" in relation to public schools prior to this case, as well. See New Jersey v. T.L.O.. In this case, the Court found that "[L]egitimate privacy expectations are even less with regard to student athletes." They are subjected to a variety of communal observations and "they voluntarily subject themselves to a degree of regulation" by joining the team. The Court balanced the reduced expectation of privacy the student-athletes receive in this environment with the government's compelling interest of protecting "school athletes, where the risk of immediate

physical harm to the drug user or those with whom he is playing his sport is particularly high.” In doing so, it found the school district’s requirements reasonable.



*Board of Education v. Earls*  
536 U.S. 822, 122 S. Ct. 822 (2002)

**FACTS:** A public school district required all students that want to participate in extracurricular activities to submit to drug testing. The students were to take a drug test before participation and then submit to random testing while participating in the activity. The tests were limited to detecting the use of illegal drugs.

**ISSUE:** Whether the government drug testing of students that engage in extracurricular activities is reasonable?

**HELD:** Yes. The government (school system) is responsible for providing a safe learning environment, and students that choose to participate in extracurricular activities have accepted a reduced expectation of privacy.

**DISCUSSION:** The Court held that “[A] student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.” This means that, in certain circumstances, the government can exert greater control than would otherwise be appropriate for adults. Focusing a drug test on those students that involve themselves with extracurricular activities is fitting as some of these activities “require occasional off-campus travel and communal undress.” Perhaps, more importantly, all of the activities impose requirements that do not apply to non-participating students. Participation reduces the students’ expectation of privacy. The Court held that “[G]iven the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that



the invasion of students' privacy is not significant.”



*Chandler v. Miller*  
520 U.S. 305, 117 S. Ct. 305 (1997)

**FACTS:** A state law required candidates for specific state offices to certify that they had taken a drug test and the results were negative. The test date is scheduled by the candidate anytime within 30 days prior to ballot qualification.

**ISSUE:** Whether the government's process is designed to pursue the “special needs” set out in the statute?

**HELD:** No. The process the government attempted to implement is too inefficient to constitute an effective test.

**DISCUSSION:** The Court held that “[W]hen such ‘special needs’--concerns other than crime detection--are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context specific inquiry, examining closely the competing private and public interests advanced by the parties.” Where the public interests are substantial (as in Skinner, Vernonia and Von Raab), such warrantless, suspicionless searches are reasonable. However, each of these cases was warranted by a “special need.” In the case at hand, the Court noted that “Georgia’s certification requirement is not well designed to identify candidates who violate antidrug laws.” Candidates subject to the statute have notice of when the drug test is taking place. In fact, the candidates themselves schedule the drug tests. The government’s claim that these warrantless, suspicionless, special needs searches deters drug users from gaining high office within the state was not very persuasive. Likewise, the Court held that the state could produce no evidence that it currently had drug problems among its elected officials or that their officials perform risky, safety sensitive tasks.



*Wyman v. James*  
400 U.S. 309, 91 S. Ct. 381 (1971)

**FACTS:** A state's Aid to Families with Dependent Children (AFDC) program stressed "close contact" with beneficiaries, requiring home visits by caseworkers as a condition for assistance. This rule prohibited visitation with a beneficiary outside working hours, as well as forcible entry. The defendant, a beneficiary under the AFDC program, refused to permit a caseworker to visit her home after receiving several days' advance notice. She received notice that the government would consequently cancel her assistance.

**ISSUE:** Whether a home visitation is an unreasonable search and, when not consented to or supported by a warrant based on probable cause, would violate the defendant's Fourth Amendment rights?

**HELD:** No. The home visitation provided for by law concerning the AFDC program is a reasonable administrative tool and does not violate any right guaranteed by the Fourth Amendment.

**DISCUSSION:** The Court held, assuming that the home visit has some of the characteristics of a traditional search, the state's program was reasonable. The Court found multiple reasons for concluding the intrusion was reasonable. The home visit served the needs of the dependent child, it enabled the government to detect that the intended objects of the benefits were receiving them, the program stressed privacy by not unnecessarily intruding on the beneficiary's rights in her home, provided the government with essential information not obtainable through other sources, was conducted, not by a law enforcement officer, but by a caseworker, and was not a criminal investigation. Finally, the consequence of refusal to permit a home visitation, which does not involve a search for violations, is not a criminal prosecution but only the cancellation of benefits.



## 5. Border Inspections

*United States v. Ramsey*  
431 U.S. 606, 97 S. Ct. 1972 (1977)

**FACTS:** A Customs officer, without any knowledge of possible criminal activity, inspecting a sack of incoming international mail from Thailand. He spotted eight envelopes that were bulky and which he believed might contain merchandise. He opened the envelopes and found controlled substances inside.

**ISSUE:** Whether Customs officials must establish a level of suspicion before searching international mail?

**HELD:** No. The Customs official must only demonstrate a suspicion that the package contains merchandise.

**DISCUSSION:** The Court noted “searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration.” In the case at hand, Congress authorized the Customs officer to act through Title 19 U.S.C. § 482, which states, in part “[A]ny of the officers or persons authorized to board or search vessels may...search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law....” At the time the Customs officer opened the letters, he “knew that they were from Thailand, were bulky, were many times the weight of a normal airmail letter, and ‘felt like there was something in there.’” The Court found that the officer was in compliance with the statute in that he established a reasonable ‘cause to suspect’ that there was merchandise or contraband in the envelopes.



*United States v. Flores-Montano*  
541 U.S. 149, 124 S. Ct. 1582 (2004)

**FACTS:** During a routine border inspection, the Customs inspector directed the defendant to leave his vehicle, which was then removed to a secondary inspection station. There, another inspector tapping on the gas tank, which sounded solid. A mechanic was summoned, and within twenty-five minutes the gas tank was removed. Controlled substances were found inside.

**ISSUE:** Whether the removal of the gas tank required reasonable suspicion?

**HELD:** No. The routine (non-damaging) inspection of property at the border is reasonable without suspicion.

**DISCUSSION:** Routine searches made at the border are reasonable by virtue of the fact that they take place at the border. The Court stated that the government’s “interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.” Routine searches and seizures that take place at the border are reasonable to regulate the collection of duties and to prevent the introduction of contraband into the country. The expectation of privacy is less at the border than it is in the interior, which is a significant factor, as well, in allowing these searches.

The Court refused to require reasonable suspicion before the government removed the gas tank, in this instance, as the procedure did not damage his property in any noticeable manner. The government’s authority to conduct suspicionless searches at the border includes the authority to remove, disassemble, and reassemble a vehicle’s fuel tank. The Court also warned that “[W]hile it may be true that some searches of property are so destructive as to require a different result, this was not one of them.”



*Abel v. United States*  
362 U.S. 217, 80 S. Ct. 683 (1960)

**FACTS:** FBI and INS agents went to a hotel room the defendant occupied as a residence. The FBI agents suspected the defendant of espionage and attempted to obtain consent from him to search the hotel room. When the defendant refused to cooperate, the FBI agents signaled to the INS agents, who arrested the defendant on an INS administrative arrest warrant (for deportation). Evidence of his participation in espionage was discovered.

**ISSUE:** Whether the administrative arrest warrant (for deportation) was illegally used as a pretext to conduct a search for evidence of criminal (and unrelated) activity?

**HELD:** No. The FBI and INS did not act in “bad faith” in the use of the administrative warrant.

**DISCUSSION:** The Court was persuaded by the fact that the actions taken by the INS “differed in no respect from what would have been done in the case of an individual concerning whom no such information was known to exist.” The FBI shared information about the defendant that the INS would find useful but “did not indicate what action it wanted the INS to take.” Once it was discovered that the investigation for espionage could not be pursued, the FBI was not “required to remain mute.”

The result would have been entirely different had the Court found that the administrative warrant “was employed as an instrument of criminal law enforcement to circumvent the latter’s legal restrictions, rather than as a bona fide preliminary step in a deportation proceeding.” The Court stated that the test is “whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime.” If the government had undertaken these steps to avoid the

constitutional restraints on criminal law enforcement, the evidence would have been suppressed.



## **VII. Fourth Amendment - Exclusionary Rule**

### **A. Origins**

*Weeks v. United States*  
232 U.S. 383, 34 S. Ct. 341 (1914)

**FACTS:** Local police officers arrested the defendant without a warrant at his place of employment. Other officers went to his home. After a neighbor told the officers where the defendant secreted a key, they entered the house. The officers searched and found evidence of gambling paraphernalia that they turned over to the U.S. Marshal. Later that day, the Marshal returned to the house and found additional evidence. Neither the Marshal nor the local officers had a search warrant. The government used this evidence to convict the defendant of using the mails to transport gambling paraphernalia.

**ISSUE:** Whether the evidence seized by the U.S. Marshal was admissible?

**HELD:** No. As the evidence was obtained through unconstitutional means, it was not admissible.

**DISCUSSION:** An official of the United States seized the evidence acting under the color of office in direct violation of the Fourth Amendment. The Supreme Court held the federal government could not use unreasonably obtained evidence in a federal courtroom. However, the fruit of the first search conducted by the state officers was admissible. “As the Fourth Amendment is not directed to the individual misconduct of such officials [state and local police officers],” the fruits of the state search were admissible in a federal trial.

**NOTE:** The Fourth Amendment would not be completely

applicable to state actions until the Mapp v. Ohio decision in 1961.



*Elkins v. United States*  
364 U.S. 206, 80 S. Ct. 1437 (1960)

**FACTS:** State officers, having received information that the defendants possessed obscene motion pictures, obtained a search warrant for the defendant's house. The officers did not find any obscene pictures but they found various paraphernalia they believed was used to make illegal wiretaps. A state court held that the search was illegal under state law. During these state proceedings, federal officers, acting under a federal search warrant, obtained the items in state custody. Shortly after that, state officials abandoned their case and federal agents obtained a federal indictment.

**ISSUE:** Whether evidence obtained because of an unreasonable search and seizure by state officers, without involvement of federal officers, is admissible in a federal criminal trial?

**HELD:** No. Evidence obtained because of an unreasonable search and seizure by state officers is inadmissible in a federal criminal trial.

**DISCUSSION:** The Supreme Court created the exclusionary rule to prevent, not repair. Its purpose is to deter unreasonable activity - to compel respect for the constitutional guaranty to be free from unreasonable searches in the only effective way - by removing the incentive to disregard it. Evidence obtained by state officers during a search that, if conducted by federal officers, would have violated the Fourth Amendment, is inadmissible in a federal criminal trial.



*Mapp v. Ohio*  
367 U.S. 643, 81 S. Ct 1684 (1961)

**FACTS:** Three police officers arrived at the defendant's home pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." The officers knocked on the door and demanded entry. The defendant, after telephoning her attorney, refused to admit them without a search warrant.

Three hours later, the officers (now with four additional officers) again sought entry. When the defendant did not immediately come to the door, the officers forcibly opened at least one door to the house. Upon confronting the defendant, she demanded to see the search warrant. One officer held up a paper claimed to be a warrant. The defendant grabbed the "warrant" and placed it in her bosom. A struggle followed in which the officers recovered the piece of paper. They handcuffed the defendant because she had been "belligerent" in resisting their official rescue of the "warrant" from her person. Running roughshod over the defendant, a police officer "grabbed" her, "twisted" [her] hand, and she "yelled [and] pleaded with him" because "it was hurting." The officers discovered the obscene materials for which she was ultimately convicted of possessing in the course of a widespread search. At trial, the officers produced no search warrant, nor was the failure to produce one explained.

**ISSUE:** Whether the Fourth Amendment applies to state actions?

**HELD:** Yes. The Supreme Court made the Fourth Amendment and the exclusionary rule applicable to the states.

**DISCUSSION:** The Fourth Amendment right of privacy is enforceable against state actions through the due process clause of the Fourteenth Amendment. State officers were now regulated by the restrictions found in the Fourth Amendment.





## **B. Fruit of the Poisonous Tree**

*Silverthorne Lumber Co. v. United States*  
251 U.S. 385, 40 S. Ct. 182 (1920)

**FACTS:** Silverthorne was indicted and arrested. While he was being detained, DOJ representatives and the U. S. Marshal went to his corporate office. Without authority, they confiscated and copied his records. The federal trial court held that the officers unconstitutionally obtained the records and ordered their return. Based on the copies, the government obtained a new indictment, and served the defendant a subpoena for the original records.

**ISSUES:**

1. Whether the government can use information obtained from an illegal search and seizure to secure other evidence?
2. Whether the Fourth Amendment protects Corporations against unlawful searches and seizures?

**HELD:**

1. No. The government may not use illegally obtained evidence to gain additional evidence.
2. Yes. Corporations are protected by the Fourth Amendment.

**DISCUSSION:** Information gained by the government's unlawful search and seizure may not be used as a basis to subpoena that information. The essence of a rule prohibiting the acquisition of evidence in an illegal way is that it cannot be used at all. This is the "Fruit of the Poisonous Tree" doctrine. This doctrine prohibits law enforcement officers from doing indirectly what they are prohibited from doing directly. Also, the Court held that corporations enjoy a right be free from unreasonable searches and seizures.



*Nardone v. United States*  
308 U.S. 338, 60 S. Ct. 266 (1939)

**FACTS:** The government convicted the defendant of fraud, based on evidence secured through a wiretap. The conviction was reversed on appeal because the wiretap violated federal law. At the second trial, the government did not introduce the evidence from the wiretap. However, the defendant was again convicted. On appeal, he argued that the trial court should have suppressed much of the evidence against him, because the government would not have learned about it but for the fact that they had performed the original illegal wiretap.

**ISSUE:** Whether courts must exclude all evidence that the government gained directly and indirectly from an illegal search?

**HELD:** No. If the government performs an illegal search, and the information learned eventually led it to other evidence, that evidence may still be introduced, if the connection between that evidence and the illegal search is distant and tenuous.

**DISCUSSION:** If the only reason that the government has a particular piece of evidence is that it performed an illegal search, then a court will exclude evidence. However, if the trial judge determines that its connection to the illegal search is remote, the evidence may still be admissible.



*United States v. Ceccolini*  
435 U.S. 268, 98 S. Ct. 1054 (1978)

**FACTS:** The FBI investigated gambling in the defendant's place of business. A year after the FBI ended its surveillance, a police officer, while taking a break in the defendant's flower shop, went behind the customer counter to talk to one of the employees of the shop. While behind the counter, the officer saw an envelope that contained money, lying on the drawer of

the cash register. The officer picked up the envelope and upon examination, he found it contained money and gambling slips. The officer then placed the envelope back on the register and, without telling the employee what he had found, asked her to whom the envelope belonged. The employee said the envelope belonged to the defendant and that she had instructions to give it to someone. The officer's finding was reported to local detectives and to the FBI. Four months later, officers interviewed the employee. Six months later, the defendant testified before the grand jury that he had never taken wagers at his flower shop. The employee testified to the contrary, and the government indicted the defendant for perjury.

**ISSUES:** Whether the employee's testimony was inadmissible as "fruit of the poisonous tree?"

**HELD:** No. The employee's testimony was admissible as the illegal search was attenuated as to the employee's statements.

**DISCUSSION:** The time lapse between the officer's illegal search of the envelope and the store clerk's testimony as to the defendant's activities was significant. This attenuation was sufficient to evaporate the connection between the illegality and the testimony so as to render the testimony admissible. A substantial period of time elapsed between the illegal search and initial contact with the store clerk who was present at the time of the search. The clerk's testimony was an act of her own free will and was not coerced or induced by official authority because of the illegal search.



*United States v. Crews*  
445 U.S. 463, 100 S. Ct. 1244 (1980)

**FACTS:** The defendant was seen in the general area of some recent crimes. He resembled a police "lookout" that described the perpetrator. An eyewitness to one of the crimes tentatively identified the defendant to a law enforcement officer as he left a

nearby restroom.

The officers detained the defendant and summoned the detective assigned to the robberies. Upon his arrival ten to fifteen minutes later, his attempt to take a photograph of the defendant was thwarted by the inclement weather. The officers then took the defendant into custody, ostensibly because he was a suspected truant. The officers took a photograph of the defendant at the station.

The following day, the police showed the first victim a photo display including a photo of the defendant. She immediately selected the defendant as her assailant. Later, another victim made a similar identification. The officers arrested the defendant. At a court-ordered lineup, the two women who had previously made the photographic identifications positively identified the defendant as their assailant. The defendant was later identified in court by the two witnesses.

**ISSUE:** Whether the in-court identification was tainted by the identifications made through the illegal seizure?

**HELD:** No. In-court identification can be tainted by identifications made through an illegal seizure; however, in this instance, the eyewitness' identification was not the result of the illegal seizure.

**DISCUSSION:** The police knew the victim's identity before the arrest and was not discovered because of the unlawful seizure. Also, the unlawful police conduct did not bias the victim's capacity to identify the perpetrator of the crime.

"The exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality. . . . The pretrial identification obtained through use of the photograph taken during defendant's illegal detention cannot be introduced; but the in-court identification is admissible . . . because the police's knowledge of defendant's

identity and the victim's independent recollections of him both antedated the unlawful arrest and were thus untainted by the constitutional violation.”



*Trupiano v. United States*  
334 U.S. 699, 68 S. Ct. 1229 (1948)

**FACTS:** A Federal agent illegally seized evidence of an illicit alcohol still. The Supreme Court held that the officer had ample time to secure a search warrant and failed to do so.

**ISSUE:** Whether the defendant is entitled to the return of his contraband property?

**HELD:** No. The exclusionary rule prohibits the government from using illegally obtained evidence in its case-in-chief against the defendant. It does not compel the government to return contraband to the defendant.

**DISCUSSION:** Where officers illegally seize property in violation of the Fourth Amendment that is contraband, the owner is not entitled to its return. The exclusionary rule only entitles the defendant to have the unlawfully seized property suppressed as evidence.



## **C. Exceptions**

### **1. No Standing to Object**

*Rawlings v. Kentucky*  
448 U.S. 98, 100 S. Ct. 2556 (1980)

**FACTS:** Police officers, armed with an arrest warrant for Marquess, lawfully entered his house. Another resident of the house and four visitors (including the defendant) were present. While searching the house unsuccessfully for Marquess, several officers smelled marijuana and saw marijuana seeds. Two

officers left to obtain a search warrant and the other officers detained the occupants, allowing them to leave only if they consented to a body search. About forty-five minutes later, the officers returned with the search warrant for the premises. Cox, a visitor, was ordered to empty her purse, which contained controlled substances. Cox told the defendant, who was standing nearby, “to take what was his.” The defendant immediately claimed ownership of the controlled substances.

**ISSUES:** Whether the defendant had a right to complain about the intrusion into Cox’s purse?

**HELD:** No. The defendant did not have a reasonable expectation of privacy in the purse, and therefore had no standing to challenge the illegal search of it.

**DISCUSSION:** The defendant could not establish that he had a reasonable expectation of privacy in Cox’s purse. Therefore, he had no standing to object to the search of the purse. The fact that the defendant claimed ownership of the drugs in the purse did not entitle him to challenge the legality of a search of the purse itself. Even assuming the government violated the defendant’s Fourth Amendment rights by detaining him while other officers obtained a search warrant, exclusion of the defendant’s admissions would not be necessary unless his statements were the direct result of his illegal detention.



*Rakas v. Illinois*

439 U.S. 128, 99 S. Ct. 421 (1978)

**FACTS:** After receiving a robbery report, officers stopped the suspected getaway car being driven by the owner and in which the defendants were passengers. The officers ordered the occupants out of the car and searched the interior of the vehicle. They discovered a box of rifle shells in the locked glove compartment and a sawed-off rifle under the front passenger seat. The officers then arrested the defendants. They conceded that they did not own the automobile and were simply passengers.

**ISSUE:** Whether the defendants had standing to object to the search of the vehicle?

**HELD:** No. The defendants had no property or privacy interest in the interior of the vehicle.

**DISCUSSION:** The defendants admitted they had neither a property nor a possessory interest in the automobile. They had no interest in the property seized, and they failed to show any reasonable expectation of privacy in the glove compartment or under the seat of the vehicle in which they were passengers. Therefore, the defendants lacked standing to challenge the search of those areas.



*Wong Sun v. United States*  
371 U.S. 471, 83 S. Ct. 407 (1963)

**FACTS:** Agents illegally seized Johnny Yee, then “Blackie” Toy, who led the agents to Wong Sun’s neighborhood where Toy pointed out where Wong Sun lived. An agent rang a doorbell, identified himself as a narcotics agent to the woman on the landing, and asked for “Mr. Wong Sun.” The woman told the agent Wong Sun was “in the back room sleeping.” The agent and six other officers entered the apartment. One of the officers went into the back room and brought Wong Sun from the bedroom in handcuffs. A thorough search of the apartment followed, but the officers did not discover any narcotic; however, Wong Sun made incriminating statements to the officers.

The government tried Wong Sun for distribution of narcotics. The trial court admitted the government’s evidence over the objections by the defense that the following items were fruits of unlawful arrests and searches: (1) the statements made orally by Toy at the time of his arrest; (2) the heroin surrendered by Johnny Yee; (3) Toy’s pretrial unsigned statement; and (4) Wong Sun’s statements.

**ISSUE:** Whether the four items of evidence were admissible against the defendant Wong Sun?

**HELD:** Yes. Wong Sun did not have standing to object to the introduction of the first three pieces of evidence and Wong Sun's statements were admissible.

**DISCUSSION:** A search that is unlawful at its inception is not validated by what officers discover in that search. However, even though contraband seized by officers is inadmissible against one defendant, it is admissible against another who has not suffered the unauthorized invasion of his privacy. Defendants must have standing to object.

As for the defendant's statements, "The exclusionary rule has no application because the Government learned of the evidence from an independent source. . . . We need not hold that all evidence is the fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." The Court held that the illegality that led to the defendant's statements had become attenuated.



*United States v. Salvucci, Jr.*  
448 U.S. 83, 100 S. Ct. 2547 (1980)

**FACTS:** Salvucci and Zackular were charged with unlawful possession of stolen mail. Police officers used a warrant to search an apartment rented by Zackular's mother. The officers found twelve checks that formed the basis of the indictment. Salvucci and Zackular moved to suppress the checks on the ground that the affidavit supporting the application for the search warrant did not establish probable cause.

**ISSUE:** Whether the defendants had standing to object to



the search of the apartment?

**HELD:** No. The defendants may claim the benefits of the exclusionary rule only if the government has violated their Fourth Amendment rights.

**DISCUSSION:** Legal possession of a seized good is not a perfect substitute for determining whether the owner had a Fourth Amendment interest. Property ownership is only one factor to be considered in determining whether an individual has a Fourth Amendment right. Possession of a good may not be used as a substitute for a factual finding that the owner had a legitimate expectation of privacy in the area searched.



*United States v. Payner*  
447 U.S. 727, 100 S. Ct. 2439 (1980)

**FACTS:** The Internal Revenue Service launched an investigation into the financial activities of United States citizens in the Bahamas. Agents focused their suspicion on the Castle Bank. An IRS agent asked Casper, a private investigator and occasional informant, to learn what he could about the Castle Bank, of which the defendant had been a client. Casper cultivated a friendship with a Castle Bank Vice President. Casper introduced the Vice President to another private investigator, Ms. Kennedy. When Casper learned that the Vice President intended to spend a few days in Miami, he devised a scheme to gain access to bank records the Vice President might be carrying in his briefcase. The IRS agent approved the basic outline of the plan.

The Vice President arrived in Miami and went directly to Ms. Kennedy's apartment. Shortly after the two left for dinner, Casper entered the apartment using a key supplied by Kennedy. He removed the briefcase and delivered it to the agent. The agent supervised the photocopying of approximately 400 documents taken from the briefcase. The records were returned without the Vice President's knowledge of their removal. The

photocopied documents led to the indictment of one of the bank's clients for falsifying his income tax return.

- ISSUES:**
1. Whether the defendant has standing to object to the illegal search and seizure of the Vice President's briefcase?
  2. Whether the defendant's right to due process had been violated by the gross illegality of the government?

- HELD:**
1. No. The defendant does not have standing to block the admission of evidence derived through violations of the constitutional rights of others.
  2. No. The defendant's right to due process was not violated by the government's actions.

**DISCUSSION:** The defendant had no reasonable expectation of privacy in the Castle Bank documents taken from the Vice President. He neither owned nor had control over the briefcase. Therefore, he has no standing to object to the illegal search and seizure of the briefcase.

Although courts should not condone unconstitutional and possible criminal behavior by government agents, such behavior does not demand the exclusion of evidence in every case of illegality. Rather, courts must weigh the applicable principles against the considerable harm that would flow from indiscriminate application of the exclusionary rule.



*United States v. Padilla*  
508 U.S. 77, 113 S. Ct. 1936 (1993)

**FACTS:** Officers unreasonably stopped and arrested Arciniega, after finding cocaine in a car he drove. They subsequently arrested several others connected to the crime,

including the defendant. The government charged them with conspiracy to distribute and possess with intent to distribute cocaine. The defendant moved to suppress the evidence discovered during the investigation, claiming that it was the fruit of an unlawful investigatory stop of a car.

**ISSUE:** Whether the defendant has the ability to object to the illegal search of a co-conspirator's reasonable expectation of privacy?

**HELD:** No. Expectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims. Participants in a criminal conspiracy may have had such expectations or interests, but the conspiracy itself neither added to nor detracted from them.

**DISCUSSION:** A defendant can seek the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that his Fourth Amendment rights were violated by the challenged search or seizure. The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself. Co-conspirators and co-defendants are not accorded any special standing in establishing a reasonable expectation in each other's privacy.



*Alderman v. United States*  
394 U.S. 165, 89 S. Ct. 961 (1969)

**FACTS:** The defendants were suspected of transmitting information regarding the national defense of the United States to a foreign power. One of the defendants discovered that his place of business had been subject to electronic surveillance by the government. The government admitted that this surveillance was unlawful.

**ISSUE:** Whether the unlawfully obtained information is

excluded from all the defendants' trials?

**HELD:** No. Only the defendant that suffered the unreasonable intrusion by the government has standing to challenge the use of the evidence.

**DISCUSSION:** The Court reaffirmed its position that a "Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing." The rights found within the Fourth Amendment are personal, limiting redress only to the offended party. The Court was "not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."



*Mancusi v. DeForte*  
392 U.S. 364, 88 S. Ct. 2120 (1968)

**FACTS:** The defendant, a vice president of a union, objected to the government's use of a subpoena to seek union records. When the union refused to honor the subpoena, the government conducted a search and seized records from an office the defendant shared with other union officials. The seized records were used at trial against the defendant.

**ISSUE:** Whether the defendant has standing to object to the search for union records?

**HELD:** Yes. The capacity to claim the protection of the Fourth Amendment depends upon whether the area searched was one in which the defendant has a reasonable expectation of freedom from governmental intrusion.

**DISCUSSION:** The Court observed the papers in question belonged to the union, not the defendant. However, “one with a possessory interest in the premises might have standing.” As the defendant “shared an office with other union officers” he could “reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups.” Therefore, he had a reasonable expectation of privacy in the office, and standing to object to the search.



## **2. Good Faith Exception**

*United States v. Leon*  
468 U.S. 897, 104 S. Ct. 3405 (1984)

**FACTS:** An officer prepared an application for a warrant to search several places. The application was reviewed by several Deputy District Attorneys, and approved by a state court judge. The resulting searches produced large quantities of drugs. The government indicted the defendants and they filed motions to suppress the evidence seized. An appellate court granted the motions in part, concluding that the affidavit was insufficient to establish probable cause.

**ISSUE:** Whether a good faith exception to the exclusionary rule exists?

**HELD:** Yes. Law enforcement officers are entitled to rely on judicially signed search warrants in good faith.

**DISCUSSION:** The exclusionary rule should not apply to evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate. Reasonable minds frequently differ on whether a particular search warrant affidavit established probable cause. Officers are entitled to rely on the judgment of the issuing magistrate.

However, deference to a magistrate in search warrant matters is not boundless. A reviewing court's deference to a finding of probable cause does not preclude its inquiry into the knowing or reckless falsity of the affidavit on which probable cause was based. A magistrate must perform a neutral and detached function and not serve merely as a rubber stamp for the government. Suppression is an appropriate remedy if information in an affidavit misled the issuing magistrate that the affiant knew was false or should have known was false (reckless disregard for the truth).



*Massachusetts v. Sheppard*  
468 U.S. 981, 104 S. Ct. 3424 (1984)

**FACTS:** The defendant was a suspect in a murder case. An officer drafted an affidavit for a search warrant for the defendant's house. As it was Sunday, the local court was closed, and the officer had a difficult time finding a warrant application form. One officer found a warrant form for a controlled substance violation. He proceeded to make changes to the form to adapt it to his search but he failed to delete the reference to "controlled substance."

The officer took the affidavit form to the home of a judge. He told the judge that the form as presented dealt with controlled substances and showed the judge where he had crossed out subtitles. After unsuccessfully searching for a more suitable form, the judge said he would make the necessary changes. The judge then took the form, made some changes to it, and signed it. However, the judge did not change the section that authorized a search for "controlled substances." Officers searched the defendant's house and found several items of evidence. At a pretrial suppression hearing, the trial judge concluded the warrant violated the Fourth Amendment because it did not particularize the items to be seized. However, the judge admitted the evidence because the police had acted in good faith reliance on the warrant. The defendant was convicted.

- ISSUES:**
1. Whether the officers could reasonably believe that the search they conducted was authorized by a valid warrant?
  2. Whether the law requires the exclusion of evidence seized under a defective warrant issued by an appropriate judicial officer?

- HELD:**
1. Yes. The officers were justified in believing that the search they conducted was authorized by a valid warrant.
  2. No. The law does not mandate the exclusion of evidence seized under a defective warrant.

**DISCUSSION:** Citing United States v. Leon, the Supreme Court held that the exclusionary rule should not be applied when the officer conducting the search acted in reasonable reliance on a warrant issued by a neutral and detached magistrate. The officers took every necessary step that the Court could reasonably expect of them. Officers are entitled to rely on warrants that they reasonably believe are lawfully issued. The exclusionary rule is designed to deter unreasonable actions by law enforcement officers.



*Arizona v. Evans*  
514 U.S. 1, 115 S. Ct. 1185 (1995)

**FACTS:** The defendant was stopped for a routine traffic violation. During this encounter, the officer learned of an outstanding warrant for the defendant's arrest. The officer arrested the defendant and conducted a search of the automobile incident to that arrest, where he found marijuana. He charged the defendant with possession of a controlled substance. Later, the government learned that a court clerk should have previously removed the arrest warrant from the computer database. The defendant moved to suppress the marijuana as it was the fruit of an unlawful arrest.

**ISSUE:** Whether the fruit of the poisonous tree doctrine is applicable when the officer acted in good faith reliance on a computer warrant database?

**HELD:** No. The fruit of the poisonous tree doctrine is designed to deter the unreasonable actions of law enforcement officers.

**DISCUSSION:** Under the framework of the good faith exception to the exclusionary rule established by United States v. Leon, the rule does not require the suppression of evidence seized because of clerical errors of court employees. Exclusion is appropriate only if such action serves the remedial objectives of the rule. The exclusionary rule is designed to deter police misconduct, not mistakes of court employees. In the case at hand, there was no unreasonable or illegal police activity that needed to be deterred.



*Herring v. United States*  
555 U.S. 135, 129 S. Ct. 695 (2009)

**FACTS:** Officers arrested Herring based on an outstanding warrant listed in another law enforcement agency's database. A search incident to arrest revealed drugs and a gun. A short time later, the officers learned the warrant on Herring had been recalled months earlier; however, this information had never been updated in the agency's database. The government indicted Herring drug and gun charges. Herring moved to suppress the evidence on the ground that his arrest had been illegal because the warrant had been rescinded.

**ISSUE:** Whether the evidence discovered because of the unlawful arrest and search of Herring should have been suppressed under the exclusionary rule.

**HELD:** No. When mistakes by officers are the result of negligence and not systematic errors or reckless disregard of constitutional requirements, the



exclusionary rule does not apply.

**DISCUSSION:** The purpose of the exclusionary rule is to prevent the use of evidence obtained unlawfully and to deter future government misconduct. However, the fact that a Fourth Amendment violation occurred, does not necessarily mean the exclusionary rule applies. The court noted, “Exclusion (of evidence) has always been our last resort, not our first impulse.” Hudson v. Michigan. To trigger the exclusionary rule, government conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. In this case, there was no evidence that the errors in the agency’s arrest warrant database were routine or widespread. The arresting officer testified he never had reason to question information about a warrant listed in that agency’s database. In addition, other officers testified that they could remember no similar miscommunication ever happening.



*Davis v. United States*  
564 U.S. 229, 131 S. Ct. 2419 (2011)

**FACTS:** Officers conducted a vehicle search under the prevailing law at that time (New York v. Belton), which led to the arrest of the defendant. The defendant appealed his subsequent conviction. Two years after the defendant’s arrest, the Supreme Court modified its Belton ruling (Arizona v. Gant).

**ISSUE:** Whether searches conducted in compliance with prevailing law that is later overruled are subject to the exclusionary rule?

**HELD:** No. The purpose of the exclusionary rule is to discourage law enforcement misconduct, which would not be furthered by excluding evidence in these cases.

**DISCUSSION:** The exclusionary rule is a Court created mechanism to “deter future Fourth Amendment violations.” The Court stated “[F]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.” As in this case, where deterrence of officer misconduct is not obtainable, the Court will refrain from applying the exclusionary rule. Citing Herring v. United States, 555 U.S. 135 (2009), the Court explained the exclusionary rule should only be applied to obtain “meaningful deterrence, and culpable enough to be worth the price paid by the justice system.”



*Illinois v. Krull*  
480 U.S. 340, 107 S. Ct. 1160 (1987)

**FACTS:** A state statute, as it existed in 1981, required licensed motor vehicle and vehicular parts sellers to permit state officials to inspect certain records. Pursuant to the statute, a police officer entered the defendant’s wrecking yard and asked to inspect records of vehicle purchases. The defendant stated that the records could not be found but gave the officer a list of approximately five purchases. The officer received permission from the defendant to look at the cars in the yard. He discovered that three were stolen and a fourth had its identification number removed. The officer seized the cars and arrested the defendant. An appellate court subsequently held that the statute was unconstitutional because it allowed too much discretion in the officers conducting the examinations.

**ISSUE:** Whether the exclusionary rule commands the suppression of the evidence?

**HELD:** No. The Fourth Amendment’s exclusionary rule does not apply to evidence obtained by the government who acted in objectively reasonable reliance upon a statute.

**DISCUSSION:** The purpose of the exclusionary rule is to discourage officers from engaging in unreasonable searches and seizures. The application of the exclusionary rule in this case would not affect future police misconduct. Officers conducting such searches were simply fulfilling their responsibility to enforce the statute as written. If a statute is not clearly unconstitutional, reviewing courts cannot expect officers to question the judgment of the legislature that passed the law.

Applying the exclusionary rule to deter legislative misconduct is ineffective. There is also no indication that the exclusion of evidence seized pursuant to a statute subsequently declared unconstitutional would affect the enactment of similar laws. Law enforcement officers, not legislators, are the focus of the rule.



### 3. Impeachment Purposes

*Walder v. United States*  
347 U.S. 62, 74 S. Ct. 354 (1954)

**FACTS:** At his trial on the charge of sale of narcotics the defendant testified that he never sold or possessed narcotics. The government then sought to introduce evidence that it had unreasonably seized (a heroin capsule that had been found in his possession). The trial judge admitted this evidence over the defendant's objection that the police had obtained the heroin capsule through an unlawful search and seizure.

**ISSUE:** Whether unconstitutionally seized evidence is admissible for impeachment purposes?

**HELD:** Yes. The exclusionary rule does not create a license for the defendant to commit perjury.

**DISCUSSION:** The government cannot violate the Fourth Amendment and use the fruits of such unlawful conduct to secure a conviction. Nor can it use such evidence to support a

conviction on evidence obtained through leads from the unlawfully obtained evidence.

However, the defendant cannot turn the existence of the exclusionary rule to his own advantage by using it as a license to commit perjury on direct examination. The defendant's assertion on direct examination that he had never possessed narcotics opens the door, solely for the purpose of attacking his credibility. The illegally seized evidence can be used for impeachment purposes.



*United States v. Havens*  
446 U.S. 620, 100 S. Ct. 1912 (1980)

**FACTS:** Law enforcement officers stopped a man named McLeroth and searched him, finding cocaine in makeshift pockets in his underclothes. McLeroth implicated the defendant, who was then illegally seized and searched. The officers found a tee shirt in the defendant's luggage from which pieces had been cut. These missing pieces matched McLeroth's makeshift pockets.

The government tried the defendant for conspiracy to import cocaine. The trial court suppressed all evidence of the tee shirt as the fruit of an illegal search. The defendant testified in his own defense. During a proper cross-examination, the prosecutor asked the defendant if he had anything to do with sewing pockets into McLeroth's underclothes. The defendant answered "absolutely not."

The prosecutor offered to introduce evidence of the tee shirt for the limited purpose of impeaching the defendant's credibility. The court admitted the shirt over defense objections, with an instruction to the jury that they could not consider the shirt as evidence of a crime, but that they could consider it in deciding whether the defendant had testified truthfully.

**ISSUE:** Whether evidence suppressed as the fruit of an unlawful search and seizure may nevertheless be used to impeach a defendant's perjury?

**HELD:** Yes. Suppressed evidence can be used to impeach a defendant who perjures himself.

**DISCUSSION:** Defendants who lie on the witness stand do so at their peril. Our courts work best when witnesses tell the truth. Therefore, the courts have developed a strong public policy against perjury.

The exclusionary rule is not constitutionally mandated. Rather, it is a creation of case law, designed to discourage officers from violating the Constitution. As case law, the exclusionary rule is subject to judge-made exceptions based on public policy.

Here, the Supreme Court decided that the policy against perjury is sufficiently strong to limit the action of the exclusionary rule to direct evidence against a defendant. If a defendant chooses to take the stand and lie, evidence that would normally be inadmissible against him will now be admissible for the limited purpose of showing that the defendant is not truthful.



*James v. Illinois*  
493 U.S. 307, 100 S. Ct. 648 (1990)

**FACTS:** Police officers believed that James was involved in a shooting that left one person dead and another seriously injured. The day after the shooting, officers located James in a beauty parlor and took him into custody. At that time, James had black, curly hair. In response to questioning, James told the officers that on the previous day his hair had been reddish-brown, long and combed straight back. James said he had gone to the beauty parlor to have his hair dyed black and curled in order to change his appearance.

The trial court later ruled that the officers lacked probable

cause to support their warrantless arrest of James. As a result, the court held that James' statements concerning his hair were the fruit of a Fourth Amendment violation; therefore, they would not be admissible at trial.

At trial, witnesses for the state testified that the shooter had "reddish" slicked-back hair. James did not testify. However, a family friend testified for the defense, claiming that James' hair had been black on the day of the shooting. The state then sought to introduce James' suppressed statements concerning his hair to impeach the credibility of the defense witness' testimony.

**ISSUE:** Whether the impeachment exception to the exclusionary rule allows the prosecution in a criminal case to introduce illegally obtained evidence to impeach the testimony of all defense witnesses.

**HELD:** No. Illegally obtained evidence may not be used to impeach the testimony of a defense witness other than the defendant.

**DISCUSSION:** The Court felt that expanding the impeachment exception to all defense witnesses would have a chilling effect on a defendant's ability to present his defense for three reasons. First, defense witnesses pose difficult challenges. Hostile witnesses called by the defense might willingly invite impeachment. Friendly defense witnesses might, through simple carelessness, subject themselves to impeachment. Also, expanding the impeachment exception to encompass the testimony of all defense witnesses would dissuade some defendants from calling witnesses who would otherwise offer probative evidence.

Second, the defendant rarely fears a perjury prosecution since the substantive charge is usually much more compelling. A witness other than the defendant fears a prosecution for perjury. Therefore, the Court's need to deter perjured testimony is less than where the witness is the defendant, so that illegally

obtained evidence can be introduced against them.

Third, expansion of the exception would significantly weaken the exclusionary rules' deterrent effect on police misconduct by opening the door inadvertently to the admission of any illegally obtained evidence. This expansion would enhance the expected value to the prosecution of illegally obtained evidence by increasing the number of occasions when evidence could be used.



#### **4. Independent Source**

*Murray v. United States*  
487 U.S. 533, 108 S. Ct. 2529 (1988)

**FACTS:** Federal officers developed probable cause that a warehouse contained marijuana. Soon thereafter, the officers entered the warehouse without a warrant, observed a number of burlap-wrapped bales that were later found to contain marijuana, and left. The officers kept the premises under surveillance. The officers then obtained a warrant to search the warehouse; however, they did not mention their prior illegal entry or rely on any observations made while inside. With the warrant, the officers re-entered the warehouse and seized evidence.

**ISSUE:** Whether the evidence was secured through an independent source?

**HELD:** Yes. The Fourth Amendment does not require the suppression of evidence initially discovered during an illegal entry if that evidence is also discovered during a later search pursuant to a valid warrant that is wholly independent of the illegal entry.

**DISCUSSION:** The exclusionary rule prohibits the introduction into evidence, in a criminal prosecution, of tangible materials seized during an unlawful search, and of testimony

concerning knowledge acquired during an unlawful search. The exclusionary rule also prohibits the introduction of evidence, both tangible and testimonial, that is the product of the unlawful search.

Neither of those events occurred here. The “independent source” doctrine allows evidence secured in connection with a violation of the Fourth Amendment to be admissible if that evidence was discovered through a source independent of the illegality.

The Court held this rule applies to evidence initially obtained during an independent lawful search as well as evidence that is discovered during an unlawful search but is later obtained independently from activities untainted by the illegality. The evidence here would be admissible if the second search, conducted with a search warrant, was a genuinely independent source of that evidence. If the agents’ decision to seek that warrant was prompted by what they saw during the illegal entry or if information obtained during that entry was presented to the reviewing magistrate, independence does not exist.



## 5. Inevitable Discovery

*Nix v. Williams*

467 U.S. 431, 104 S. Ct. 2501 (1984)

**FACTS:** During the holiday season, a young girl disappeared from Des Moines, Iowa. Police officers arrested the defendant the next day 160 miles away.

After his initial appearance, the officers told the defendant’s attorney they would pick up the defendant and return him to the appropriate district without questioning him. During the return trip one of the officers initiated a conversation with the defendant, which resulted in the defendant stating where the victim’s body was located. As they approached the location, the defendant agreed to take the officers to the child’s body.



At that time, one search team was only two and one-half miles from where the defendant soon guided the officers to the body. The child's body was found next to a culvert in a ditch beside a gravel road within the search area.

**ISSUE:** Whether evidence that was about to be discovered through lawful channels must be suppressed if it is discovered through illegal means?

**HELD:** No. The evidence derived from the conversation was admissible as it would have been inevitably discovered.

**DISCUSSION:** The Court held that when illegally seized evidence could have been obtained through an independent source and efforts are underway that would lead to that discovery, exclusion of that evidence is not justified. While the independent source exception may not justify the admission of evidence here (as the evidence had been removed and could not be independently discovered), its rationale is wholly consistent with and justifies the adoption of the inevitable discovery exception to the exclusionary rule. Unlawfully obtained evidence is admissible if ultimately or inevitably it would have been discovered by lawful means.



## 6. Attenuation

*Utah v. Strieff*  
579 U.S. \_\_\_, 136 S. Ct. 2056 (2016)

**FACTS:** After receiving an anonymous tip concerning narcotics activity at a particular house, a police officer conducted surveillance. During this time, the officer saw numerous visitors arrive at the house and then depart after being there for only a few minutes. Based on these observations, the officer believed the occupants of the house were dealing drugs. When one of the visitors, later identified as Strieff, exited the house, the officer detained Strieff and asked him what he was doing at

the house. During the stop, the officer requested Strieff's identification and conducted a record check through his dispatcher. The dispatcher told the officer that Strieff had an outstanding arrest warrant for a traffic violation. The officer arrested Strieff, and during the search incident to arrest found a bag of methamphetamine and drug paraphernalia.

Even though the prosecutor conceded the officer lacked reasonable suspicion to stop Strieff, he argued the evidence seized from Strieff should not be suppressed because the existence of the valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband.

**ISSUE:** Whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of the drug-related evidence seized by the officer.

**HELD:** Yes. The Supreme Court held that the evidence seized from Strieff was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant.

**DISCUSSION:** The attenuation doctrine provides that evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote, or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated," (the right to be free from unreasonable seizures) "would not be served by suppression of the evidence obtained."

First, the Court determined the short amount of time between the unlawful stop and the search favored suppressing the evidence, as the officer discovered the contraband on Strieff's person only minutes after the stop.

Second, the Court held the officer's discovery of the valid arrest warrant was a critical intervening circumstance that was completely independent of the unlawful stop, which favored the State.

Finally, the Court found that the officer's unlawful stop of Strieff was, at most, negligent, and not a flagrant act of police misconduct.



## 7. Other Hearings

*United States v. Calandra*  
414 U.S. 338, 94 S. Ct. 613 (1974)

**FACTS:** Federal officers obtained a warrant to search the defendant's business premises for evidence of illegal gambling operations. The warrant specified the object of the search was bookmaking records and wagering paraphernalia. The search did not reveal any gambling paraphernalia. However, in exceeding the scope of the warrant, an officer found an index card suggesting that Dr. Walter Loveland had been making periodic payments to the defendant. The officer was aware the U.S. Attorney's Office was investigating possible violations of extortionate credit transactions, and that Dr. Loveland had been a victim. The defendant was subpoenaed by a special Grand Jury convened to investigate the proliferation of "loan sharking" activities. The defendant refused to respond because the information identifying him with these activities had been illegally obtained.

**ISSUE:** Whether grand jury witnesses can refuse to answer questions on the ground that they were developed on illegally seized evidence?

**HELD:** No. The grand jury may question the witness based on the illegally obtained material, and the witness may not refuse to answer on those grounds.

**DISCUSSION:** The exclusionary rule does not extend to grand jury proceedings. The rationale for this rule is that allowing the grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties, and would achieve only a

speculative and minimal advance of the exclusionary rule's purpose of deterring police that disregard Fourth Amendment requirements.



*Pennsylvania Board of Probation and Parole v. Scott*  
524 U.S. 357, 118 S. Ct. 2014 (1998)

**FACTS:** The defendant was released from prison on parole. Subject to that parole, he signed an express consent to search form that permitted parole officers to search his residence without a search warrant. Parole officers, acting on this consent, found evidence of a parole violation and attempted to revoke his parole.

**ISSUE:** Whether the exclusionary rule applies to parole revocation hearings.

**HELD:** No. There is no substantial societal interest protected by applying the exclusionary rule to parole revocation hearings.

**DISCUSSION:** The Court stated that the government's "use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution." The exclusionary rule's design and intent is to deter illegal searches and seizures but does not "proscribe the introduction of illegally seized evidence in all proceedings or against all persons." It is only to be employed by the courts where a substantial societal benefit can be obtained. The Court was hesitant to extent the exclusionary rule matters outside of the criminal courtroom because the "[A]pplication of the exclusionary rule would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings."



## VIII. RELATED SEARCH AND SEIZURE ISSUES

### A. Officer's Intent

*Whren v. United States*  
517 U.S. 806, 116 S. Ct. 1769 (1996)

**FACTS:** Plainclothes drug detectives were patrolling a known drug-use area in an unmarked police car. The officers noticed the defendant's vehicle because of its suspicious, though legal, activity. As the officers made a U-turn to get a closer look at the vehicle, it suddenly turned without signaling and sped off at an unreasonable speed. Within a short distance, the vehicle stopped behind other traffic at a red light. One plainclothes detective got out of the unmarked car, approached the vehicle, identified himself as a police officer, and directed the operator to park his vehicle. The officer acknowledged that the purpose of his direction was to get a better look at the suspect, not issue a traffic ticket. The officer observed two large plastic bags of what appeared to be crack cocaine in the defendant's hands. The detective arrested the defendant and the subsequent search of the vehicle yielded several types of illegal drugs.

**ISSUE:** Whether the officer's pretextual detention of a motorist for a traffic violation rendered the seizure unreasonable under the Fourth Amendment?

**HELD:** No. The reasonableness of the officer's seizure turns on whether the officer had the authority to make the seizure.

**DISCUSSION:** The Supreme Court found probable cause that the defendant's vehicle was involved in a traffic violation. The Court also found that the plainclothes officers would not have stopped the vehicle but for their concern that the vehicle might be involved in drug activity. As a general matter, the Court held that stopping an automobile is reasonable if the police officer has probable cause to believe that a traffic violation has occurred. Therefore, the Court was only left to

consider whether the officers' pretextual intent in stopping the vehicle converted an otherwise reasonable police activity into an unlawful stop. While previous decisions left no doubt that the officer's motive can invalidate inventory searches and administrative inspections, the Court has never held the officer's motives relevant in any other area. The Court held that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." The seizure was lawful.



*Devenpeck v. Alford*  
543 U.S. 146, 125 S. Ct. 588 (2004)

**FACTS:** An officer stopped the defendant based on suspicion that he was impersonating a police officer. On his approach to the defendant's vehicle, the officer noticed that the defendant had a special radio designed to receive police frequencies, and the defendant possessed handcuffs and a portable police scanner. The defendant's answers were evasive and inaccurate. After a supervisor arrived at the scene, he noticed a tape recorder in the front seat of the vehicle. The recorder was operating in the "record" position. The officers placed the defendant under arrest for violating a state privacy act, though their primary concern was that he was impersonating a police officer. At a later time, the privacy act charge was dismissed.

**ISSUE:** Whether the probable cause inquiry to arrest is confined to the known facts of the offense for which the arrest is made?

**HELD:** No. The government is only required to demonstrate that the arresting officer knew of facts that established probable cause of an offense at the time of the arrest.

**DISCUSSION:** The Court rejected outright a "closely related offense" rule, which would have permitted the officer to establish probable cause for offense (or a closely related offense)

for which the defendant was arrested alone. No other potential offenses could sustain the arrest, even if the officer could establish probable cause. The Supreme Court has previously established that the determination of probable cause depends upon the facts known to the arresting officer at the time of the arrest. Maryland v. Pringle. The officer's subjective motive for making the arrest is irrelevant. The Court stated the "[S]ubjective intent of the arresting officer, however it is determined (and of course subjective intent is always determined by objective means), is simply no basis for invalidating an arrest."



*Arkansas v. Sullivan*  
532 U.S. 769, 121 S. Ct. 1876 (2001)

**FACTS:** A police officer stopped the defendant for speeding and for having an improperly tinted windshield. After a brief discussion with the defendant, the officer realized that he was aware of "intelligence on [the defendant] regarding narcotics." The officer noticed a weapon when the defendant opened the car door in an (unsuccessful) attempt to locate his registration and insurance papers. He placed the defendant under arrest for speeding, driving without his registration and insurance documentation, carrying a weapon, and improper window tinting with the expectation of conducting an inventory search of the defendant's vehicle. During an inventory of the vehicle's contents, the officer discovered a controlled substance. The defendant moved to suppress this evidence on the grounds that the arrest was a pretext and sham to search.

**ISSUE:** Whether the officer's subjective intent is relevant in determining the reasonableness of a seizure?

**HELD:** No. The officer's subjective intent is immaterial in evaluating whether a seizure is reasonable.

**DISCUSSION:** The Supreme Court reaffirmed its holding in Whren, in which it noted its "unwillingness to entertain Fourth

Amendment challenges based on the actual motivations of individual officers.” The subjective intent of the officer making the seizure plays no role in determining whether probable cause to affect a seizure exists.

The U.S. Supreme Court also rejected the Arkansas Supreme Court’s contention that it may interpret the United States Constitution to provide greater protection than the U.S. Supreme Court. The U.S. Supreme Court reiterated its holding in Oregon v. Hass, 420 U.S. 7 (1975) that a state can make its own laws more restrictive of police activity but cannot do so as a matter of federal constitutional law in contradiction of U.S. Supreme Court decisions.



## **B. Other Issues**

*G. M. Leasing Corp. v. United States*  
429 U.S. 338, 97 S. Ct. 619 (1977)

**FACTS:** The IRS seized certain property of a corporation that was determined to be the alter ego of a delinquent taxpayer. Government agents seized automobiles registered in the corporation’s name, acting without warrants, on public streets, parking lots, and other open places. They also went to the defendant’s office, a cottage-type building, and made a warrantless forced entry. Pending further information as to whether the cottage was an office or a residence, the agents made no initial seizures. However, two days later they again entered the cottage without a warrant and seized books, records, and other property.

**ISSUES:**

1. Whether the seizure of the defendant’s property in public was reasonable?
2. Whether the warrantless intrusion into corporate property was reasonable?



- HELD:**
1. Yes. The Fourth Amendment was not violated by the warrantless seizures of the corporation's automobiles, since the seizures took place on public streets, parking lots, or other open places, and did not involve any invasion of privacy.
  2. No. The warrantless entry into the corporation's business office constituted an unconstitutional intrusion into privacy that violated the Fourth Amendment.

**DISCUSSION:** The Court held the warrantless automobile seizures, which occurred in public streets, parking lots, or other open areas, involved no invasion of privacy and were constitutional. The property was validly subject to seizure and securing the property in public did not invoke any further privacy interest of the defendant's. However, the warrantless entry into the privacy of the defendant's office violated the Fourth Amendment, since "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." The Fourth Amendment protects business premises, and corporations enjoy Fourth Amendment protections.



*Florida v. White*  
526 U.S. 559, 119 S. Ct. 1555 (1999)

**FACTS:** Officers observed the defendant use his car to deliver cocaine. This subjected the car to forfeiture under a state statute that prohibited the use of motor vehicles in the transportation of contraband. Several months later, the officers arrested the defendant at his place of employment for an unrelated crime. His car was parked in the employee parking lot. The officers seized his car, without a warrant, because they believed it was subject to the forfeiture statute.

**ISSUE:** Whether the officers may make a warrantless seizure of a car subject to forfeiture in a public place?

**HELD:** Yes. The automobile could be seized in a public place because it did not involve any greater intrusion than that authorized by law.

**DISCUSSION:** After the defendant used the automobile in violation of the forfeiture statute, the Court considered the automobile contraband. As the contraband was readily movable, the officers were reasonable in their warrantless seizure. This is to be distinguished from a seizure that takes place on private property as entry to make a seizure there constitutes an invasion of privacy. To seize an automobile on private property, officers must obtain a search warrant.



*Kolender v. Lawson*  
461 U.S. 352, 103 S. Ct. 1855 (1983)

**FACTS:** A state statute required persons who loiter or wander on the streets to identify themselves and to account for their presence when requested by a police officer. The state appellate court construed the statute to require a person to provide “credible and reliable” identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a Terry stop. The defendant was arrested and convicted under the statute.

**ISSUE:** Whether the state statute was constitutionally valid?

**HELD:** No. The statute, as drafted and as construed by the state court, was unconstitutionally vague on its face.

**DISCUSSION:** A state criminal statute that requires persons to identify themselves and to account for their presence when

requested by a police officer under circumstances that would justify a valid stop is unconstitutionally vague. This statute encourages arbitrary enforcement by failing to clarify what is contemplated by the requirement that a suspect provide a “credible and reliable identification.” The statute vests virtually complete discretion in the hands of the government to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. Therefore, the statute is void-for-vagueness. The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.



*Hübel v. Sixth Judicial District Court*  
542 U.S. 177, 124 S. Ct. 1494 (2004)

**FACTS:** An officer developed reasonable suspicion that the defendant was involved in an assault. He approached the defendant, explained he was investigating a crime, and asked to see the defendant’s identification. The defendant refused the officer’s eleven requests to see his identification. The officer arrested the defendant for violating a state law that prohibited “obstructing a public officer in discharging...any legal duty of his office.” The legal duty that the defendant obstructed was a statute that provided “[A]ny person so detained (Terry stop) shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.”

**ISSUE:** Whether the state statute is constitutional in that it requires persons to identify themselves during a Terry stop?

**HELD:** Yes. “Stop and identify” statutes do not change the nature of the seizure itself and the information obtained typically satisfies a significant governmental interest.

**DISCUSSION:** The Fourth Amendment requires all seizures to be reasonable. Reasonableness is determined “by balancing its intrusions on the individual’s Fourth Amendment interests against its promotion of legitimate government interests.” Delaware v. Prouse. The Court held that the state statute satisfies this standard. The statute does not change the character, duration or location of a stop and the officer’s demand for identity had an immediate purpose for the Terry stop.

The defendant’s Fifth Amendment argument failed to persuade the Court because disclosure of his name presented no real danger of incrimination. The Court has previously determined that the Fifth Amendment privilege only covers those communications that are testimonial, compelled, and incriminating. The defendant’s “refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him.”



*Gerstein v. Pugh*  
420 U.S. 103, 95 S. Ct. 854 (1975)

**FACTS:** The defendants were arrested and charged with felonies based on a prosecutor’s charging document. At that time, the state only required indictments for capital offenses. State case law held that the filing of an information foreclosed the defendant’s right to have a judge determine whether probable cause existed for the arrest.

**ISSUE:** Whether a person arrested and held for trial under an information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty?

**HELD:** Yes. The Fourth Amendment demands a judicial review of an arrest before an “extended restraint of liberty” is imposed.

**DISCUSSION:** The Court noted that in many instances, the government is permitted to act without the review of a judicial authority. The Court stated that “a policeman’s on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate’s neutral judgment evaporate.” At some point, the government’s need to secure the defendant subsides and “the suspect’s need for a neutral determination of probable cause increases significantly.” Based on these factors the Court held that “the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.” The fact that the prosecutor found substantial evidence to warrant a prosecution does not afford the citizen the protections contemplated in the Fourth Amendment.



*Zurcher v. Stanford Daily*  
436 U.S. 547, 98 S. Ct. 1970 (1978)

**FACTS:** During a civil disturbance, a group of demonstrators attacked a group of nine police officers. One officer was knocked to the ground and was struck repeatedly on the head. Another officer suffered a broken shoulder. All nine were injured. The officers were only able to identify two of their assailants, but one saw a photographer recording the assault. A special edition of the Stanford Daily (Daily), a student newspaper published at Stanford University, carried articles and photographs devoted to the protest. The photographs carried the byline of a Daily staff member and indicated that he had been in the area of the assault on the nine officers. A warrant was issued for an immediate search of the Daily’s offices for negatives, film, and pictures showing the events at the demonstration.

**ISSUE:** Whether the newspaper's reasonable expectation of privacy is also protected by a First Amendment "freedom of the press" protection from the government intrusion?

**HELD:** No. Organizations involved in traditional First Amendment activities are not provided extra constitutional protections.

**DISCUSSION:** A search of the premises of a newspaper is not unreasonable within the meaning of the Fourth Amendment and does not violate the First Amendment. There is no constitutional requirement that when the innocent party of a search is a newspaper, criminal evidence must generally be secured through a subpoena duces tecum rather than a search warrant. Where the government seeks materials presumptively protected by the First Amendment, the warrant requirement of the Fourth Amendment should be administered to leave as little as possible to the discretion or whim of the officer in the field.

**NOTE:** This decision led to the enactment of 42 U.S.C. § 2000aa (Privacy Protection Act) that places some additional burdens on government officials attempting to secure a search warrant of premises traditionally operated in First Amendment activities.



*A Quantity of Copies of Books v. Kansas*  
378 U.S. 205, 84 S. Ct. 1723 (1964)

**FACTS:** A state law authorized the seizure of allegedly obscene books. The law did not provide the possessors of these books the right to challenge the determination of obscenity until after the seizure of property. Law enforcement officers obtained an order under this law to seize and impound copies of certain paperback novels from a place of business.

**ISSUE:** Whether the procedures leading to the seizure of obscene materials was constitutionally sufficient?

**HELD:** No. The line between constitutionally protected material and obscene material is very fine. Procedures for seizing illegal material must not inhibit the lawful possession of other materials.

**DISCUSSION:** The Court held that “[S]tate regulation of obscenity must ‘conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.’” Bantam Books, Inc., v. Sullivan, 372 U.S. 58 (1963). As the state did not provide the defendant with the opportunity to challenge the determination of obscenity prior to the books’ seizure, the process was unconstitutional.



## **IX. THE FIFTH AMENDMENT**

### **A. Introductory Issues**

*Malloy v. Hogan*  
378 U.S. 1, 84 S. Ct. 1489 (1964)

**FACTS:** The defendant was arrested for and pled guilty to a misdemeanor gambling charge. While on probation, he was ordered to testify before a county referee conducting an investigation into gambling in the local area. The defendant refused to answer any questions on the grounds the answers may incriminate him. The court held the defendant in contempt for failing to answer the questions.

**ISSUE:** Whether the Fifth Amendment's self-incrimination clause applies to state actions?

**HELD:** Yes. Through the Fourteenth Amendment, the states must abide by the legal principles of the Fifth Amendment's Self-Incrimination Clause.

**DISCUSSION:** The Court held that the Due Process Clause of the Fourteenth Amendment to the Constitution requires states to respect the self-incrimination principles of the Fifth Amendment. The defendant may refrain from answering questions that would support a confession or provide a link in the chain of evidence needed to prosecute him.



*Corley v. United States*  
556 U.S. 303; 129 S. Ct. 1558 (2009)

**FACTS:** The defendant was arrested for assaulting a federal officer. He was also suspected of being involved in a bank robbery. The officers eventually took the defendant to their offices, located in the same building as the local magistrate judges. Some 9.5 hours after his arrest, the defendant waived his Miranda rights and gave an oral confession to the bank



robbery. He then stated “he was tired and wanted a break” which was granted. The following morning, the officers continued their interrogation, which resulted in the defendant’s written confession that afternoon. Twenty-nine and a half hours after his arrest, the officers presented the defendant to a magistrate judge for his initial appearance.

**ISSUE:** Whether statements made 9.5 and 29.5 hours after an arrest are involuntarily obtained?

**HELD:** Yes. Through statute and case law, statements obtained more than six hours after arrest and without the benefit of a preliminary hearing are presumed to be inadmissible.

**DISCUSSION:** The Court has previously held “a confession given seven hours after arrest inadmissible for ‘unnecessary delay’ in presenting the suspect to a magistrate, where the police questioned the suspect for hours ‘within the vicinity of numerous committing magistrates’” [citing Mallory v. United States]. Delay for the purpose of conducting an interrogation is the height of the meaning of “unnecessary delay” prohibited by the Federal Rules of Procedure 5(a). This is known as the McNabb-Mallory rule.

When Congress enacted 18 U.S.C. § 3501, the statute specified that statements (1) voluntarily given and (2) made within 6 hours of arrest, are admissible. The 6-hour time limit is extended when further delay is “reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate judge].” The Court found that this statute “modified McNabb-Mallory without supplanting it.” This means that admissibility determinations will hinge on “whether the defendant confessed within six hours of arrest (unless a longer delay was ‘reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate judge]’).” “If the confession came within that period, it is admissible, subject to the other Rules of Evidence.” Statements obtained beyond the six-hour rule can be suppressed if a court decides the delay was unreasonable or

unnecessary under the McNabb-Mallory rule.



*Brogan v. United States*  
522 U.S. 398, 118 S. Ct. 805 (1998)

**FACTS:** The defendant falsely answered “No,” when federal agents asked him whether he had received any cash or gifts from a company whose employees were represented by the union in which he was an officer. He was indicted on federal bribery charges and for making a false statement within the jurisdiction of a federal agency in violation of 18 U.S.C. § 1001 (false statements).

**ISSUE:** Whether the defendant has the right to assert a false defense?

**HELD:** No. Defendants have a constitutional right to remain silent during investigations, but no right to lie.

**DISCUSSION:** Although many Court of Appeals decisions had embraced the “exculpatory no” doctrine, the Court held that it is not supported by § 1001’s plain language. By its terms, § 1001 covers “any” false statement including the use of the word “no” in response to a question. The defendant’s argument that § 1001 does not criminalize simple denials of guilt proceeded from two mistaken premises: that the statute criminalizes only those statements that “pervert governmental functions,” and that simple denials of guilt do not do so. The Fifth Amendment confers a privilege to remain silent. It does not confer a privilege to lie.



*Mitchell v. United States*  
526 U.S. 314, 119 S. Ct. 1307 (1999)

**FACTS:** The defendant pled guilty to one count of conspiring to distribute five or more kilograms of cocaine. The

quantity of drugs involved was crucial, because this amount would be used by the court in sentencing. The defendant reserved the right to contest the drug quantity attributable to her under the conspiracy count. The trial court advised the defendant the drug quantity would be determined at her sentencing hearing. During the sentencing proceeding, the government offered testimony from others involved in the conspiracy to establish both the number of transactions in which the defendant had participated, as well as the amount of cocaine she sold. The defendant did not testify at the sentencing proceedings, relying instead on her attorney's attacks on the credibility of the government witnesses. The judge expressly stated that he was drawing an adverse inference from the defendant's failure to testify at her sentencing hearing.

**ISSUE:** Whether a defendant waives her privilege against self-incrimination in the sentencing phase of the case by pleading guilty?

**HELD:** No. A defendant who pleads guilty does not waive her Fifth Amendment right against self-incrimination in the sentencing phase of the case.

**DISCUSSION:** Nothing prevents a defendant from relying upon a Fifth Amendment privilege at a sentencing proceeding. "Treating a guilty plea as a waiver of the privilege at sentencing would be a grave encroachment on the rights of defendants." Otherwise, the government could compel a defendant to take the witness stand and under questioning, elicit information from the defendant that could contribute to an enhanced sentence. "Where a sentence has not yet been imposed, a defendant may have a legitimate fear of adverse consequences from further testimony." The government retains the burden of presenting facts "relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." By holding her silence against her, the judge impermissibly interfered with the defendant's exercise of her Fifth Amendment right against compulsory self-incrimination.



## B. Fourth Amendment Violations

*Dunaway v. New York*  
442 U.S. 200, 99 S. Ct. 2248 (1979)

**FACTS:** Following a robbery and murder, the government received information that implicated the defendant, though it did not amount to probable cause to arrest. Nevertheless, the officers illegally seized the defendant and brought him to the police station. Once at the station, the officers placed the defendant in an interrogation room, where he was given his Miranda rights. The defendant waived his rights and, within an hour of reaching the police station, made statements and drew sketches that implicated him in the crime.

**ISSUE:** Whether the statements and sketches made by the defendant are admissible if the government violates his Fourth Amendment rights?

**HELD:** No. The statements and sketches provided by the defendant were inadmissible, as they were the product of an illegal seizure under the Fourth Amendment.

**DISCUSSION:** The government effectively arrested the defendant when they seized him and took him to the station for questioning. While the government did not characterize the seizure as an “arrest,” there was no practical difference between how the defendant was treated and a traditional arrest. Because they did not have probable cause, the defendant’s seizure was in violation of the Fourth Amendment.

As for the defendant’s statements, the Court considered “whether the connection between the unconstitutional government conduct and the incriminating statements and sketches obtained during the defendant’s illegal detention were nevertheless sufficiently attenuated to permit their use at trial.” Among the factors to be considered are the time between “the

arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.” Applying these factors, the Court found a direct connection between the illegal arrest of the defendant and the statements and sketches obtained from him. Less than two hours had elapsed between the arrest and the statements; there were no “intervening” circumstances; and the clear purpose of the officers in taking the defendant into custody was to interrogate him. Although the defendant was properly advised of his Miranda rights and his statements were given “voluntarily,” these facts are not enough to break the direct causal connection between the illegal arrest and his statements.



*New York v. Harris*  
495 U.S. 14, 110 S. Ct. 1640 (1990)

**FACTS:** Officers had probable cause the defendant committed a murder. They went to his apartment to arrest him without a warrant. After arriving, the officers knocked on the door, displayed their guns and badges, and entered the defendant’s apartment without consent. Once inside, the officers read the defendant his Miranda rights, which he waived. In response to the officers’ questions, the defendant admitted his guilt in an oral statement and was arrested. The officers took the defendant to the police station, and again informed him of his Miranda rights. For a second time, the defendant admitted his guilt, this time in a signed, written statement. A third statement, this time videotaped, was later obtained from the defendant, even though he indicated that he wanted to end the interrogation. At trial, the defendant’s first and third statements were suppressed, while his second statement was admitted into evidence. The defendant was convicted of second-degree murder.

**ISSUE:** Whether the defendant’s second statement (the written statement taken at the police station) should have been suppressed because the police

violated his Fourth Amendment protections?

**HELD:** No. Where the government has probable cause to arrest a suspect, the exclusionary rule does not bar the government's use of a statement made by the defendant outside of his home, even though the statement was obtained after an illegal entry into the home.

**DISCUSSION:** In Payton v. New York, the Court held, "the Fourth Amendment prohibits the police from effecting a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." Here, while the police had probable cause to arrest the defendant, they entered his home without an arrest warrant and without his consent. Their entry into the defendant's home violated the Fourth Amendment. Any evidence obtained during this illegal entry is excluded as the fruit of an unreasonable search. However, "the rule in Payton was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects, like the defendant, protection for statements made outside their premises where the police have probable cause to make an arrest." In this case, the police had probable cause to arrest the defendant prior to entering his home. Because of this, the defendant "was not unlawfully in custody when he was removed to the station house, given Miranda warnings, and allowed to talk." While the entry into the defendant's home was illegal, his continued custody outside of the home was lawful. Accordingly, the statement taken at the station house "was not an exploitation of the illegal entry into the defendant's home" and the exclusionary rule should not apply.



*Brown v. Illinois*  
422 U.S. 590, 95 S. Ct. 2254 (1975)

**FACTS:** The government arrested the defendant without probable cause and without a warrant, and under circumstances indicating that the arrest was part of an

investigation. The defendant made two in-custody incriminating statements after he had been given Miranda warnings.

**ISSUE:** Whether being advised of his Miranda protections adequately removed the taint of the illegal arrest so as to allow the government the right to use the statements against the defendant at his trial?

**HELD:** It depends. Providing Miranda warnings to a suspect that was illegally arrested is only one factor in determining whether the “taint” of the illegal seizure has evaporated.

**DISCUSSION:** The Court held that the exclusionary rule serves different interests and policies under the Fourth and Fifth Amendment. The state court erred in adopting a per se rule that Miranda warnings in and of themselves break the causal chain between an illegal seizure (Fourth Amendment) and any subsequent statement (Fifth Amendment). Miranda warnings do not automatically amend Fourth Amendment transgressions. Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remained.

The question about whether a confession is voluntarily given must be answered on the facts of each case. Though the Miranda warnings are an important factor in resolving the issue, other factors must be considered. Trial courts should consider: the temporal proximity of the arrest to the confession, the intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. The burden of showing admissibility of in-custody statements of persons who have been illegally arrested rests with the government.



*Taylor v. Alabama*  
457 U.S. 687, 102 S. Ct. 2664 (1982)

**FACTS:** After a robbery, an incarcerated individual told police that he had heard that the defendant was involved. Based on this information, two officers arrested the defendant without a warrant, searched him, fingerprinted him, questioned him, and placed him a lineup. Subsequently, the police matched the defendant's fingerprints with those found on items that had been handled by one of the robbers. Once told of this, the defendant waived his rights and confessed. A court found that the tip from the incarcerated individual was insufficient to give police probable cause to obtain a warrant or to arrest petitioner.

**ISSUE:** Whether the confession obtained from the defendant was the fruit of an illegal seizure?

**HELD:** Yes. The initial fingerprints, which were themselves the fruit of an illegal arrest, and which were used to extract a confession from petitioner, were not sufficiently attenuated to break the connection between the illegal arrest and the confession.

**DISCUSSION:** The Court held that a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession. The Court identified several factors that should be considered in determining whether a confession has been purged of the taint of the illegal arrest: time between the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. The government bears the burden of proving that a confession is admissible.

Here, there was no meaningful intervening event. The illegality of the initial arrest was not cured by the facts that six hours elapsed between the arrest and confession, that the confession was "voluntary" for Fifth Amendment purposes because Miranda warnings were given; that the defendant was permitted



a short visit with his girlfriend; or that the police did not physically abuse petitioner. Nor was the fact that an arrest warrant, based on a comparison of fingerprints, was filed after the defendant had been arrested.



*Kaupp v. Texas*  
538 U.S. 626, 123 S. Ct. 1843 (2003)

**FACTS:** Suspecting (but without probable cause) that a 17 year-old defendant was involved in a murder, three officers went to his home at 3 a.m. on a January morning. They were granted entry to the home by the defendant's father, and immediately went to the defendant's room, where they found him asleep. One of the officers awoke the defendant with a flashlight, identified himself, and stated, "we need to go and talk." The defendant's reply was "okay." The officers handcuffed the defendant and led him out of the house, putting him into a patrol car. The defendant was shoeless and wearing only boxer shorts and a T-shirt. At no point did the officers tell the defendant that he was free to leave. The officers took the defendant to their interview room, removed the handcuffs, and advised him of his Miranda rights. After initially denying his involvement, the defendant made incriminating statements.

**ISSUE:** Whether the defendant's illegal arrest tainted his subsequent statements about his involvement in the crime?

**HELD:** Yes. Unless the government can demonstrate that the statements were not the direct result of an illegal arrest, the statements were involuntarily obtained.

**DISCUSSION:** The Court did not consider the defendant's statement "okay" as a basis for a consensual encounter. It found that the "removal from one's house in handcuffs on a January night with nothing on but underwear for a trip to a crime scene on the way to an interview room at law enforcement

headquarters” to be a seizure. Though the Supreme Court has authorized certain seizures on something less than probable cause, it has never approved the involuntary removal of a suspect from his home for investigative purposes absent probable cause or judicial authorization.

This illegal arrest requires suppression of any subsequent statements unless the government can demonstrate they were made as “an act of free will [sufficient] to purge the primary taint of the unlawful invasion” (citing Wong Sun v. United States). Significant factors to examine include the providing of Miranda warnings, the sequential nearness of the illegal arrest and the statement, intervening circumstances, and, especially, the reason and flagrancy of the government’s misbehavior. In this case, the Court noted that only one of these factors (providing of Miranda warnings) supported the government. The Court previously held that the provision of Miranda warnings does not, by itself, automatically break the misconduct chain. All other factors favored the defendant’s position.



### **C. Due Process**

*Foster v. California*  
394 U.S. 440, 89 S. Ct. 1127 (1969)

**FACTS:** Following a robbery, officers presented a lineup to the only witness to the crime. The defendant was placed in the lineup with two other men. While the defendant was approximately six feet tall, the other two men were six to seven inches shorter. Additionally, the defendant wore a leather jacket that the witness stated was similar to one wore by the robber. When the witness was unable to identify the defendant as the robber, he requested, and was granted, the opportunity to speak with the defendant alone. He was still unable to identify the defendant as the robber. Approximately 10 days later, a second lineup was held, this time with five men. The defendant was the only man in the second lineup that had also appeared

in the first lineup. This time, the witness positively identified him as the robber. He was ultimately convicted of robbery.

**ISSUE:** Whether the lineup procedures were conducted in a manner that could produce mistaken identification so as to deny due process of law?

**HELD:** Yes. Judged by the “totality of the circumstances,” the lineup was unnecessarily suggestive of the defendant as the criminal.

**DISCUSSION:** The Supreme Court held that the identification procedures utilized by the government violated the defendant’s right to due process. Looking at the “totality of the circumstances” in this case, “the suggestive elements in this identification procedure made it all but inevitable that the witness would identify the defendant as the robber, whether or not he was in fact the man.” In the first lineup, the defendant stood out from the other two men due to the physical differences. He was also the only participant in the lineup wearing clothing similar to that worn by the actual robber. Because the witness was still unable to identify the defendant, the government permitted a “one on one” confrontation between the witness and the defendant. “The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.” The second lineup was unfairly suggestive because the defendant was the only participant who was also in the first lineup. “In effect, the police repeatedly said to the witness, ‘This is the man.’ This procedure so undermined the reliability of the eyewitness identification so as to violate due process.”



*Stovall v. Denno*  
388 U.S. 293, 87 S. Ct. 1967 (1967)

**FACTS:** A doctor was stabbed to death in his home. His wife was also stabbed by the attacker, but survived. She underwent major surgery to save her life but it was unclear

whether she would survive. The officers found evidence at the crime scene that led them to the defendant, who was arrested the day after the assault. The next day, the officers arranged to have the defendant brought to the injured woman's hospital room to determine if she could identify the defendant as the murderer. During this identification process, the defendant was handcuffed to one of the five officers accompanying him, and was the only African-American in the room. The defendant was also required to say some words for the purpose of voice identification. The victim identified the defendant as the murderer.

**ISSUE:** Whether the identification procedures utilized by the officers was so unnecessarily suggestive so as to violate the defendant's due process rights?

**HELD:** No. Judged by the "totality of the circumstances," the identification procedures were necessary to secure significant information.

**DISCUSSION:** "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." Nonetheless, whether identification procedures constitute a due process violation requires the Court to look to the "totality of the circumstances" surrounding the identification. In this case, it was evident that the procedures utilized by the police were necessary. The victim was the only person who could either identify the defendant or exonerate him for the crime. "Her words, and only her words, could have resulted in freedom for the defendant. The hospital was not far from the courthouse and jail. No one knew how long the victim might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that the victim could not visit the jail, the officers followed the only feasible procedure and took the defendant to the hospital room."



*Neil v. Biggers*  
409 U.S. 188, 93 S. Ct. 375 (1972)

**FACTS:** The defendant was convicted of rape. Some of the evidence consisted of testimony concerning the victim's visual and voice identification at a stationhouse show-up that occurred seven months after the crime. The victim had been in the presence of the assailant for a significant amount of time and had several opportunities to directly observe him both indoors and outdoors. She testified that she had "no doubt" that the defendant was her assailant. She had previously given the government a description of her assailant that was confirmed by an officer. The victim had not identified any of the others who were presented at previous show-ups, lineups, or through photographs. Officers asserted that they used the show-up technique because they had difficulty in finding other individuals generally fitting the defendant's description as given by the victim for a lineup.

**ISSUE:** Whether the show-up was so impermissibly suggestive of the defendant's identification as the perpetrator, to deprive him of his right to due process?

**HELD:** No. While the station-house identification may have been suggestive, under the "totality of the circumstances," the victim's identification of the defendant was reliable.

**DISCUSSION:** The Supreme Court held that the identification of the defendant was reliable. Eyewitness identification at trial following a pretrial identification will be set aside only if the pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. The factors to be considered in evaluating the likelihood of misidentification include:

- 1) The opportunity of the witness to view the criminal at the time of the crime,

- 2) The witness's degree of attention,
- 3) The accuracy of the witness's prior description of the criminal,
- 4) The level of certainty demonstrated by the witness at the confrontation,
- 5) The length of time between the crime and the confrontation.

Based on these factors, the witness's identification of the defendant was reliable.



*Perry v. New Hampshire*  
565 U.S. 228, 132 S. Ct. 716 (2012)

**FACTS:** An officer was called to an apartment parking lot to investigate a suspicious person in the early morning hours. Upon her arrival, she found the defendant engaged in what appeared to be the burglary of a motor vehicle. A second officer arrived and detained the defendant in the parking lot while the initial officer visited an eyewitness to the crime. The eyewitness was located in her residence on the fourth floor of the apartment complex. The officer asked for a description of the perpetrator of the crime and the eyewitness provided a basic description of the defendant. When the officer asked for a more specific description, the eyewitness "pointed to her kitchen window and said the person she saw breaking into...[the] car was standing in the parking lot, next to the police officer." The officers arrested the defendant. Approximately one month later, the officers showed the eyewitness a photographic array that included a picture of the defendant but the eyewitness was not able to identify the perpetrator of the crime.

**ISSUE:** Whether a suggestive eyewitness circumstance that occurred through no influence of the government can amount to a Due Process violation?

**HELD:** No. The Due Process Clause is reserved as a protection against inherent governmental misconduct.

**DISCUSSION:** The Court is very concerned with the enormous influence the government has in the pretrial eyewitness identification process. A principle of due process is that trial courts screen these events to ensure that the government has provided a fair method of establishing the identity of the offender. However, the Court noted that “[W]e have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers.” This is because all prior decisions have aimed “to deter police from rigging identification procedures, for example, at a lineup, show-up, or photograph array.”

There were reasons to question the accuracy of the eyewitness’ identification in this case: the parking lot was dark; the defendant was standing next to a police officer; he was the only African-American male in the vicinity; and the witness was later unable to pick the defendant out of a photographic array. However, because the government’s procedures were not unnecessarily suggestive, the reliability of this testimony was for the jury to consider, not the trial court to suppress. “Only where the police employ suggestive identification techniques...does the Due Process Clause require a trial court to assess the reliability of identification evidence before permitting a jury to consider it.”



*Simmons v. United States*  
390 U.S. 377, 88 S. Ct. 967 (1968)

**FACTS:** Two unmasked men robbed a bank. Five bank employees witnessed the robbery, and on that same day gave the FBI written statements. The next morning FBI agents obtained and showed separately to each of the witnesses some snapshots consisting mostly of group pictures of the defendants, and others. Each witness identified the defendant

as one of the robbers from the pictures.

**ISSUE:** Whether the use of photographs to identify the defendant as the culprit was a deprivation of his due process rights?

**HELD:** No. The use of photographs is an effective way to identify perpetrators of crime if done so in a fair manner.

**DISCUSSION:** The Court came to this determination in light of the “totality of the circumstances.” Each case involving pretrial identification by photographs has to be considered on its own facts. The court will set aside convictions based on eyewitness identification at trial on the grounds of prejudice only if the pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. In this case, the use of photographic identification by the FBI was necessary: a serious felony had been committed; the perpetrators were at large; the inconclusive clues led to the defendant; and the agents had to determine swiftly if they were on the right track.



*Manson v. Brathwaite*  
432 U.S. 98, 97 S. Ct. 2243 (1977)

**FACTS:** An undercover officer purchased heroin from a seller through the open doorway of an apartment. The transaction took two or three minutes while the officer stood within two feet of the seller in a hallway illuminated by natural light. The undercover officer described the seller to another officer, who suspected the defendant based on this description. The suspecting officer left a photograph of the defendant in the undercover officer’s office. He viewed it two days later and identified it as the picture of the seller. The defendant was charged with, and convicted of, possession and sale of heroin.



**ISSUE:** Whether the photograph tainted the undercover officer's identification of the defendant?

**HELD:** No. Based on the "totality of the circumstances" the eyewitness' identification of the defendant was reliable.

**DISCUSSION:** Reliability is the linchpin in determining the admissibility of identification testimony for identifications occurring prior to and after arrest. Reliability depends on the "totality of the circumstances." The factors to be weighed against the corrupting effect of the suggestive procedure in assessing reliability are whether the witness had an opportunity to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Under the "totality of the circumstances" in this case, there does not exist a very substantial likelihood of irreparable misidentification. A trained officer with a sufficient opportunity to view the suspect, who accurately described him, positively identified the defendant's photograph as that of the suspect, and made the photograph identification only two days after the crime is reliable.



#### **D. Testimonial Evidence**

*Schmerber v. California*  
384 U.S. 757, 86 S. Ct. 1826 (1966)

**FACTS:** The defendant was the apparent driver involved in an accident. At the direction of an officer, and without the defendant's consent, a physician at the hospital drew blood from the defendant's body. The chemical analysis of this sample indicated that the defendant was intoxicated. At trial, the chemical analysis was admitted into evidence against the defendant over his objection. Specifically, the defendant claimed that the withdrawal of the blood violated his

constitutional protections, including his Fifth Amendment privilege against compelled self-incrimination.

**ISSUE:** Whether the withdrawal of the defendant's blood, as well as the admission of the chemical analysis, violated the defendant's Fifth Amendment privilege against compelled self-incrimination?

**HELD:** No. The defendant's blood does not constitute a testimonial admission.

**DISCUSSION:** The Court held that the Fifth Amendment privilege against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question did not involve compulsion to these ends." The right against self-incrimination protects a suspect's communications, in whatever form they may take. However, the privilege does not protect a suspect from providing "real or physical evidence," such as fingerprints, DNA or blood for identification.



*United States v. Dionisio*  
410 U.S. 1, 93 S. Ct. 764 (1973)

**FACTS:** A federal grand jury subpoenaed various individuals, including the defendant, to obtain voice exemplars to compare them to previously recorded conversations. The defendant refused to comply, claiming that providing the voice exemplars would violate his Fifth Amendment right to be free from compelled self-incrimination.

**ISSUE:** Whether compelling a defendant to provide voice exemplars violated the defendant's Fifth Amendment right against self-incrimination?

**HELD:** No. The sound of a suspect's voice is not testimonial in nature and is not protected by the defendant's Fifth Amendment right against self-incrimination.

**DISCUSSION:** The privilege against self-incrimination "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." The privilege prohibits compelling communications or testimony. In this case the voice recordings were to be used solely to measure the physical properties of the witnesses' voice, not for the communicative content of what was said.



*United States v. Mara*  
410 U.S. 19, 93 S. Ct. 774 (1973)

**FACTS:** A grand jury twice subpoenaed the defendant to appear and provide handwriting and printing exemplars for comparison with documents already in the grand jury's possession. The defendant refused, asserting that requiring him to produce the exemplars would violate his Fourth Amendment protections. Additionally, because he had not seen the documents in the grand jury's possession, the defendant alleged that the government might actually be seeking "testimonial" communications (i.e., the contents of the handwriting exemplars, as opposed to the physical characteristics of his writing) in violation of his Fifth Amendment rights.

**ISSUE:** Whether compelling a defendant to provide handwriting exemplars violates the defendant's Fifth Amendment right against self-incrimination?

**HELD:** No. Compelling a defendant to provide handwriting exemplars does not require the defendant to make a communicative assertion.

**DISCUSSION:** The Supreme Court emphasized that the Fifth Amendment protection against self-incrimination did not protect the production of handwriting exemplars. “If the Government should seek more than the physical characteristics of the witness’ handwriting - if, for example, it should seek to obtain written answers to incriminating questions or a signature on an incriminating statement - then, of course, the witness could assert his Fifth Amendment privilege against compulsory self-incrimination.” Here, the grand jury was not concerned with the contents of the writings, but rather with the physical characteristics of the individual writer.



### 1. Compelled

*Brown v. Mississippi*  
297 U.S. 278, 56 S. Ct. 461 (1936)

**FACTS:** The defendants were convicted of murder. The only evidence offered against the defendants were confessions obtained from them through various forms of torture. For example, one of the defendants was repeatedly hung by the neck from a tree in an attempt to get him to confess. He ultimately confessed to the crime only after he was beaten and threatened with continued beatings. Two other defendants confessed only after they were laid over chairs and had their backs cut to pieces with a leather strap.

**ISSUE:** Whether the defendants’ convictions, which rested solely upon confessions secured by violence, were valid under the due process clause of the Fourteenth Amendment?

**HELD:** No. The convictions were not obtained in a fundamentally fair way.

**DISCUSSION:** While states are allowed some latitude in regulating the procedures of their courts, they are still required to comply with the due process clause of the Fourteenth

Amendment. “The rack and torture chamber may not be substituted for the witness stand.” In this case, the methods used by the government to obtain the confessions were so egregious that they deprived the defendants of their right to the due process of law guaranteed by the Fourteenth Amendment. As stated by the Court: “It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions” in this case.



*Andresen v. Maryland*  
427 U.S. 463, 96 S. Ct. 2737 (1976)

**FACTS:** The defendant was being investigated for fraud. Officers obtained a search warrant to search his office for business records containing statements made by the defendant. Various business records, some of which contained statements made by the defendant, were found and used in a criminal trial against him.

**ISSUE:** Whether the defendant’s business records were obtained in violation of his Fifth Amendment right to be free from self-incrimination?

**HELD:** No. The government neither compelled the defendant to make the statements nor compelled him to bring the statements to the courthouse for use against him.

**DISCUSSION:** The Fifth Amendment serves as a prohibition against compelling individuals to bear witness against himself or herself. The Court noted that the defendant was not compelled to do or say anything. The government did not compel the defendant to create the records, bring the records to the criminal courtroom, or identify the records as his property. The Court quoted Mr. Justice Holmes in stating, “A party is privileged from producing the evidence but not from its production,” cited in Johnson v. United States, 228 U.S. 457 (1913).



*United States v. Doe*  
465 U.S. 605, 104 S. Ct. 1237 (1984)

**FACTS:** The defendant owned several sole proprietorships. During a grand jury investigation of corruption, the grand jury served subpoenas on the defendant, seeking the production of voluntarily prepared business records of the sole proprietorships. The defendant moved to quash the subpoenas on two grounds. First, he claimed that the subpoenaed records were privileged under the Fifth Amendment. Second, he claimed that the act of producing the requested documents was privileged under the Fifth Amendment.

- ISSUES:**
1. Whether voluntarily created business records are protected by the Fifth Amendment privilege against self-incrimination?
  2. Whether the act of compelling the production of the requested business records is protected by the Fifth Amendment privilege against self-incrimination?

- HELD:**
1. No. Business records that are voluntarily created are not protected by the Fifth Amendment privilege against self-incrimination as they were not compelled in their creation.
  2. Yes. The act of compelling the production of requested business records (by subpoena) is protected by the Fifth Amendment privilege against self-incrimination.

**DISCUSSION:** The Fifth Amendment protects the defendant only from compelled self-incrimination. However, “where the preparation of business records is voluntary, no compulsion is present.” In other words, “if the party asserting the Fifth

Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged.”

While the contents of the subpoenaed business records are not privileged under the Fifth Amendment, the act of producing the records is privileged. By producing the documents requested in the subpoena, the defendant is admitting the document’s existence, that the defendant has possession or control over the document, and that the documents being turned over are authentic. These acts “may have testimonial aspects and an incriminating effect.” However, the government could compel the defendant to produce the documents by providing him with “use” immunity, pursuant to 18 U.S.C. §§ 6002-6003, or secure them through the use of a search warrant.



*United States v. Hubbell*  
530 U.S. 27, 120 S. Ct. 2037 (2000)

**FACTS:** The defendant pled guilty to charges of mail fraud and tax evasion. The plea agreement required the defendant to provide the prosecution with “full, complete, accurate, and truthful information” about matters relating to another investigation. The subsequent prosecution of the defendant resulted from the government’s determination that the defendant had violated that plea agreement. While incarcerated, the defendant was served with a grand jury subpoena calling for the production of eleven broad categories of documents. Subsequently, the defendant appeared before the grand jury and invoked his Fifth Amendment privilege against self-incrimination. In response to questioning, the defendant refused “to state whether there [were] documents within [his] possession, custody, or control responsive to the subpoena.” He was then granted “use” immunity under 18 U.S.C. § 6002, and produced documents related to the subpoena. The contents of the documents provided the prosecutor with the information that led to a second prosecution of the defendant.

- ISSUES:**
1. Whether the Fifth Amendment privilege against self-incrimination protects a witness from being compelled to disclose the existence of incriminating documents that the government is unable to describe with reasonable particularity?
  2. Whether “use” immunity under 18 U.S.C. § 6002 prevents the government from using information produced by a witness pursuant to a grant of immunity in preparing criminal charges against that witness?

- HELD:**
1. Yes. The constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence.
  2. Yes. The “derivative use” of the testimonial act of producing the records is covered by the immunity granted under 18 U.S.C. § 6002.

**DISCUSSION:** The Court held that “the act of production” itself may implicitly communicate “statements of fact.” By “producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic.” Here, the answers to the prosecutor’s questions and the act of production could certainly communicate information about the existence, custody, and authenticity of the documents. In addition, the Fifth Amendment protection extends to compelled statements that lead to the discovery of incriminating evidence, even though the statements themselves are not incriminating and are not introduced into evidence. It is undeniable that providing a catalog of existing documents fitting within any of the eleven broadly worded subpoena categories could provide a



prosecutor with a “lead to incriminating evidence” or “a link in the chain of evidence needed to prosecute.” Additionally, it was necessary for the defendant to make extensive use of “the contents of his own mind” in identifying the hundreds of documents responsive to the requests in the subpoena.



*United States v. Balsys*  
524 U.S. 666, 118 S. Ct. 2218 (1999)

**FACTS:** The defendant was a resident alien who obtained admission to the United States in 1961. In his application for admission, he stated that he had served in the Lithuanian army between 1934 and 1940, and had lived in hiding in Lithuania between 1940 and 1944. Further, he swore that the information was true, and signed a statement of understanding that if his application contained any false information or materially misleading statements, or concealed any material fact, he would be subject to criminal prosecution and deportation. The Office of Special Investigations (OSI), which was created to institute denaturalization and deportation proceedings against suspected Nazi war criminals, began investigating the defendant to determine if he had participated in Nazi persecution during World War II. If proven, this participation could have resulted in the defendant being deported. Pursuant to a subpoena issued by OSI, the defendant appeared to testify at a deposition, but refused to answer questions about his wartime service and his immigration to the United States. He invoked his Fifth Amendment right against compelled self-incrimination, claiming that his answers could subject him to criminal prosecution by Lithuania, Israel, and Germany.

**ISSUE:** Whether an individual can claim the Fifth Amendment privilege against self-incrimination based upon fear of prosecution by a foreign nation?

**HELD:** No. The Fifth Amendment privilege against self-incrimination may only be based upon fear of prosecution within the United States.

**DISCUSSION:** The self-incrimination clause of the Fifth Amendment provides a privilege against self-incrimination in “any criminal case.” This means that an individual has a right against compelled self-incrimination if what he says “could be used in a criminal proceeding against him brought by the Government of either the United States or one of the States.” However, in this case, the defendant did not invoke the privilege based upon a fear of prosecution by the United States or one of the states. The Court held that possible criminal prosecution by a foreign government is not subject to our constitutional guarantees and, therefore, is beyond the scope of the Fifth Amendment’s protections.



## 2. Holder of the Privilege

*Braswell v. United States*  
487 U.S. 99, 108 S. Ct. 2284 (1988)

**FACTS:** The defendant incorporated a business in which he was the sole shareholder. The defendant moved to quash a grand jury subpoena for the corporate records on the basis that the act of producing the records would violate his Fifth Amendment right to be free from self-incrimination.

**ISSUE:** Whether a sole shareholder of a corporation, as custodian of the records, may resist a subpoena for corporate records on the ground that the act of production would incriminate him in violation of his Fifth Amendment rights?

**HELD:** No. Corporations do not enjoy the Fifth Amendment self-incrimination protection.

**DISCUSSION:** Corporations do not enjoy a Fifth Amendment privilege. The Fifth Amendment protects only private papers and records. However, the custodian of corporate records, regardless of how small the corporation may be, can claim a privilege.



*Couch v. United States*  
409 U.S. 322, 93 S. Ct. 611 (1973)

**FACTS:** The defendant turned over various business and tax records to her accountant for several years. The IRS summoned the accountant to bring these records to a court proceeding. The accountant, ignoring the summons, turned the records over to the defendant's attorney.

**ISSUE:** Whether a defendant may invoke a Fifth Amendment privilege against self-incrimination to prevent the production of her business and tax records in possession of her accountant?

**HELD:** No. Since the defendant was not in possession of the records, she could not object to the production by her accountant. The defendant was not compelled to do or say anything.

**DISCUSSION:** The Fifth Amendment privilege is a personal privilege that adheres to the person and not to the information that may incriminate. A person cannot be compelled to produce information but they cannot prevent the production of incriminating documents that are in the hands of others through the self-incrimination protection.



*Doe v. United States*  
487 U.S. 201, 108 S. Ct. 2341 (1988)

**FACTS:** The defendant was the target of a federal grand jury investigation. He was subpoenaed to produce records

concerning accounts in foreign banks. However, the defendant invoked his Fifth Amendment privilege against self-incrimination when questioned about the existence or location of additional bank records. The foreign banks refused to comply with subpoenas to produce any account records without the customer's consent. The government sought a court order directing the defendant to sign a consent form authorizing the foreign banks to disclose the defendant's records.

**ISSUE:** Whether a court can compel a target of a grand jury investigation to authorize foreign banks to disclose records of his accounts?

**HELD:** Yes. However, the court may not require the defendant to explain the contents of these records or acknowledge their existence.

**DISCUSSION:** The Supreme Court held that a court order compelling the target of the grand jury investigation to authorize foreign banks to disclose records of his accounts, without identifying those documents or acknowledging their existence does not violate the target's Fifth Amendment privilege against self-incrimination. The consent form itself was not testimonial in nature. In order to be "testimonial," an accused's oral or written communication or act of production must itself, explicitly or implicitly, relate a factual assertion or disclose information. The privilege may be asserted only to resist compelled explicit or implicit disclosures of incriminating information.



*Fisher v. United States*  
425 U.S. 391, 96 S. Ct.1569 (1976)

**FACTS:** In each of these cases, the defendants were under investigation for civil or criminal liability under the federal income tax laws. The defendants retrieved documents prepared by their respective tax accountants and transferred the documents to their respective attorneys to assist in their

defenses. Subsequently, the government served summonses on the attorneys directing them to produce the documents, who refused to comply. The government then brought enforcement actions.

**ISSUE:** Whether documents delivered by the defendant to his attorney are protected by the self-incrimination clause?

**HELD:** No. Compelled production of the documents from the attorneys does not implicate whatever Fifth Amendment privilege the defendants may have enjoyed themselves.

**DISCUSSION:** The Fifth Amendment may have precluded a subpoena from compelling the defendants to produce the documents while the documents were in their possession. However, enforcing the subpoena against another does not violate this privilege. Such action in no way would compel the defendant to be a “witness” against himself. See Couch v. United States. The fact that the attorneys were agents of the taxpayers does not change this result.

The attorney-client privilege applies to documents in the hands of a client that would have been privileged in the hands of the attorney. However, the Fifth Amendment would not protect the defendants from producing these documents. The government could have secured them through the use of a search warrant. Production of the documents themselves does not involve incriminating testimony. The Fifth Amendment does not prohibit the compelled production of all incriminating evidence. It only prohibits compelling the accused to make a testimonial communication that is incriminating. However incriminating the contents of the documents might be, the act of delivering them to the government under order does not involve testimonial self-incrimination.



*Bellis v. United States*  
417 U.S. 85, 94 S. Ct. 2179 (1974)

**FACTS:** During the defendant's tenure as a law partner in Bellis, Kolsby & Wolf, the partnership's financial records were maintained in his office. After the partnership dissolved, the defendant left to join another law firm. The partnership records remained in the partnership's previous location for approximately three years. Later, the defendant's secretary, acting at the defendant's request, removed the records and brought them to his new office. Approximately two months later, the defendant was subpoenaed by a grand jury and ordered to appear and testify and to bring with him "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969." The defendant refused to produce the partnership's records, claiming his Fifth Amendment right against self-incrimination.

**ISSUE:** Whether a defendant who holds partnership records in a representative capacity has a Fifth Amendment privilege against self-incrimination to avoid producing those partnership records, where the records might incriminate him personally?

**HELD:** No. The self-incrimination clause is a personal right, not one belonging to an artificial entity such as a partnership.

**DISCUSSION:** "It has long been established that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony." This protection may extend to the business records of a sole proprietor or sole practitioner. However, the Fifth Amendment right against compulsory self-incrimination is a purely private right that cannot be invoked by any artificial entity, such as a corporation or a partnership. "It follows that an individual acting in his official capacity on behalf of the organization may likewise not take advantage of his personal

privilege.” Instead, “the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity.” This rule applies even where the records sought might personally incriminate the individual who holds them provided that the records sought are those of the organization and not the individual. Here, it was clear, based on the nature of the records sought, that they constituted records of the partnership, not the personal records of the defendant. The defendant had no ownership rights in these records, and could not use the records for anything other than partnership purposes.



### **E. Voluntary**

*Rogers v. Richmond*  
365 U.S. 534, 81 S. Ct. 735 (1961)

**FACTS:** The defendant was arrested for robbery. The officers found a weapon on him that was connected to a murder. The defendant denied committing the murder for the first six hours of the interview. Then, within the hearing of the defendant, an officer pretended to place a phone call directing other officers to prepare to bring the defendant’s wife in for questioning. The defendant remained silent from that point on until he was told by the officer that his wife was about to be taken into custody. The defendant then confessed. The next day, the local Coroner directed that the defendant be held incommunicado at the jail. When the defendant’s lawyer tried to visit the defendant, he was turned away. The defendant was then taken to the Coroner’s office where he was placed under oath and confessed again. In ruling on the admissibility of the defendant’s confessions, the trial judge took into account the probable truth or falsity of the confessions in determining whether or not they had been voluntarily given. The statements were admitted into evidence and the defendant was convicted of murder.

**ISSUE:** Whether the correct legal standard in determining the admissibility of the defendant's statements is the likelihood of truthfulness?

**HELD:** No. In determining the voluntariness of a confession, the correct legal standard is whether the government's conduct was such as to overbear the defendant's will to resist.

**DISCUSSION:** The Court stated that the correct standard is "whether the behavior of the State's law enforcement officials was such as to overbear the petitioner's will to resist and bring about confessions not freely self-determined...." This question must be answered without regard to whether the defendant was speaking truthfully when he made the confession. The Court reaffirmed its holdings in previous decisions that "convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand." This is not because the confessions are unlikely to be true, but because due process of law requires the government to establish a defendant's guilt "by evidence independently and freely secured, and may not by coercion prove its charge against an accused out of his own mouth."



*Lynumn v. Illinois*  
372 U.S. 528, 83 S. Ct. 917 (1963)

**FACTS:** Officers watched a confidential informant enter the defendant's apartment where he allegedly engaged in a narcotics deal with the defendant. The government arrested the defendant outside her apartment for selling marijuana and took her back inside to question her. While inside the apartment, the defendant initially denied she had sold marijuana. Later she confessed to the crime after being told by the officers that state aid to her infant children would be cut off and her children taken from her if she did not "cooperate." Specifically, the defendant was told that she "had better do what she was



told if she wanted to see her kids again.” These threats were made while police officers and the confidential informant surrounded the defendant. The defendant had no previous criminal experiences; had no friend or adviser to whom she could speak; and had no reason to believe that the government did not have the power to carry out the threats they were making. The confession was used to convict the defendant at her trial.

**ISSUE:** Whether the defendant’s statement was voluntarily given?

**HELD:** No. The government cannot use statements obtained through overcoming the defendant’s will to remain silent through coercion.

**DISCUSSION:** In determining whether a defendant is “voluntarily” giving a statement, the question is “whether the defendant’s will was overborne at the time he confessed.” The statement must be “the product of a rational intellect and a free will.” Looking at the totality of the circumstances, the Court held that the statement given by the defendant was not given voluntarily.



*Colorado v. Connelly*  
479 U.S. 157, 107 S. Ct. 515 (1986)

**FACTS:** The defendant approached an officer and stated that he had committed murder and wanted to discuss it. The officer advised the defendant of his Miranda rights. The defendant said that he understood his rights but still wanted to talk about the murder. Shortly thereafter, a detective arrived and again advised the defendant of his rights. After the defendant responded that he had traveled all the way from Boston to confess to the murder, he was taken to police headquarters. He then confessed and pointed out the exact location of the murder. Subsequent psychiatric evaluation revealed that defendant was following the “voice of God” in

confessing to the murder.

**ISSUE:** Whether the defendant's waiver of his Miranda rights and his statements were coerced?

**HELD:** No. Coercion must originate in the government's actions.

**DISCUSSION:** Voluntariness of a waiver of the privilege of the Fifth Amendment depends upon absence of governmental overreaching. The sole concern of the Fifth Amendment is governmental coercion. The Supreme Court is not concerned with moral and psychological pressures to confess coming from sources other than government coercion. The statements made by the defendant are admissible. The government need prove only by a preponderance of the evidence that the defendant knowingly, voluntarily and intelligently waived his Miranda rights.



*Arizona v. Fulminante*  
499 U.S. 279, 111 S. Ct. 1246 (1991)

**FACTS:** After the defendant's stepdaughter was murdered in Arizona, he left the state. He was convicted of an unrelated crime and was incarcerated in prison in New York. There, Sarivola, a fellow inmate who was also a paid informant of the government, befriended him. Sarivola told the defendant that he knew the defendant was getting harsh treatment from other inmates because of a rumor he was a child murderer. Sarivola offered him protection in exchange for the truth. The defendant admitted to Sarivola that he had killed his stepdaughter, and he provided details. The defendant made the same confession to Sarivola's wife. Subsequently, he was indicted for murder.

**ISSUE:** Whether the defendant's confession was coerced?

**HELD:** Yes. The confession was the result of mental coercion.

**DISCUSSION:** The Court reasoned that the defendant was motivated to confess by a fear of physical violence, absent protection from a government informant. The Court found that a credible threat of physical violence is sufficient to support a finding that the subsequent confession is unreliable.



*Beecher v. Alabama*  
408 U.S. 234, 92 S. Ct. 2282 (1972)

**FACTS:** The defendant made a series of incriminating statements after being threatened by various government authorities. In a 1967 decision, the Supreme Court rejected the government's use of those statements from the point of his arrest to written statements he made five days later. The Court held that the "stream of events" was such that the defendant did not make the statements voluntarily. Nonetheless, the government retried the defendant with the use of additional statements the defendant made to an attending physician. One hour after his arrest, the defendant was taken to a hospital for treatment for a gunshot wound, which required two large morphine injections. Within the presence of the attending physician but not the officers, the defendant made several incriminating statements, presumably while under the influence of the morphine injections.

**ISSUE:** Whether the statements made to the attending physician were made voluntarily?

**HELD:** No. The defendant's statements were made during the "stream of events" that had been prompted by government coercion.

**DISCUSSION:** The Court held that the statements made to the attending physician were a part of the "stream of events" that was involuntary in nature. This "stream of events" was so infected with gross coercion that the Court did not feel comfortable that any statements made under these circumstances were voluntary. The Due Process Clause

demands such inherently untrustworthy evidence to be excluded from the government's use.



*Haynes v. Washington*  
373 U.S. 503, 83 S. Ct. 1336 (1963)

**FACTS:** The defendant was arrested for robbery. The officers took him to the station house and questioned him about the crime. The defendant asked to call either his wife or his attorney. The police officers told him that he could do so once he had "cooperated." The defendant then made several incriminating statements.

**ISSUE:** Whether the defendant's statements were voluntarily made?

**HELD:** No. The defendant's statements were made in an atmosphere dominated by substantial coercion.

**DISCUSSION:** The test of admissibility of a suspect's statement is whether it was made freely, voluntarily and without compulsion or inducement of any sort. The issue of coercion or improper inducement can only be determined by examining "all the attendant circumstances," or, the "totality of the circumstances." As the suspect had initially resisted giving any kind of statement, and only made statements after repeated denials of his request to contact his wife or attorney, the Court held that the defendant did not voluntarily make the statements.



*Townsend v. Sain*  
372 U.S. 293, 83 S. Ct. 745 (1963)

**FACTS:** The defendant, a confirmed heroin addict, was arrested for his suspected involvement in a murder. When questioned, he denied any involvement. Several hours later the defendant complained of withdrawal sickness. A physician was

summoned and administered a dosage of Phenobarbital and hyoscine. The doctor also gave the defendant four or five tablets of Phenobarbital to combat withdrawal symptoms in the future. After the doctor left, an officer and a state's attorney questioned the defendant. The defendant gave a complete confession to the murder. The defendant later alleged that these drugs had the effect of a "truth serum." The officers testified they were unaware of the potential effects of the doctor's treatment.

**ISSUE:** Whether the confession was voluntarily made?

**HELD:** No. Courts must consider the mental state of a person who makes statements before considering their voluntariness.

**DISCUSSION:** Statements are not voluntary if the individual's will is overborne, or not the product of his rational intellect or free will. The Court stated that coercion could take place either through physical or psychological pressure. Factors that play a role in determining psychological pressure include the mental competency, the youth or inexperience, or the effects drugs have on the suspect. It was immaterial to the Court that the officers did not know of the potential "truth serum" characteristics of the medication administered to the suspect. "Any questioning by officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible."



*Lego v. Twomey*  
404 U.S. 477, 92 S. Ct. 619 (1972)

**FACTS:** The defendant confessed to committing armed robbery. The confession was included at trial. The defendant denied making the confession voluntarily. The state law provided that a challenged confession could be admitted into evidence if, at a hearing outside the presence of the jury, the judge found it voluntary by a preponderance of the evidence.

**ISSUE:** Whether the standard of proof for voluntariness of confessions is a preponderance of the evidence?

**HELD:** Yes. Proof of the voluntariness of a confession by a preponderance of the evidence is constitutionally adequate.

**DISCUSSION:** When the government seeks to use a confession challenged as involuntary, the defendant is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. The Court held that this is accomplished by requiring the government to prove at least by a preponderance of the evidence that the confession was voluntary. The exclusion of unreliable confessions is not the purpose of a voluntariness hearing. The sole issue in such a hearing is whether a confession was coerced.



*Spano v. New York*  
360 U.S. 315, 79 S. Ct. 1202 (1959)

**FACTS:** A foreign-born man, age 25, was a suspect in a killing. He had no previous criminal history or experience with official interrogation. He had only six months of high school education and a history of emotional instability. The defendant was questioned by officials for nearly eight straight hours, long into the night, before he confessed. The defendant repeatedly refused to answer questions and even requested his attorney. During the interrogation, the officers used a “childhood friend” of the defendant who had become a police officer. This officer told the suspect that the situation had gotten the officer in trouble and that his job was in jeopardy. He played up the terrible effect this would have on the officer’s family. At almost sunrise, the government obtained the final pieces of the defendant’s confession.

**ISSUE:** Whether the suspect’s statement was voluntarily given?

**HELD:** No. The suspect's will was overborne by official pressure, fatigue, and sympathy from deception, in violation of the Due Process Clause of the Fourteenth Amendment.

**DISCUSSION:** In this pre-Miranda case, the Court's focus was on the voluntariness of the statements made by the suspect. Given the tactics used by the officers (inducing false sympathy, lengthy interrogation), and the vulnerability of their somewhat unstable suspect, the Court determined that the statement was not voluntary and should not have been admitted at trial. The Court looked at all the facts taken together in reaching its holding that the statement violated Due Process guarantees.



## **F. Immunity**

*Murphy et. al. v. Waterfront Commission of New York Harbor*  
378 U.S. 52, 84 S. Ct. 1594 (1964)

**FACTS:** The defendants were subpoenaed to testify in front of the Waterfront Commission of New York Harbor. When they refused to answer questions asked of them, they were granted immunity from prosecution under the laws of both New Jersey and New York. They still refused to testify, contending that their answers might tend to incriminate them under federal law, to which the grant of immunity did not extend. They were then held in civil and criminal contempt.

**ISSUE:** Whether a state can compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime in federal court?

**HELD:** No. The defendant's right to remain silent is a protection against both federal and state prosecution.

**DISCUSSION:** The Court looked to the policies and purposes of the Fifth Amendment right to be free from compulsory self-incrimination. “Most, if not all, of these policies and purposes are defeated when a witness ‘can be whipsawed into incriminating himself under both state and federal law even though’ the constitutional privilege against self-incrimination is applicable to each.” The Fifth Amendment right against compulsory self-incrimination protects a “state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.” Accordingly, the Court held that “a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.”



*Kastigar v. United States*  
406 U.S. 441, 92 S. Ct. 1653 (1972)

**FACTS:** The defendants were subpoenaed to testify before a federal grand jury. Anticipating that the defendants would invoke their Fifth Amendment right against self-incrimination, the government sought an order to compel the defendants to testify under a grant of immunity pursuant to 18 U.S.C. §§ 6002-6003. The immunity granted to the defendants provided them protection from the use of their compelled testimony in subsequent criminal proceedings, as well as immunity from the use of evidence derived from the testimony (use and derivative use immunity) but not from the crimes themselves. The order was granted over the objection of the defendants. When the defendants appeared before the grand jury, all invoked their privilege against self-incrimination and refused to testify. The District Court held the defendants in contempt and placed them in custody until such time as they answered the grand jury’s questions or the grand jury’s term expired.

**ISSUES:** 1. Whether the government can compel testimony from an unwilling witness who



invokes his Fifth Amendment privilege against self-incrimination by granting the witness immunity?

2. Whether the government must grant use or transactional immunity to compel testimony?

- HELD:**
1. Yes. The government can compel testimony from an unwilling witness who invokes his Fifth Amendment privilege against self-incrimination by granting the witness immunity.
  2. No. The grant of use immunity to the witness is all that the Fifth Amendment guarantees.

**DISCUSSION:** The power to compel individuals to testify before grand juries and in courts is well settled. However, this power is not absolute and is subject to a variety of exemptions, most notably the Fifth Amendment privilege against self-incrimination. In this case, the defendants asserted that, at a minimum, a statute must afford them full transactional immunity in order to comply with the Fifth Amendment privilege. The Court rejected this argument, stating “that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege.” Transactional immunity, on the other hand, provides a defendant a much broader protection than does the Fifth Amendment privilege, in that a defendant is afforded full immunity from prosecution. “While a grant of immunity must afford protection commensurate with that afforded by the Fifth Amendment privilege, it need not be broader.” In sum, the Court concluded “the immunity provided by 18 U.S.C. § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it.”



*Ohio v. Reiner*  
532 U.S. 17, 121 S. Ct. 1252 (2001)

**FACTS:** The defendant was charged with the death of his child. He alleged that abuse by the family's babysitter caused his child's death. Upon advice of counsel, the babysitter invoked her privilege against self-incrimination, although she denied any wrongdoing. The trial court granted transactional immunity for the babysitter's testimony, the jury was advised of the grant of immunity, and the babysitter testified that she had nothing to do with the child's injuries.

**ISSUE:** Whether the babysitter's denial of culpability precluded any self-incrimination privilege, so that the granting of immunity prejudiced the defendant by effectively telling the jury that the babysitter was innocent?

**HELD:** No. The babysitter had a reasonable apprehension that her answers could have been used to incriminate her, and, therefore, had a right to invoke her self-incrimination protection.

**DISCUSSION:** The Supreme Court held that, while the self-incrimination protection only extended to witnesses who had reasonable cause to apprehend danger from a direct answer, the babysitter's expression of innocence did not by itself eliminate the babysitter's privilege. It was reasonable for the babysitter to fear that answers to possible questions might tend to incriminate her, despite her asserted innocence.

The witness' assertion of innocence did not, by itself, preclude her invocation of the privilege against self-incrimination. Therefore, the court's grant of immunity to the witness was not prejudicial. In view of the defense accusation that the witness committed the child abuse, the witness had reasonable ground to fear that answers might tend to incriminate her.



## **G. Custodial Interrogation - Miranda**

*Miranda v. Arizona*

384 U.S. 436, 86 S. Ct. 1602 (1966)

**FACTS:** The defendant was arrested at his home for a rape and taken to the police station. While there, the victim identified him as the rapist. The police took the defendant to an interrogation room, where he was questioned by two officers. These officers later testified at trial that the defendant was not advised that he had a right to have an attorney present during his questioning. The officers also testified that the defendant was not told that he had a right to be free from self-incrimination. The defendant signed a statement that contained a pre-prepared clause stating that he had “full knowledge” of his “legal rights.” At trial, the written confession was admitted against the defendant and he was convicted.

**ISSUE:** Whether the written confession given by the defendant was obtained in violation of the defendant’s Fifth Amendment right to be free from compulsion?

**HELD:** Yes. The defendant has a right to know of his Fifth Amendment privilege against compulsory self-incrimination before he can effectively waive it.

**DISCUSSION:** The Court held that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” The Court defined a “custodial interrogation” as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way [underline added].” The procedural safeguards required by the Court consisted of four warnings that must be provided to the suspect before a custodial interrogation can take place:

- 1) The suspect must be notified that he has the right to remain silent.
- 2) The suspect must be notified that any statement made may be used as evidence against him.
- 3) That the suspect has the right to consult with a lawyer and have the lawyer present during the questioning.
- 4) The suspect must be informed that if he cannot afford to retain a lawyer, one will be appointed to represent him prior to any questioning.

Once these warnings have been given, then and only then, can the individual voluntarily, knowingly, and intelligently waive these rights. However, “if the individual indicates in any manner that he wishes to remain silent, the interrogation must cease.” Similarly, “if the individual states that he wants an attorney, the interrogation must cease until an attorney is present.”



*Dickerson v. United States*  
530 U.S. 428, 120 S. Ct. 2326 (2000)

**FACTS:** The defendant was arrested for bank robbery. He made several incriminating statements in violation of his Miranda protections. The government attempted to admit these statements into evidence through the use of a federal statute enacted after the Miranda v. Arizona decision that permitted the introduction of statements into evidence solely on whether they were made voluntarily. An appellate court allowed the government to use the federal statute because it did not disrupt a constitutional standard.

**ISSUE:** Whether Miranda warnings are constitutional in nature?

**HELD:** Yes. The Supreme Court held that the Miranda warnings are a constitutional rule and may not be reduced by Congressional intervention.

**DISCUSSION:** In Miranda v. Arizona, the Court set out “concrete constitutional guidelines for law enforcement agencies and courts to follow.” Congress’ enactment of the federal statute was an effort to overturn the ruling of Miranda. In certain circumstances, this is acceptable. “Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.” However, “Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”

Here, the Court noted that the history of Miranda is that it had constitutional dimension as its interpretations had consistently been applied to the states. The Court noted that it has no “supervisory power over the courts of the several States.” The Supreme Court’s “authority is limited to enforcing the commands of the United States Constitution.” As the statute relied upon by the government does not provide the full protections found in the Miranda decision, that statute is unconstitutional. The Court explicitly rejected the notion of overruling the Miranda decision as it “has become embedded in routine police practice to the point where the warnings have become part of our national culture.”



*Florida v. Powell*  
559 U.S. 50, 130 S. Ct. 1195 (2010)

**FACTS:** Police arrested the defendant and read him a Miranda warning prior to questioning. He waived his rights and made criminal admissions. The warning used included the following, “You have the right to talk to a lawyer before answering any of our questions” and “[y]ou have the right to use any of these rights at any time you want during this interview.”

**ISSUE:** Whether the warning language used adequately informed the defendant of his right to have his attorney present during questioning, as required by Miranda?

**HELD:** Yes. The warning requirements are satisfied when the language reasonably conveys to the suspect his rights as required by Miranda.

**DISCUSSION:** The rights that are required under Miranda to be given in warnings to a custodial suspect cannot be varied, and must include the right to have an attorney present during any questioning. However, the words used to communicate the information may be varied, so long as they adequately inform the suspect the essential rights required under Miranda. The warning that was used did not omit any of the required rights under Miranda. While not in the clearest possible language, taken together, the words used did reasonably convey that an attorney could be present not only at the outset, but at all times during the interview.



## 1. Police

*Illinois v. Perkins*  
496 U.S. 292, 110 S. Ct. 2394 (1990)

**FACTS:** The police suspected the defendant had information concerning a murder. They placed an undercover officer in a jail cellblock with the defendant when he was incarcerated on unrelated charges. The officer engaged the defendant in conversation about plans to escape. When the officer asked him if he had ever killed anyone, the defendant made inculpatory statements implicating himself in the murder. The defendant was then charged with the murder. The defendant filed a motion to suppress the statements because the officer had not provided him Miranda warnings.

**ISSUE:** Whether the officer must provide a suspect in

custody Miranda warnings if the suspect does not know the officer represents the government?

**HELD:** No. Miranda warnings only apply to the police-dominated environment in which a known police officer controls the conditions.

**DISCUSSION:** The Miranda doctrine must be strictly enforced, but only in situations where the concerns underlying that decision are present (i.e., a government-dominated atmosphere whereby the suspect may feel compelled to speak by the fear of reprisal or in the hope of more lenient treatment should he confess). That coercive atmosphere is not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate. In such circumstances, Miranda does not forbid mere strategic deception by taking advantage of a suspect's misplaced trust. The Miranda warnings were not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates. Note that Massiah v. United States, which held that the government could not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged, is inapplicable here since no murder charges had been filed at the time of the interrogation (the Sixth Amendment had not attached).

Coercion is determined from the perspective of the suspect. The inherent coerciveness of custodial interrogation is not present when the target is unaware that he is talking with authorities. Miranda is not concerned with ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak.



*Arizona v. Mauro*  
481 U.S. 520, 107 S. Ct. 1931 (1987)

**FACTS:** The defendant was arrested for killing his son. After being read his Miranda rights, he invoked his right to

counsel and stated that he did not wish to answer any questions until a lawyer was present. The defendant's wife insisted that she be allowed to speak with the defendant. The police allowed the meeting on the condition that an officer be present during the encounter. Using a tape recorder in plain sight, the officer taped a brief conversation during which the defendant told his wife not to answer any questions until a lawyer was present. At trial, the prosecution used the tape to rebut defendant's insanity defense.

**ISSUE:** Whether the police impermissibly interrogated the defendant in violation of his Miranda rights?

**HELD:** No. The defendant, who had asserted his right to counsel, was not subjected to interrogation or its functional equivalent when the government allowed the defendant's wife to speak with defendant in the presence of an officer.

**DISCUSSION:** The purpose of Miranda is to prevent the government from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment. This fear was not implicated here because the defendant was not subjected to compelling influences, psychological ploys, or direct questioning by the government. From the defendant's perspective, it is improbable that he felt he was being coerced to incriminate himself simply because he was told his wife would be allowed to speak to him.



## 2. Custody

*Berkemer v. McCarty*  
468 U.S. 420, 104 S. Ct. 3138 (1984)

**FACTS:** After observing the defendant's car weave, a police officer stopped him and asked him to get out of the car. Noticing that the defendant was having difficulty standing, the officer concluded that he would arrest the defendant for drunk



driving, though he did not communicate this intent to the defendant. The defendant failed field sobriety tests, whereupon the officer asked if he had been using intoxicants. The defendant replied that he had consumed two beers and had smoked marihuana a short time before. The officer formally arrested the defendant. At no time did the officer provide the defendant with Miranda warnings during this encounter.

**ISSUE:** Whether the defendant was in custody for Miranda purposes?

**HELD:** No. Routine traffic stops do not create a government-dominated atmosphere Miranda is designed to protect against.

**DISCUSSION:** A person subjected to custodial interrogation by police officers is entitled to Miranda warnings. However, roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute “custodial interrogation.” The Miranda warnings are applicable as soon as a suspect’s freedom of action is curtailed to a degree associated with formal arrest. An officer’s unarticulated plan to arrest a motorist and charge him with a traffic offense does not amount to custody. The relevant inquiry was whether a reasonable person in the motorist’s position would have believed he or she was in custody.



*Pennsylvania v. Bruder*  
488 U.S. 9, 109 S. Ct. 205 (1988)

**FACTS:** An officer observed a motorist driving erratically and ignoring a red light. He stopped the defendant’s vehicle. After smelling alcohol and observing the defendant’s stumbling movements, the officer administered field sobriety tests to the defendant, including asking the defendant to recite the alphabet. The officer inquired about the defendant’s use of alcohol. The defendant stated that he had been drinking. The defendant also failed the sobriety tests. The officer arrested the

defendant, placed him a police car, and administered his Miranda warnings.

**ISSUE:** Whether the defendant was in custody at the time he was asked if he had been drinking?

**HELD:** No. Ordinary traffic stops do not involve custody for purposes of the requirement to give Miranda warnings.

**DISCUSSION:** The rule of Berkemer v. McCarty, that ordinary traffic stops do not involve custody for the purposes of Miranda, governs this case. Although unquestionably a seizure, this stop had the same non-coercive aspects as the Berkemer seizure: a single police officer asking the defendant a modest number of questions and requesting him to perform simple tests in a location visible to passing motorists. The defendant was not in custody and, therefore, the officer did not have to administer Miranda warnings before questioning.



*Oregon v. Mathiason*  
429 U.S. 492, 97 S. Ct. 711 (1977)

**FACTS:** The defendant, a parolee, was suspected of being involved in a residential burglary. The officer investigating the burglary left his card at the defendant's apartment, with a note asking him to call the officer "to discuss something." The defendant called the officer the next day. When the officer asked the defendant where it would be convenient to meet, the defendant expressed no preference. The officer asked if the defendant could come to the police station to meet. The defendant agreed and voluntarily went to the station. The officer met the defendant in the hallway, shook his hand, and took him into an office. He told the defendant that he was not under arrest. The officer closed the office door and the two sat down. The officer explained that he wanted to talk to the defendant about a burglary, and that the district attorney or judge would possibly consider his truthfulness. The officer told

the defendant that he was suspected of committing the burglary and falsely claimed his fingerprints had been found at the scene of the crime. The defendant considered this information, then admitted his involvement in the burglary. At that point, the officer advised the defendant of his Miranda rights for the first time, secured a waiver, and obtained a taped confession. Once the taping had been completed, the defendant was released and told that the matter would be turned over to the district attorney for a determination on whether charges would be filed.

**ISSUE:** Whether the defendant was in “custody” when he made his initial incriminating statement?

**HELD:** No. At the time he was being questioned, the defendant was not in “custody.”

**DISCUSSION:** Officers must provide Miranda warnings to any person who is being subjected to a “custodial interrogation.” The phrase “custodial interrogation” means “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Here, the defendant voluntarily came to the patrol station where the officer immediately advised him that he was not under arrest. At the close of the interview, the defendant was allowed to leave. For these reasons, the Court held that the defendant was not in “custody” or “otherwise deprived of his freedom of action in any significant way.”



*Beckwith v. United States*  
425 U.S. 341, 96 S. Ct. 1612 (1976)

**FACTS:** The IRS was investigating the defendant for tax fraud. Two IRS agents met with the defendant in a private home where he sometimes stayed. One of the agents testified that they went to see the defendant at this residence at approximately 8:00 a.m. in order to spare him the possible embarrassment of being interviewed at his place of employment,

which opened at 10:00 a.m. Upon arrival, the agents were invited into the house and, when the defendant entered the room, they introduced themselves. The defendant excused himself for a period of approximately five minutes to finish dressing. When he returned, the three sat at a dining room table where the agents presented their credentials, informed the defendant of why they wanted to speak with him, and read him some, but not all, of his Miranda warnings. The defendant acknowledged that he understood his rights and the agents interviewed him until approximately 11:00 a.m. The agents described the conversation as “friendly” and “relaxed,” while the defendant noted that the agents did not “press” him on any question he could not or chose not to answer. Before ending the interview, the agents requested permission to examine certain records. When the defendant indicated the records were maintained at his place of employment, the agents asked if they could meet him there later. The agents met him approximately 45 minutes later at his place of employment. The senior agent advised the defendant that he was not required to furnish any books or records, but the defendant supplied the books to the agents nonetheless. Prior to trial, the defendant moved to suppress all of the statements made to the agents and any evidence obtained as a result of those statements on the grounds that he was in custody at the time of the interview and had not been fully advised of his Miranda warnings.

**ISSUE:** Whether the defendant was in custody at the time of the interview?

**HELD:** No. The defendant could not have reasonably believed he was in custody at the time of the interview.

**DISCUSSION:** Miranda warnings are necessary whenever law enforcement officers question an individual who has been “taken into custody or otherwise deprived of his freedom of action in any significant way.” The defendant was neither arrested nor detained against his will by the agents. While he was clearly the “focus” of the agents’ investigation, “he hardly found himself in the custodial situation described by the

Miranda Court as the basis for its holding.” The agents were not required to read him his Miranda warnings, and any statements he made and any evidence derived from those statements were admissible against him at his later trial.



*Orozco v. Texas*  
394 U.S. 324, 89 S. Ct. 1095 (1969)

**FACTS:** Orozco was the suspect in a shooting at a restaurant that left one man dead. At approximately 4:00 a.m., four officers went to Orozco’s boardinghouse where they were admitted by a woman who told the officers that Orozco was asleep in the bedroom. The officers entered Orozco’s bedroom and questioned him. Orozco told the officers he was at the restaurant earlier that night, and he admitted owning a pistol. Orozco eventually told the officers where they could locate the pistol. The officers recovered the pistol and ballistics tests indicated it was the pistol that had fired the fatal shot. At no time, did the officers advise Orozco of his Miranda rights. At trial, one of the officers testified about Orozco’s statements concerning the pistol and about Orozco’s admission that he was at the scene of the shooting.

**ISSUE:** Whether Orozco’s admissions were obtained in violation of Miranda.

**HELD:** Yes. The use of Orozco’s admissions obtained in the absence of the required warnings was a violation of the Self-Incrimination Clause of the Fifth Amendment as construed in Miranda.

**DISCUSSION:** The State argued that since Orozco was interrogated on his own bed, in familiar surroundings, the officers were not required to advise him of his Miranda rights before they interrogated him. While Miranda involved a situation where a suspect was interrogated at the police station, in its opinion the Supreme Court emphasized the absolute necessity for officers interrogating people “in custody” to first

advise them of the warnings provided in Miranda. The Miranda opinion held that the warnings were required when the person being interrogated was “in custody at the station or otherwise deprived of his freedom of action in any significant way.” According to the testimony of one of the officers, from the moment he gave his name, Orozco was not free to go where he pleased but was “under arrest.” For this reason, Orozco’s admissions, without the benefit of Miranda warnings, were obtained in violation of the Fifth Amendment privilege against compelled self-incrimination.



*Mathis v. United States*  
391 U.S. 1, 88 S. Ct. 1503 (1968)

**FACTS:** Mathis was serving a state prison sentence when an IRS agent questioned him about tax returns. Prior to questioning, the agent did not advise Mathis of his Miranda rights. Documents and oral statements obtained from Mathis during this interview were introduced at his criminal trial for filing false claims for tax refunds.

**ISSUE:** Whether Mathis’ statements to the IRS agent should have been suppressed. because Mathis was not advised of his Miranda rights.

**HELD:** Yes. Because Mathis was not advised of his Miranda rights, the lower courts improperly allowed the introduction of his incriminating statements.

**DISCUSSION:** The government claimed that Miranda warnings were not required because: (1) The questions were asked as part of a routine tax investigation that would not necessarily result in criminal charges; and (2) The defendant was not placed in jail by the officer questioning him, but was there for an entirely separate offense. The Court disagreed with both of these positions. First, while tax investigations “may be initiated for the purpose of civil action rather than criminal prosecution,” these investigations frequently lead to criminal

prosecutions, just as occurred here. Thus, “routine tax investigations” still require that Miranda warnings be given to a person in custody. Second, the reason the defendant was in custody was irrelevant for Miranda purposes. According to the Court, there is “nothing in the Miranda opinion that calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody.”

**NOTE:** The Court in Mathis did not hold that imprisonment, in and of itself, is enough to constitute Miranda custody. In addition, it was not possible to tell from either the opinion of the Supreme Court or the court below whether Mathis’ interview was routine or whether there were special features that may have created an especially coercive atmosphere.



*Howes v. Fields*  
565 U.S. 499, 132 S. Ct. 1181 (2012)

**FACTS:** The defendant was serving a state prison sentence. A corrections officer took him to a conference room where two officers wanted to question him about unrelated events that occurred before he went to prison. To get to the conference room, the defendant had to go down a floor and pass through a locked door that separated two sections of the facility. The officers told the defendant “that he was free to leave and return to his cell.” The officers repeated this statement to the defendant at a later time. The officers were armed during the interview, but the defendant remained free of handcuffs and other restraints. The door to the conference room was sometimes open and sometimes shut. The officers questioned the defendant for five to seven hours without providing Miranda warnings. The defendant made incriminating statements about the uncharged conduct.

**ISSUE:** Whether a defendant is “in custody” for Miranda purposes when he is incarcerated at the time of the interrogation?

**HELD:** No. Prisoners are not automatically “in custody” based solely on their imprisonment.

**DISCUSSION:** The Court held, “It is abundantly clear that our precedents do not clearly establish...that the questioning of a prisoner is always custodial when the prisoner is removed from the general prison population and questioned about events that occurred outside the prison.” In explaining its earlier Mathis decision, the Court stated “Mathis did not hold that imprisonment, in and of itself, is enough to constitute Miranda custody.” The Court refused to acknowledge a categorical rule that those imprisoned are “in custody.”

“Custody” is a term of art that rests on several significant factors, including the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning. “[I]mprisonment alone is not enough to create a custodial situation within the meaning of Miranda” the Court found, for three basic reasons:

- 1) it does not generally involve the shock that very often accompanies arrest
- 2) “a prisoner, unlike a person who has not been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing for prompt release,” and
- 3) “a prisoner...knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence.

In this instance, the defendant was not in custody for Miranda purposes.





*Stansbury v. California*  
511 U.S. 318, 114 S. Ct. 1526 (1994)

**FACTS:** The defendant was thought to be a witness to a homicide. When he was contacted by three police officers at his home, the defendant agreed to go to the police station for an interview. Upon arrival, the defendant was questioned by officers about his whereabouts at the time of the murder. The lead officer did not provide the defendant with Miranda warnings before he asked these questions. However, when the defendant mentioned that he had been driving a vehicle that matched the description given by another witness, one of the officers suspected that the defendant was involved in the murder. When the defendant then admitted that he had previously been convicted of rape, kidnapping, and child molestation, the officers terminated the interview and a different officer advised the defendant of his Miranda rights. The defendant declined to answer any further questions, requested an attorney, and was arrested. At trial, the defendant filed a motion to suppress his statements made to the government, as well as all evidence discovered as a result of those statements.

**ISSUE:** Whether an officer's subjective view concerning whether the person being interviewed is a suspect is relevant to whether the person is in "custody?"

**HELD:** No. An officer's subjective thoughts regarding a suspect is irrelevant to the assessment of whether the person is in "custody."

**DISCUSSION:** An officer is required to administer Miranda warnings whenever an individual is questioned while in custody (or otherwise deprived of his freedom of action in any significant way). In determining whether an individual is in custody for purposes of Miranda, courts use the "totality of the circumstances" test. Previous decisions of the Court, however, clearly provide that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." The requirement to

administer Miranda warnings does not depend on whether the person being questioned is the focus of the government's investigation, but on "how a reasonable man in the suspect's position would have understood his situation." An officer's "subjective view that the individual under questioning is a suspect, if not disclosed to the individual, does not bear upon the question of whether the individual is in custody for purposes of Miranda." However, if the officer communicates his views to the suspect, this fact weighs upon the question of custody. "In sum, an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment of whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave."



*California v. Beheler*  
463 U.S. 1121; 103 S. Ct. 3517 (1983)

**FACTS:** After the defendant called the police to report a homicide in which he was involved, he voluntarily accompanied them to the station house. The officers told the defendant that he was not under arrest. At the station house, the defendant talked about the murder in an interview that lasted less than 30 minutes. The police did not advise him of his Miranda rights. The defendant was permitted to return to his home, and he was arrested five days later. After he was advised of his Miranda rights at that time, he waived those rights and gave a second confession.

**ISSUE:** Whether the defendant was in custody at the time of his first interview?

**HELD:** No. A person is not in custody if he or she voluntarily goes to a police station and is allowed to

leave unhindered by the police after a brief interview.

**DISCUSSION:** The Court held that Miranda warnings were not required at the defendant's first interview with the police. Miranda warnings are not necessary unless there is police custodial interrogation. The Court found that the defendant was neither taken into custody for the first interview nor significantly deprived of his freedom of action. Although the circumstances of each case must be considered in determining whether a suspect is "in custody," the ultimate inquiry is whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Miranda warnings are not required simply because the questioning takes place in a coercive environment in the station house or because the questioned person is one whom the government suspects. Also, the length of time that elapses between the commission of a crime and a police interview that takes place when a person voluntarily comes to the police station has no relevance in determining whether a Miranda warning is required. The fact that a person who voluntarily engages in an interview with the government is unaware of the consequences of his participation does not transform the voluntary interview into custody.



*Thompson v. Keohane*  
516 U.S. 99, 116 S. Ct. 457 (1995)

**FACTS:** A defendant, upon the request of a police officer, presented himself at police headquarters. Once there, during a 2-hour tape-recorded session, he was questioned by officers about the murder of his former wife. During the questioning, the officers repeatedly told the accused that he was free to leave, but also told him that they knew he had killed the victim. The accused was not informed of his Miranda rights. Eventually, he told the officers that he had committed the crime. Following the interview, the defendant was allowed to leave the police headquarters. He was arrested 2-hours later

and charged with first-degree murder. The state court found that the defendant was not in custody at the time of the statements.

**ISSUE:** Whether the state court's determination of the custody issue has a presumption of correctness?

**HELD:** No. The determination of whether a person is in custody is a mixed question of fact and law.

**DISCUSSION:** Trial courts are given great deference in issues of credibility. However, two discrete inquiries are essential to the determination whether there was "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler. The first inquiry, what circumstances surrounded the interrogation, is distinctly factual. The second inquiry, would a reasonable person have felt at liberty to terminate the interrogation and leave, calls for application of the law. In these inquiries, the trial court's superior capacity to resolve credibility issues is not the foremost factor.



*Yarborough v. Alvarado*  
541 U.S. 652, 124 S. Ct. 2140 (2004)

**FACTS:** The 17-year old defendant was involved in a murder. About a month later, at the request of a police officer, the defendant's parents brought him to a police station. With only the officer and the defendant present, the officer conducted a two-hour interview. At the conclusion of this interview, the defendant made incriminating statements. At no time did the officer offer the defendant his Miranda warnings.

**ISSUE:** Whether the defendant's youth and inexperience must be evaluated in determining whether a reasonable person in his position would have felt as if he was in custody?

**HELD:** No. The Court stated that its prior “opinions applying the Miranda custody test have not mentioned the suspect’s age, much less mandated its consideration.”

**DISCUSSION:** Custody must be determined based on how a reasonable person in the suspect’s situation would perceive the circumstances. In making this determination, the Supreme Court has never held that “a suspect’s age or experience is relevant to the Miranda custody analysis.” These factors (as well as education and intelligence) are useful in viewing whether a suspect engaged in a voluntary act, such as in making a statement to law enforcement officers. However, age and experience are not proper factors in determining custody.

**But see J.D.B. v. North Carolina below.**



*J. D. B. v. North Carolina*  
564 U.S. \_\_\_, 131 S. Ct. 2394 (2011)

**FACTS:** The defendant was 13-year-old suspect in two home break-ins. A uniformed officer removed him from his classroom and took him to a closed-door conference room. The defendant was then questioned for half an hour, during which he initially denied any wrongdoing. He then inquired whether he would “still be in trouble” if he returned “the stuff.” The officer explained that the matter was destined to go to court and that a juvenile seizure order may be obtained.

**ISSUE:** Whether the defendant’s age plays a role in the court’s determination of “custody” for Miranda purposes?

**HELD:** Yes. The test to determine “custody” remains an objective one, though the government must take into account the age of the suspect if it is known or knowable to the officer.

**DISCUSSION:** In updating its position in Alvarado, the Court noted that “Justice O’Connor’s concurring opinion explained that a suspect’s age may indeed ‘be relevant to the ‘custody’ inquiry’ (quoting Alvarado).” In some circumstances, “a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.” Therefore, the Court held that “so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.”



### **3. Interrogation**

*Rhode Island v. Innis*  
446 U.S. 291, 100 S. Ct. 1682 (1980)

**FACTS:** A robbery victim identified the defendant in a photo display. Nearly four hours later, a police officer spotted the defendant. The defendant was arrested and advised of his Miranda rights. He was not in the possession of the shotgun used in the robbery at the time of his arrest. After being advised of his rights, the defendant requested to speak with a lawyer. A supervisor on scene had the defendant placed in a vehicle, along with three officers. Before departing, the supervisor advised the officers in the vehicle “not to question the defendant or intimidate or coerce him in any way.” While traveling to the police station, two of the patrolmen discussed the possibility that a handicapped child from a nearby school might find a loaded shotgun and get hurt. The defendant, who overheard the conversation, interrupted the conversation and told the officers to turn the car around so that he could show them where the shotgun was located. The police returned him to the scene of the arrest and again advised of his Miranda rights. He replied that he understood his rights, but that he “wanted to get the gun out of the way because of the kids in the area in the school.” The defendant then led the police to a nearby field, where he pointed out the hidden shotgun. At trial,

both the shotgun and the testimony relating to its discovery were introduced against the defendant.

**ISSUE:** Whether the police officers “interrogated” the defendant through their overheard conversation?

**HELD:** No. The police officers’ actions did not amount to “interrogation” or the “functional equivalent of interrogation” of the defendant.

**DISCUSSION:** The procedural safeguards of Miranda apply “whenever a person in custody is subjected to either express questioning or its functional equivalent.” The Court stated “the term ‘interrogation’ under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” In this case, the defendant had not been “interrogated” since there had been neither “express” questioning, nor the “functional equivalent” of questioning. There was no “express” questioning in that the conversation was entirely between two officers in the vehicle, and not directed to the defendant. Similarly, the officers did not subject the defendant to the “functional equivalent” of questioning. “There is nothing in the record to suggest that the officers were aware that the defendant was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent (defendant) was unusually disoriented or upset at the time of his arrest.”

**NOTE:** Compare this case to Brewer v. Williams.



*Pennsylvania v. Muniz*  
496 U.S. 582, 110 S. Ct. 2638 (1990)

**FACTS:** The defendant was stopped by a police officer on suspicion of driving while intoxicated. He performed poorly on

a series of field sobriety tests and was placed under arrest. The officer took the defendant to a booking center. Officers there, following the usual practice with drunk-driving suspects, videotaped the booking proceedings. The defendant, who was informed of the videotaping, responded to questions concerning his name, address, height, weight, eye color, date of birth, and current age, stumbling over his address and age. In response to a question about whether he knew the date of his sixth birthday, the defendant stated, "No, I don't." He did poorly in repeated sobriety tests. The defendant was then advised of his Miranda rights for the first time, signed a statement waiving those rights, and admitted under questioning that he had been driving while intoxicated.

**ISSUE:** Whether the officers interrogated the defendant before providing him with his Miranda warnings?

**HELD:** Yes. The defendant's Fifth Amendment rights were violated by the admission of that part of the videotape in which the suspect responded to the question as to the date of his sixth birthday. However, the admission of the portions of the videotape in which the suspect performed the sobriety tests and responded to booking questions was not interrogation.

**DISCUSSION:** The privilege against self-incrimination protects an "accused from being compelled to testify against himself, or otherwise, provide the State with evidence of a testimonial or communicative nature," but not from being compelled by the State to produce "real or physical evidence." Schmerber v. California. To be testimonial, the communication must, "explicitly or implicitly, relate a factual assertion or disclose information." Doe v. United States.

The defendant's answers to direct questions are not rendered inadmissible by Miranda merely because the slurred nature of his speech was incriminating. Any slurring of speech and other evidence of lack of muscular coordination revealed by the defendant's responses constitute non-testimonial aspects of



those responses. The defendant's incriminating responses made during the sobriety tests were not the result of interrogation as the officer's dialogue with him concerning the tests consisted of carefully scripted instructions as to how the tests were to be performed. Therefore, they were not "words or actions" constituting custodial interrogation.

However, the defendant's response to the sixth birthday question was incriminating not just because of his delivery, but also because the content of his answer supported an inference that his mental state was confused. His response was testimonial because he was required to communicate an express or implied assertion of fact or belief and, thus, was confronted with the "trilemma" of truth, falsity, or silence, the historical abuse against which the privilege against self-incrimination was aimed.



#### **4. Right to Silence**

*Salinas v. Texas*  
570 U.S. \_\_\_, 133 S. Ct. 2174 (2013)

**FACTS:** Salinas voluntarily gave his shotgun to officers and accompanied the officers to the police station so the officers could question him about a murder. The officers did not advise Salinas of his Miranda rights, as he was not in custody. Salinas answered most of the interviewing officer's questions; but, when the officer asked Salinas if his shotgun "would match the shells recovered at the scene of the murder," Salinas did not reply. After a short period of silence, the officer asked Salinas other questions, which Salinas answered. Salinas did not testify at trial; however the prosecutor commented on Salinas' failure to answer the officer's question about the shotgun, arguing it was evidence of Salinas' guilt.

**ISSUE:** Does the Fifth Amendment's Self-Incrimination Clause protect a defendant's refusal to answer questions asked by the government before he has

been arrested or read his Miranda rights?

**HELD:** No. The privilege against self-incrimination generally is not self-executing; therefore, a witness who wants its protection needs to invoke it explicitly.

**DISCUSSION:** The Fifth Amendment does not establish a complete right to remain silent. The Fifth Amendment only guarantees a criminal defendant may not be compelled to testify against himself. Consequently, no Constitutional violation occurs as long as the government does not deprive a defendant of the opportunity to claim a Fifth Amendment privilege.



*Berghuis v. Thompkins*  
560 U.S. 370, 130 S. Ct. 2250 (2010)

**FACTS:** A police investigation into a shooting pointed to two suspects, one of whom was the defendant. Once arrested, officers advised the defendant of his Miranda rights and received his verbal confirmation of his understanding. The defendant refused to sign a form stating he acknowledged those rights. Over the course of the interrogation, the defendant was largely silent, answering only a few questions either non-verbally or with simple statements such as “yeah,” “no,” or “I don’t know.” After nearly three hours, an officer tried what he called a “different tack.” After asking the defendant whether he believed in and prayed to God, the officer asked whether the defendant had asked God for forgiveness for “shooting that boy down.” The defendant replied, “Yes.” This statement was used against him at trial.

**ISSUE:** Whether a defendant’s Miranda right to silence is violated when, after being advised of his Miranda rights, police continue to question him for three hours while he remains silent and ultimately obtain an incriminating statement from him?

**HELD:** No. A suspect who receives and understands Miranda warnings, and fails to invoke his Miranda rights, waives his right to remain silent when offering an uncoerced statement to the police.

**DISCUSSION:** The Court examined the suspect's waiver of his right to silence as well as what is required for an invocation of the right to remain silent. When a suspect engages in limited verbal communication with police but never explicitly invokes his right to silence, the Court concluded that he had not invoked his right to silence. In order to invoke the right to silence, the suspect must say so expressly and unambiguously. A suspect must give an unambiguous declaration of his intention to invoke his right to remain silent or he has not invoked such a right. The government still has the burden of proving a valid waiver. A valid waiver may be inferred from the facts that the suspect received warnings, understood his rights and ultimately responded to government questioning.



*Jenkins v. Anderson*  
447 U.S. 231, 100 S. Ct. 2124 (1980)

**FACTS:** The defendant was suspected of a homicide. He turned himself in two weeks later. At his trial for first-degree murder, the defendant took the witness stand and contended that the killing was the result of self-defense. The prosecutor argued that the defendant's two-week delay in reporting the incident was inconsistent with self-defense.

**ISSUE:** Whether the government's use of the defendant's pre-arrest silence violated his constitutional right to remain free from self-incrimination?

**HELD:** No. The use of the defendant's pre-arrest silence was not contemplated by the Fifth Amendment privilege from self-incrimination.

**DISCUSSION:** The Court long ago held that the “immunity from giving testimony is one in which the defendant may waive by offering himself as a witness,” citing Raffel v. United States, 271 U.S. 494 (1926). When the defendant took the witness stand in this case, the prosecution was entitled to impeach his testimony as inconsistent with his previous actions. Courts have repeatedly allowed the impeachment of witnesses with their failure to state a fact under circumstances in which it would have been natural to do so. If the defendant does not want to face this standard trial practice, he should decline to testify.



*Fletcher v. Weir*  
455 U.S. 603, 102 S. Ct. 1309 (1982)

**FACTS:** The defendant was involved in an altercation that led to the death of another man. The defendant immediately left the scene and did not report the incident to the police. He was later arrested for murder but at no time was he provided Miranda warnings. At his trial, the defendant took the witness stand. He admitted to accidentally stabbing the victim but claimed to have acted in self-defense. This was the first time the defendant had offered an exculpatory explanation of the events. On cross-examination, the prosecution asked why the defendant had not offered this explanation to the police at the time of his arrest, or disclose the location of the knife.

**ISSUE:** Whether the government may use the defendant’s silence to impeach his testimony?

**HELD:** Yes. The government may use the defendant’s silence against him if no Miranda warnings were provided.

**DISCUSSION:** It is fundamentally unfair and a deprivation of due process to use a person’s silence against them after they have accepted the protections of their Miranda rights. The government should not be able to coax a suspect into remaining

silent through a reading of the Miranda rights and then use that silence against him at trial. However, the defendant here was not promised that his silence would not be used against him, as he was not read his Miranda rights. The Court found that, absent this promise, the government was free to introduce the defendant's silence against him at trial for purposes of impeachment, as his silence was inconsistent with his defense. It would have been reasonable to assume that a person would want to explain their involvement in an accidental stabbing rather than face a murder charge.



*United States v. Hale*  
422 U.S. 171, 95 S. Ct. 2133 (1975)

**FACTS:** The defendant was arrested for robbery. He was advised of his Miranda rights, searched, and found to be in possession of a small amount of currency. The defendant made no response when the officer asked him where he got the money. At trial, the defendant testified that he met the victim on the day of the robbery but did not commit the crime. He claimed the money found on him belonged to his wife and was for the purpose of purchasing money orders. On cross-examination, the prosecutor asked the defendant why he did not mention these facts to the arresting officer.

**ISSUE:** Whether the government can inquire into why a suspect remained silent after invoking his right to remain silent?

**HELD:** No. It is not unusual (or inconsistent) for a suspect to remain silent after being advised of his right to do so.

**DISCUSSION:** It is a basic principle of the law of evidence that a witness can be impeached with prior inconsistent statements they have made. However, there must be a connection between the initial statement (or lack thereof) and the testimony at trial. In most circumstances, silence does not

amount to prior inconsistency (but see Jenkins v. Anderson). The act of silence amounts to a prior inconsistent statement only if it would have been natural to object to the question when it was put to the witness. This was not the case at the time the question was put to the defendant at his arrest. The guilty and innocent alike could find an arrest so intimidating that they choose to remain silent.



*Doyle v. Ohio*  
426 U.S. 610, 96 S. Ct. 2240 (1976)

**FACTS:** The defendants were arrested for attempting to sell a controlled substance and were provided Miranda warnings. At trial, they testified that the government had “framed” them. The government then sought to introduce evidence that the defendants had not made any statements to this effect after their arrest.

**ISSUE:** Whether the government’s use of the defendants’ post-arrest silence on cross-examination violated their Fifth Amendment right to remain silent?

**HELD:** Yes. Once provided the right to remain silent, the government may not use that protection against the defendant.

**DISCUSSION:** Providing a constitutional protection to a defendant and then using that protection against them renders the protection meaningless. The Court stated that “while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person’s silence to be used to impeach an explanation subsequently offered at trial.”



*Michigan v. Mosley*  
423 U.S. 96, 96 S. Ct. 321 (1975)

**FACTS:** The defendant was arrested for two robberies. Once in custody, an officer attempted to interview him regarding the robberies. The defendant was brought to an office in the police headquarters building, where the officer advised the defendant of his Miranda rights and had him read and sign a notification certificate. He also had the defendant orally acknowledge an understanding of his rights. When the officer attempted to question him, the defendant stated that he did not wish to answer any questions about the robberies. He did not, however, request to speak with counsel. The officer immediately ceased the interrogation and took the defendant to a cell. Over two hours later, a homicide detective had the defendant moved to a different office building for questioning about a homicide that was unrelated to the robberies for which the defendant had been arrested. Again, the defendant was read his Miranda rights and signed a notification certificate. Within 15-minutes, the defendant made a statement implicating himself in the homicide. At no time during this interview did the defendant request a lawyer or indicate that he did not wish to discuss the homicide. Additionally, at no time was the defendant asked any questions regarding the robberies for which he had been arrested. The incriminating statement was introduced at the defendant's first-degree murder trial and he was convicted.

**ISSUE:** Whether the police violated the defendant's rights by questioning him about an unrelated crime after he had invoked his right to remain silent?

**HELD:** No. The police may re-approach the defendant after he invoked his right to remain silent.

**DISCUSSION:** In answering this question, the Court relied almost entirely on a single passage from their decision in Miranda v. Arizona: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." The Miranda

decision never addressed “under what circumstances, if any, a resumption of questioning is permissible.” What was clear, however, was that nothing in the Miranda opinion “can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.”

The Court concluded “that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his right to cut off questioning was ‘scrupulously honored.’” In this case, a review of the circumstances led the Court to hold that the defendant’s right to cut off questioning was “scrupulously honored.” First, before his initial interrogation, the defendant was fully informed of his Miranda rights, orally acknowledged an understanding of those rights, and signed a notification certificate. Second, when the defendant stated that he did not wish to answer questions about the robberies, all questioning immediately ceased. Third, a significant period of time (more than two hours) passed before a different officer, in a different location, regarding a different crime, next questioned the defendant. Fourth, before his second interview, the defendant was again fully advised of his Miranda rights.



## 5. Right to Counsel

*Edwards v. Arizona*  
451 U.S. 477, 101 S. Ct. 1880 (1981)

**FACTS:** After being arrested on a criminal charge and being advised of his Miranda rights, the defendant was questioned by the police until he said that he wanted an attorney. The officers ceased their questioning. The next day, the police went to the jail, again advised defendant of his Miranda rights, and obtained a confession.



**ISSUE:** Whether the officers may approach a suspect who has invoked his Fifth Amendment right to counsel?

**HELD:** No. An accused, having expressed his desire to deal with the police only through counsel, may not be subject to further interrogation until counsel has been made available to him, unless the accused has initiated further communication with the police.

**DISCUSSION:** The use of the defendant's confession violated his rights under the Fifth Amendment to have counsel present during custodial interrogation. When an accused has invoked his right to have counsel present during custodial interrogation (as opposed to his right to remain silent; see Michigan v. Mosley), a valid waiver of that right cannot be established by showing only that he responded to police-initiated interrogation after again being advised of his rights. In this case, the authorities initiated the second interrogation. The defendant's confession, made without counsel present, did not amount to a valid waiver.



*Arizona v. Roberson*  
486 U.S. 675, 108 S. Ct. 2093 (1988)

**FACTS:** After being arrested at the scene of a burglary and given Miranda warnings, the defendant said he "wanted a lawyer before answering any questions." Three days later, while still in custody, and without a lawyer having been appointed, a different officer approached the defendant about an unrelated crime. This officer was unaware of the defendant's previous request for an attorney. He provided the defendant with Miranda warnings, which the defendant waived. The defendant gave an incriminating statement about the crime for which he had not yet been arrested.

**ISSUE:** Whether the Edwards rule bars custodial interrogation by another law enforcement officer on other offenses after a defendant has invoked his

right to counsel under Miranda?

**HELD:** Yes. A request for counsel under the Fifth Amendment prohibits the government from approaching the defendant about any crime, unless counsel is present.

**DISCUSSION:** The principle of Edwards v. Arizona was designed to provide a bright-line rule for law enforcement officers that bars further government-initiated custodial interrogation of a suspect who has requested counsel. It is immaterial whether it is a different law enforcement officer or that the questions are about a different offense. Subsequent law enforcement officer-initiated interrogation will result only in an invalid waiver. Such interrogation may occur only in the presence of counsel or if initiated by the defendant.



*Minnick v. Mississippi*  
498 U.S. 146, 111 S. Ct. 486 (1990)

**FACTS:** The defendant was wanted for murders committed in Mississippi. He was arrested in California. The day after his arrest, two FBI agents sought to interview the defendant. The defendant was advised of his Miranda rights and agreed to speak with the two agents. After answering some questions, the defendant stopped, telling the agents to “Come back Monday, when I have a lawyer,” and stating that he would “make a more complete statement then with his lawyer present.” The agents then terminated the interview. Three days later, after the defendant had consulted with his lawyer on two or three occasions, a Sheriff from Mississippi arrived in California to question the defendant. The defendant was told that he “had to talk” to the Sheriff, and that he “could not refuse.” The defendant declined to sign a written waiver of his Miranda rights, but agreed to talk to the Sheriff and made an incriminating statement. The defendant’s lawyer was not present during this interview.

**ISSUE:** Whether the defendant’s Fifth Amendment right to counsel was violated by the police-initiated questioning that was conducted after he had requested counsel, even though he had been given the opportunity to consult with his counsel?

**HELD:** Yes. The defendant’s Fifth Amendment right to counsel was violated. The questioning was initiated by the police after he had requested counsel.

**DISCUSSION:** In Miranda v. Arizona, the Court held that “the police must terminate an interrogation of an accused in custody if the accused requests the assistance of counsel.” To ensure compliance with this mandate, the Court held in Arizona v. Edwards that “once an accused requests counsel, officials may not reinitiate questioning until counsel has been made available to him.” The issue in this case was whether the police could reinitiate questioning after a defendant, who requested counsel, has been given the opportunity to consult with counsel. The Court relied upon the language in its Miranda decision for the holding that “the Fifth Amendment protection of Edwards is not terminated or suspended by consultation with counsel.” In other words, “when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.” The need for counsel to protect a suspect’s Fifth Amendment right against self-incrimination includes not only the right to consult with counsel, but also to have counsel present during any questioning, if the suspect so desires.



*Maryland v. Shatzer*  
559 U.S. 98, 130 S. Ct. 1213 (2010)

**FACTS:** The defendant was initially approached by officers for questioning while in prison serving a sentence for an unrelated conviction. Shatzer invoked his right to counsel, the

interview was terminated, and the case closed. Still in prison more than 2-years later, the defendant was re-approached by officers, who had reopened the case. After being again advised of his Miranda rights and without counsel present, he waived his rights and made incriminating admissions that led to his conviction.

- ISSUES:**
1. Whether post-conviction incarceration in prison constitutes custody for purposes of Miranda?
  2. Whether a sufficient “break in custody” would permit officers to re-approach a suspect in custody who has previously invoked his right to counsel under Miranda and obtain a valid Miranda waiver without his counsel present?

- HELD:**
1. No. An incarcerated suspect serving a prison sentence is not in custody for purposes of Miranda, absent some additional restraint being placed on the suspect’s freedom of movement.
  2. Yes. A break in a suspect’s custody of 14 days or more is sufficient to allow officers to re-approach a suspect in custody who has previously invoked his right to counsel and obtain a valid Miranda waiver from the suspect without his counsel being present.

**DISCUSSION:** The rule in Edwards v. Arizona presumes invalid any Miranda waiver given by a suspect in custody and without counsel present, when re-approached by officers after he had previously invoked his right to counsel. This rule was intended to protect a suspect who has invoked his right to counsel – signifying his unwillingness to deal with officers directly – from overzealous officers who might exploit the inherently coercive circumstances of prolonged custody by badgering him into waiving that right. Unlike a suspect being held in pre-trial or investigative custody however, a prisoner

serving a prison sentence is not subject to the same coercive pressures that both Miranda and Edwards intended to address. The prisoner cannot reasonably view submission to his interrogator's will as affecting the circumstances of his continued incarceration. A police interrogation of a prisoner housed in the general prison population is thus not deemed to be a custodial interrogation without some additional coercive restraint being imposed on the prisoner.

Similarly, a sufficient break in custody, permitting a suspect to return to familiar people, surroundings, and routines, serves to diminish the coercive pressures of the custody such that the protections of Edwards are not justified. A break in custody of 14 days or more, which includes a prisoner's return to the general prison population after invoking his Miranda right to counsel, is of sufficient duration to terminate the need for Edwards protection and permit officers to re-approach a suspect in a custodial setting and obtain a valid Miranda waiver.



*Davis v. United States*  
512 U.S. 452, 114 S. Ct. 2350 (1994)

**FACTS:** Police officers suspected the defendant of committing a murder and brought him to their office. After being read his rights under the Uniform Code of Military Justice (similar to Miranda rights), the defendant waived his rights to remain silent or to consult with an attorney and agreed to be interviewed by the officers. About a half hour into the interview, the defendant stated "Maybe I should talk to a lawyer." The officers stated this request would be respected if the defendant wanted to speak to an attorney. The defendant stated "No, I'm not asking for a lawyer," and continued with the interview for another hour. At that point, the defendant confirmed that he wanted to speak to an attorney before saying anything else and the interview was terminated. The government used several incriminating statements made during the interview at the defendant's court-martial.

**ISSUE:** Whether the defendant's statement concerning whether he should speak to a lawyer was a legal request for an attorney?

**HELD:** No. The defendant's request for counsel must be unequivocal.

**DISCUSSION:** The right to request counsel during custodial interrogation was designed to act as a safeguard against the police badgering a defendant into waiving previously asserted Miranda rights. At that moment, the government must discontinue their efforts to interview a suspect. However, the suspect must assert his right before this safeguard takes effect. The Supreme Court noted that it has a long history of denying the assertion of rights based on ambiguous references by a suspect. The suspect must articulate his desire to have counsel present in a sufficiently clear manner so that a reasonable officer would understand that such articulation is a request for counsel. Otherwise, questioning of the suspect may continue.



*Smith v. Illinois*  
469 U.S. 91, 105 S. Ct. 490 (1984)

**FACTS:** Shortly after his arrest in connection with a robbery, the 18-year-old defendant was taken to an interrogation room for questioning by two officers. When the officers informed him that he had a right to his counsel's presence at the interrogation, the accused responded "Uh, yeah. I'd like to do that." Despite this response, the officers continued with their questioning, and when they subsequently asked the accused whether he wished to talk to them without a lawyer being present, the accused responded "Yeah and no, uh, I don't know what's what, really," and "All right. I'll talk to you then." The defendant then told the officers that he knew in advance about the planned robbery but claimed that he was not a participant. After considerable probing, the defendant confessed, before he reasserted his earlier story that he only knew about the planned crime. Upon further questioning, the

defendant again requested a lawyer saying “I wanta get a lawyer.” This time the officers honored the request and terminated the interrogation.

**ISSUE:** Whether the defendant’s initial request for counsel was ambiguous in light of his responses to further police questioning?

**HELD:** No. The defendant’s responses to continued government questioning did not render his initial request for counsel ambiguous under rule that all questioning must cease after an accused requests counsel.

**DISCUSSION:** The Court held that the accused’s initial request for counsel when he stated “Uh, yeah. I’d like to do that,” was not ambiguous. The officers should have terminated their questioning at that point. The defendant’s post-request responses to further interrogation could not be used to cast doubt on the clarity of his initial request for counsel. A valid waiver of an accused’s right to have his counsel present during interrogation cannot be established by showing only that the accused responded to further government-initiated custodial interrogation.



*McNeil v. Wisconsin*  
501 U.S. 171, 111 S. Ct. 2204 (1991)

**FACTS:** The defendant was arrested for armed robbery. Two officers advised him of his Miranda rights, and sought to question him. The defendant refused to answer any questions, but did not request an attorney. The officers ended the interview. The defendant appeared at a bail hearing on the armed robbery charge and accepted representation by a public defender. Later that day, an officer visited the defendant as a part of an investigation of a completely unrelated murder. The officer advised the defendant of his Miranda rights. The defendant signed a waiver form and made admissions regarding

the murder.

**ISSUE:** Whether an accused's request for counsel at an initial appearance on a charged offense constitutes an invocation of his Fifth Amendment right to counsel that precludes police interrogation on unrelated, uncharged offenses?

**HELD:** No. An accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding (bail hearing) does not constitute an invocation of the right to counsel derived from Miranda rights.

**DISCUSSION:** The Sixth Amendment right to counsel does not attach until the initiation of the adversarial judicial process. Even then, it only serves to guarantee the right to have counsel present for critical stages of the adversarial process that has initiated the right in the first place. Miranda protections apply to uncharged matters but only if the suspect is placed in custody and confronted with government interrogation.

The defendant's invocation of his Sixth Amendment right with respect to the armed robbery does not restrict the use of his statements regarding uncharged offenses. The Miranda right to counsel is not offense-specific. Once asserted, it prevents any further government-initiated interrogation outside the presence of counsel. However, the invocation of the Sixth Amendment right does not impart a Miranda right. The two different rights to counsel have different purposes and effects. The Miranda protections are intended to ensure the suspect's "desire to deal with the police only through counsel" for any encounter. The Sixth Amendment right is intended to protect the unaided layman at critical confrontations with the government after the initiation of the adversarial process with respect to a particular crime.





*Oregon v. Bradshaw*  
462 U.S. 1039, 103 S. Ct. 2830 (1983)

**FACTS:** Following the death of a minor in a vehicle accident, the defendant was given his Miranda rights and questioned by officers. The defendant was suspected of being the driver of the vehicle. While he denied driving the vehicle, the defendant admitted to furnishing alcohol to the minor. He was arrested for furnishing alcohol to a minor and again informed of his Miranda rights. Upon being told that he was suspected of being the driver of the vehicle, the defendant invoked his right to counsel and the conversation ended. Shortly thereafter, the defendant was being transported to the county jail, when he asked an officer, “Well, what is going to happen to me now?” The officer reminded the defendant he did not have to speak to the police and that if he chose to do so it would have to be of his free will. The defendant stated that he understood and a discussion followed in which the officer suggested that the defendant take a polygraph examination. The defendant agreed. The next day, before the polygraph examination, the defendant was read his Miranda warnings for a third time. When the polygraph examiner stated he did not believe the defendant was being truthful, the defendant admitted to driving the vehicle at the time of the fatal accident.

**ISSUE:** Whether there exist circumstances in which the government can continue to interrogate a defendant that has invoked his Fifth Amendment right to counsel?

**HELD:** Yes. If the defendant initiated the conversation with the government after invoking his right, the interrogation can resume.

**DISCUSSION:** The Court held that once a suspect invokes his right to counsel, that request must be strictly honored and all questioning must cease. Only after the suspect “initiates further communication, exchanges, or conversation with the police” can further interrogation take place. In other words, “before a suspect in custody can be subjected to further

interrogation after he requests an attorney, there must be a showing that the ‘suspect himself initiates dialogue with the authorities.’” In this case, the defendant’s question to the officer, “Well, what is going to happen to me now?” showed a clear desire on the defendant’s part “for a generalized discussion about the investigation.” The defendant’s comment was distinct from some of the routine questions that necessarily arise when a suspect is in custody, such as a request to use the bathroom. Even if the accused initiates a conversation, the government still bears the burden of showing that the suspect waived his right to have counsel present.



## 6. Waiver

*Colorado v. Spring*  
479 U.S. 564, 107 S. Ct. 851 (1987)

**FACTS:** The defendant killed a person named Walker in Colorado. Thereafter, an informant told ATF agents that the defendant was engaged in the interstate transportation of stolen firearms, and that the defendant had discussed his participation in the Colorado killing. Based on this information, ATF agents set up an undercover purchase of firearms from the defendant. After the purchase was made, the agents arrested the defendant and advised him of his rights. The defendant waived his Miranda rights and the agents questioned him about the firearms transactions. They also asked him about the Colorado murder. The defendant stated that he had “shot another guy once.” When asked if the defendant had shot a man named Walker, the defendant said “no.” Sometime later, state officers read the defendant his Miranda rights. After he waived these rights he confessed to the Colorado murder.

**ISSUE:** Whether a suspect must be advised of all the subjects about which he will be questioned in order to make a valid waiver of his Miranda rights?

**HELD:** No. The purpose of reading Miranda rights is to

ensure the defendant does not feel compelled to make any statement.

**DISCUSSION:** A suspect's awareness of all the crimes about which he could be questioned is not relevant in determining the validity of the decision to waive his rights. The Court is only interested in whether the suspect waived his or her Miranda rights in a voluntary, knowing, and intelligent manner. The Court set out a two-part test to determine if a waiver was obtained through coercion: (1) whether the defendant relinquished the right voluntarily, and (2) if it was given with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it.



*Connecticut v. Barrett*  
479 U.S. 523, 107 S. Ct. 828 (1987)

**FACTS:** The defendant, while in custody for sexual assault, was advised of his Miranda warnings three times. On each occasion, after signing and dating an acknowledgment that he had been informed of his rights, the defendant indicated to the officers that he would not make a written statement. However, he was willing to talk about the incident that led to his arrest. After the second and third warnings, the defendant added that he would not make a written statement outside the presence of counsel. He then orally admitted to his involvement in the sexual assault.

**ISSUE:** Whether the defendant's limited invocation of his right to counsel prohibits all interrogation?

**HELD:** No. As long as the officers scrupulously abided by the defendant's requests they can proceed with the interrogation.

**DISCUSSION:** The fundamental purpose of the Miranda rights is "to assure that the individual's right to choose between speech and silence remains unfettered throughout the

interrogation process.” Once the suspect is warned, he is free to exercise his own will in deciding whether or not to make a statement.

The defendant’s limited requests for counsel were accompanied by affirmative announcements of his willingness to speak with the officers. The defendant’s decision need not be logical. It only needs to be voluntary.



*California v. Prysock*  
453 U.S. 355, 101 S. Ct. 2806 (1981)

**FACTS:** The defendant was apprehended for commission of a murder. Prior to questioning, an officer informed the defendant as follows:

You have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used as evidence against you in a court of law. You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. You have the right to have a lawyer appointed to represent you at no cost to yourself.

The defendant acknowledged that he understood these rights and then provided a taped statement to the officer. Based in part on his taped statement, the defendant was convicted of first-degree murder.

**ISSUE:** Whether an officer must use the precise language contained in the Miranda case?

**HELD:** No. An officer is not required to use the precise language contained in the Miranda case but must convey the equivalent information found in that case.

**DISCUSSION:** The Supreme Court does not require that an

officer use the precise language contained in the Miranda case when notifying defendants of their Miranda warnings. The Court actually stated in Miranda that “the warnings required and the waiver necessary ... are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant (emphasis added).” Further, in Rhode Island v. Innis, the Court discussed the Miranda case and noted that what was required was “the now familiar Miranda warnings ... or their equivalent.” In this case, “nothing in the warnings given the [defendant] suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right ‘to a lawyer before you are questioned ... while you are being questioned, and all during the questioning.’”



*Duckworth v. Eagan*  
492 U.S. 195, 109 S. Ct. 2875 (1989)

**FACTS:** The defendant agreed to go to the police station to discuss a stabbing. The officer read the defendant a form purporting to be his Miranda rights. The defendant signed the form which contained all required Miranda warnings but which said “You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you if you wish, if and when you go to court.” The defendant claimed his innocence but was taken into custody. Twenty-nine hours later, he was interrogated and confessed after reading and signing a warning without the conditional provision previously added.

**ISSUE:** Whether informing a suspect that an attorney would be appointed for him “if and when you go to court” renders the Miranda warnings inadequate?

**HELD:** No. The law only requires that the suspect be informed that he has the right to an attorney before and during questioning, and that an attorney would

be appointed for him if he could not afford one.

**DISCUSSION:** The Miranda decision required that certain warnings be given as a prerequisite to the admissibility of a custodial statement. However, the Court has never held that these must be given in the form set forth in the Miranda case. That form or a fully effective equivalent is sufficient. Miranda compliance does not require that attorneys be produced on call, but only that the suspect be informed, as he was here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one. If a law enforcement officer cannot provide appointed counsel, Miranda requires only that the officer not question a suspect unless he waives his right to counsel.



*North Carolina v. Butler*  
441 U.S. 369, 99 S. Ct.1755 (1979)

**FACTS:** The defendant was involved in the armed robbery of a gas station. At the time of his arrest on a fugitive warrant, the defendant was fully advised of his Miranda rights, although he was not questioned at that time. Later, after it was determined that the defendant had an 11th grade education and was literate, he was given an “Advice of Rights” form containing the Miranda warnings, which he read. When asked if he understood his rights, the defendant stated that he did. However, the defendant refused to sign the waiver at the bottom of the form. He was then told that he did not need to either speak or sign the form, but that the agents would like to speak to him. The defendant stated, “I will talk to you, but I am not signing any form.” He then made an incriminating statement. The defendant said nothing when he was advised of his right to counsel, and at no time did he request counsel or attempt to terminate the questioning. He was ultimately convicted with the use of his verbal statement.

**ISSUE:** Whether the defendant validly waived his right to counsel at the time he made the incriminating

statement, as required by Miranda?

**HELD:** Yes. Waivers may be made orally or in writing.

**DISCUSSION:** In Miranda, the Court held that an “express” statement (e.g., “I waive my right”) could constitute a valid waiver. However, the Court never made an express statement a requirement for obtaining a valid waiver. “An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver.” What is required, regardless of the form of the waiver, is that it be voluntary and knowing, considering “the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.” While the Court in Miranda held that mere silence, standing alone, is not enough to establish a valid waiver of rights, “that does not mean that the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights.” In this case, the defendant’s waiver of his right to counsel can be inferred from his actions and words.



*Oregon v. Elstad*  
470 U.S. 298, 105 S. Ct. 1285 (1985)

**FACTS:** The defendant was identified as the suspect in a burglary. Two officers obtained an arrest warrant and went to his home. They found the defendant laying on his bed and asked him to get dressed and accompany them to the living room. One of the officers, without providing the defendant his Miranda warnings, asked the defendant if he knew why the officers were there. When the defendant responded that he did not, the officer told him that they believed the defendant was involved in the burglary. The defendant admitted he had been at the victim’s home. Upon arriving at the police station, the defendant was advised for the first time of his Miranda rights.

After indicating that he understood his rights, the defendant waived them and gave the officers a full written confession. The defendant conceded that the officers made no threats or promises either at his residence or at the station house. At trial, the defendant contended that the first statement (given at the home) should be suppressed because no Miranda warnings had been provided, and that the second statement (given at the police station) should be suppressed under the “fruit of the poisonous tree” doctrine.

**ISSUE:** Whether the officers’ initial failure to read the defendant his Miranda warnings, without more, “tainted” the subsequent confession given by the defendant after he had been advised of, and agreed to waive, his Miranda rights?

**HELD:** No. The officers’ initial failure to read the defendant his Miranda warnings, without more, did not “taint” the subsequent confession.

**DISCUSSION:** A police officer’s failure to administer Miranda warnings creates a presumption of compulsion. However, “a procedural Miranda violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the ‘fruit of the poisonous tree’ doctrine.” While the defendant’s unwarned statement must be suppressed, “the admissibility of any subsequent statement should turn solely on whether it is knowingly and voluntarily given.” The Court concluded that, “absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion” with regard to any subsequent statements. Providing Miranda warnings to a suspect who has previously given a voluntary, but unwarned, statement “ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.”





*Missouri v. Seibert*,  
542 U.S. 600, 124 S. Ct. 2601 (2004)

**FACTS:** The defendant was arrested for participating in a murder. The officers specifically refrained from providing her with Miranda warnings and took her to the police station. After 30 to 40 minutes of interrogation, she admitted to her role in the crime. The officers gave the defendant a short break, turned on a tape recorder, provided her Miranda warnings, and obtained a signed waiver of those protections. The officer then resumed questioning the defendant and she repeated her admissions. The officer testified that he made a “conscious decision” to withhold Miranda warnings from the defendant; using an interrogation technique he had been taught.

**ISSUE:** Whether Miranda warnings provided to the defendant after being placed in custody and thoroughly questioned are adequate?

**HELD:** No. Such “question-first” interrogation tactics invalidate subsequent Miranda warnings.

**DISCUSSION:** The purpose of the “question-first” tactic is to seek a particularly opportune moment to provide the warnings after the confession has already been secured. By withholding warnings until after a successful interrogation, they become ineffective in preparing the suspect for the follow up interrogation. The Court found that this “question-first” tactic is likely to lead to confusion on the part of the suspect because of the “perplexity about the reason for discussing the rights as that point, bewilderment being an unpromising frame of mind for knowledgeable discussion.”

This case is different from Oregon v. Elstad. In Elstad the Court held that an officer’s initial failure to warn was an “oversight” rather than a deliberate design. The connection between the first (pre-Miranda warnings) and second (post-Miranda warnings) interviews with the police was “speculative and attenuated.” In Elstad, the questioning at a station house was significantly different from the short conversation that

occurred in the defendant's house. In the case at hand, the pre-Miranda interrogation occurred at the station house and the question was methodical and extensive. At the conclusion of the interrogation, most of the incriminating statements had been divulged. The defendant was only allowed 15 to 20 minutes for a break and the post-Miranda interrogation transpired in the same location.



*Bobby v. Dixon*  
565 U.S. 23, 132 S. Ct. 26 (2011)

**FACTS:** The defendant was suspected of being a co-conspirator in a murder. During a chance encounter, an officer read the defendant his Miranda rights. The defendant refused to answer questions without his attorney present and left. Five days later, officers arrested the defendant for forgery, a crime related to the murder. The officers decided not to provide the defendant with Miranda warnings for fear that he would again refuse to speak without an attorney present. The defendant made several incriminating statements regarding the forgery but steadfastly denied involvement in the murder. After a four hour break in the interrogation, the defendant learned that his co-conspirator had cooperated with the government. He told the officers "I talked to my attorney, and I want to tell you what happened." The officers read the defendant his Miranda rights, obtained a waiver, and the defendant provided a detailed confession.

**ISSUE:** Whether the officers' intentional withholding of Miranda warnings during the first interrogation rendered the subsequent statement involuntarily obtained?

**HELD:** No. The Court found a no nexus between the unwarned statement and the warned statement that would render the second statement involuntary.

**DISCUSSION:** The Court distinguished this case from Missouri v. Seibert in that it did not find the “two-step interrogation technique” used in that case. “In Seibert, the suspect's first, unwarned interrogation left ‘little, if anything, of incriminating potential left unsaid,’ making it ‘unnatural’ not to ‘repeat at the second stage what had been said before (quoting Seibert).” In this instance, there was no confession to repeat after being provided Miranda warnings. “Four hours passed between [the defendant’s] unwarned interrogation and his receipt of Miranda rights, during which time he traveled from the police station to a separate jail and back again; claimed to have spoken to his lawyer; and learned that police were talking to his accomplice and had found [the victim’s] body. Things had changed.” As the Court found no nexus between the defendant’s “unwarned admission to forgery and his later, warned confession to murder” the confession was voluntarily obtained.



*Michigan v. Tucker*  
417 U.S. 433, 94 S. Ct. 2357 (1974)

**FACTS:** The defendant was arrested and brought to the police station for questioning about a rape. The officers asked the defendant if he wanted an attorney and that any statements he made could be used against him in court. They did not tell him he had the right to have an attorney appointed to represent him if he could not afford one himself. The defendant stated that he understood his rights and invoked the name of an associate, Henderson, as an alibi. The police interviewed Henderson. They learned that the defendant was not in his company at the time of the crime and made several incriminating statements to Henderson on the day following the crime. The police only knew of Henderson’s identity as a result of the defendant’s statements.

**ISSUE:** Whether the government may use information (Henderson’s statements) obtained after providing imperfect Miranda warnings?

**HELD:** Yes. The purpose of the exclusionary rule is designed to deter future law enforcement behavior.

**DISCUSSION:** The Court stated that “[J]ust as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever.” The police asked the defendant if he wanted an attorney, and he stated that he did not. “Whatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness Henderson as well.”



*United States v. Patane*  
542 U.S. 630, 124 S. Ct. 2620 (2004)

**FACTS:** Officers approached the defendant at his home to discuss his possible connection to a gun crime and for violating a restraining order. After placing the defendant under arrest for violating the order, one of the officers began to read him the Miranda warnings. The defendant interrupted the officer, claiming to understand his rights. Without completing the Miranda warnings, the officer began questioning the defendant about a gun. The defendant volunteered several statements. He told the officers the gun was located in his residence and granted consent for its retrieval.

**ISSUE:** Whether the failure to provide adequate Miranda warnings prohibits the government from using physical evidence discovered as a result of this violation?

**HELD:** No. The Miranda rule protects against violations of the self-incrimination clause. This clause is not implicated by the admission into evidence the physical evidence found through voluntary statements made by the defendant.

**DISCUSSION:** The Court held that “[T]he Miranda rule is not a code of police conduct, and police do not violate the Constitution (or even the Miranda rule, for that matter) by mere failures to warn.” The primary protection afforded by the self-incrimination clause is a prohibition on compelling a defendant to testify against himself at trial. “Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial.” The Court recognized that the Miranda rule sweeps beyond those protections actually found in the self-incrimination clause and is, therefore, reluctant to extend its reach without significant justification.

In the case at hand, the introduction of non-testimonial fruit of a voluntary statement does not implicate the self-incrimination clause. “The admission of such fruit presents no risk that a defendant’s coerced statements (however defined) will be used against him at a criminal trial.” Exclusion of the statements themselves serves as a complete remedy for any perceived Miranda violation. Note that the fruit of involuntary (through force or other coercive means) statements will continue to be suppressed.



*Chavez v. Martinez*  
538 U.S. 760, 123 S. Ct. 1994 (2002)

**FACTS:** After an altercation with the police that led to his arrest, the defendant was seriously injured. An investigating officer approached the defendant while receiving medical attention at the hospital. The defendant admitted that he took the gun from an officer’s holster and pointed it at the police. The defendant also stated “I am not telling you anything until they treat me,” though the officer continued the interview. At no point did the officer ever give the defendant Miranda warnings. The defendant was never charged with the crimes but he filed a suit against the officer for depriving him of his Miranda warnings.

**ISSUE:** Whether an officer can be held liable for failing to

provide Miranda warnings to suspect?

**HELD:** No. The Fifth Amendment's protections prohibit the government from compelling a suspect from becoming a witness against himself in a criminal case. This did not occur.

**DISCUSSION:** The Court stated that as the defendant was "never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case" a violation of his rights never occurred. A criminal case does not take place until there is "the initiation of legal proceedings." The Court also stated that "it is enough to say that police questioning does not constitute a 'case.'" As the defendant was not made to be a witness against himself in a criminal case, no violation of the Constitution occurred.



*Moran v. Burbine*  
475 U.S. 412, 106 S. Ct. 1135 (1986)

**FACTS:** The defendant was arrested for burglary. The government obtained evidence suggesting that the defendant might be also responsible for the murder of a woman in Providence. The officers telephoned the Providence police and an hour later Providence officers arrived at the station to question the defendant. That same evening the defendant's sister telephoned the Public Defender's Office to obtain legal assistance for the defendant on the burglary charge. She was unaware that he was also suspected of involvement in a murder. At 8:15 p.m., an Assistant Public Defender telephoned the station, stated that she would act as the defendant's counsel if the police intended to question him, and was told that he would not be questioned further until the next day. The Public Defender was not informed that the Providence police were present or that the defendant was a murder suspect. Less than an hour later, the Providence police interviewed the defendant after providing him with his Miranda warnings. The defendant admitted to committing the murder. At all relevant

times, the defendant was unaware of his sister's efforts to retain counsel and of the attorney's telephone call, but at no time did he request an attorney.

**ISSUE:** Whether the police violated either the defendant's Miranda rights or his Sixth Amendment right to counsel?

**HELD:** No. The defendant knowingly and voluntarily waived his Fifth Amendment rights and his Sixth Amendment right to counsel had not yet attached.

**DISCUSSION:** The Court held that the officer's failure to inform the defendant of the attorney's telephone call did not deprive him of information essential to his ability to knowingly waive his Fifth Amendment rights. Events occurring outside of a suspect's presence and entirely unknown to him have no bearing on the capacity to comprehend and knowingly relinquish a constitutional protection. Once it is demonstrated that a suspect's decision to waive his rights was uncoerced, that he at all times knew he could stand silent and request a lawyer, and that he was aware of the government's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

Further, the conduct of the police did not violate the defendant's Sixth Amendment right to counsel. This right initially attaches only after the first formal charging procedure, whereas the government's conduct here occurred before the defendant's initial appearance. The Sixth Amendment becomes applicable only when the government's role shifts from investigation to accusation through the initiation of the adversarial judicial process. Nor was the asserted government misconduct so offensive as to deprive the defendant of the fundamental fairness guaranteed by due process. Although on facts more egregious than those presented here police deception might rise to a level of a due process violation, the conduct challenged falls short of the kind of misbehavior that shocks the sensibilities of civilized society.



## 7. Government Employees

*Gardner v. Broderick*  
392 U.S. 273, 88 S. Ct. 1913 (1968)

**FACTS:** The defendant was a police officer. He was subpoenaed to testify before a grand jury that was investigating alleged bribery and corruption of police officers. He was advised that the grand jury proposed to examine him concerning the performance of his official duties. The defendant was advised of his privilege against self-incrimination, but was asked to sign a “waiver of immunity” so that the grand jury could continue to look into his potential wrongdoing. He was told that he would be fired if he did not sign. Following his refusal, he was given an administrative hearing and was discharged solely for this refusal.

**ISSUE:** Whether a government employee who refuses to waive the privilege against self-incrimination may be dismissed because of that refusal?

**HELD:** No. The threat of the loss of financial position amounts to coercion.

**DISCUSSION:** The defendant’s testimony was demanded before the grand jury in part so that it could be used to prosecute him, and not just for the purpose of securing an accounting of his official duties. The mandate of the self-incrimination clause prohibits the attempt to coerce a waiver of immunity from the defendant. Threatened loss of employment amounts to coercion. However, if a government employee refuses to answer questions relating to performance of his official duties after being granted immunity (his statements could not be used in a criminal case), the privilege against self-incrimination does not prevent his dismissal.





*Garrity v. New Jersey*  
385 U.S. 493, 87 S. Ct. 616 (1967)

**FACTS:** The defendant was a police officer. A state statute required state employees to answer questions or forfeit their job and pension. The defendant was told:

- 1) Anything he said could be used against him in a criminal prosecution;
- 2) He could refuse to answer questions if the answers could tend to incriminate him; and
- 3) If he refused to answer he could be removed from his job.

The defendant made admissions and was convicted of a criminal offense in part based on the evidence consisting of his admissions.

**ISSUE:** Whether the defendant was deprived of his Fifth Amendment rights in view of the state statute?

**HELD:** Yes. The protection of the individual under the Fifth Amendment against coerced statements prohibits the use in subsequent criminal proceedings of statements obtained under threat of removal from a job.

**DISCUSSION:** Coercion that drives a confession can be mental as well as physical. The choice the government gave the defendant was between self-incrimination or job forfeiture. These choices were likely to exert such pressure as to prevent the defendant from making a free and rational choice. Because of the state statute, the defendant had a choice between a “rock and a whirlpool.” Making such a choice cannot be voluntary. The protection of the individual under the Fifth Amendment against coerced statements prohibits the use of these statements in subsequent criminal proceedings. However, the Fifth Amendment does not prohibit the use of these statements

in administrative or civil matters.



*Kalkines v. United States*  
473 F.2d 1391 (1973)

**FACTS:** The defendant was a federal employee who was suspected of taking money in return for favorable treatment. There was an on-going criminal investigation of the defendant concurrent with this civil/administrative inquiry. He was called for four interviews. In three of those interviews, the defendant was not told that his answers would not be used against him in a criminal prosecution. In one interview he was told of this fact. The defendant was fired for violating a personnel policy that required employees to provide information in their possession about agency matters and to allow agents to obtain information on employee financial matters.

**ISSUE:** Whether the defendant was advised of his options and the consequences of his choice and was adequately assured of the protection against the use of his answers or their fruits in any criminal prosecution?

**HELD:** No. The government must provide sufficient warnings.

**DISCUSSION:** In citing Gardner v. Broderick, the appellate court reaffirmed that a person cannot be discharged simply because he invokes his Fifth Amendment right against self-incrimination in refusing to respond. The appellate court also cited Garrity v. New Jersey, holding that a later prosecution cannot constitutionally use statements, or their fruits, coerced from a government employee in an earlier disciplinary investigation by threat of removal from office if he fails to answer questions. A government employer can insist on answers or remove an employee for refusal to answer if the employee is adequately informed both that he is subject to discharge for not answering and that his replies (and their

fruits) cannot be used against him in a criminal case.



*Lefkowitz v. Turley*  
414 U.S. 70, 94 S. Ct. 316 (1973)

**FACTS:** New York Municipal law required public contracts to provide that if a contractor refused to answer questions concerning a contract, the contract may be canceled and the contractor shall be disqualified from further public transactions. The defendants were subpoenaed to testify before a grand jury investigating charges of conspiracy. They refused to waive their right to remain silent. The state then initiated proceedings to terminate their current contracts.

**ISSUE:** Whether the government can compel public contractors to waive their right to be free from self-incrimination?

**HELD:** No. The government can only secure self-incriminating statements from witnesses if it first agrees that those statements will not be used in criminal prosecutions against the witnesses.

**DISCUSSION:** The purpose of the Fifth Amendment is to insure that persons are not compelled to give testimony that may prove that they were involved in criminal activity. While the state has a strong public interest in ferreting out fraud and other criminal activity as it relates to their contracts, it does not outweigh the importance of the self-incrimination clause. The Court further stated that a waiver of a right secured under threat of substantial economic sanction is not voluntarily made. If the state desires this testimony, it must ensure that any information gathered would not be used against the defendant in a criminal trial.



*LaChance v. Erickson*  
522 U.S. 262, 118 S. Ct. 753 (1998)

**FACTS:** The defendants, federal employees, were subjected to adverse actions by their agencies. Each made false statements to agency investigators with respect to the misconduct with which they were charged. In each case, the agency additionally charged the false statement as a ground for adverse action, and the action taken against the employees were based in part on the added charge.

**ISSUE:** Whether the government may take adverse action against an employee for making a false statement during an agency investigation?

**HELD:** Yes. If answering an agency's investigatory question could expose an employee to a criminal prosecution, he could exercise his Fifth Amendment right to remain silent, but not lie.

**DISCUSSION:** The American legal system provides methods for challenging the government's right to ask questions -- lying is not one of them. A citizen can decline to answer the government's question, or answer it honestly. However, a citizen may not knowingly and willfully answer with the government with a falsehood without repercussion.

If answering an agency's investigatory question could expose an employee to a criminal prosecution, he may exercise his Fifth Amendment right to remain silent. The Court stated that "it may well be that an agency, in ascertaining the truth or falsity of the charge, would take into consideration the failure of the employee to respond." The Fifth Amendment does not forbid adverse inferences against parties in civil or administrative actions when they refuse to testify. The Fifth Amendment's right to remain silent applies only to those cases with criminal ramifications.



*NASA v. FLRA*  
527 U.S. 229, 119 S. Ct. 1979 (1999)

**FACTS:** The Federal Service Labor-Management Relations Statute (FSLMRS) permits union participation at an employee examination conducted “by a representative of the agency” if the employee believes that the examination will result in disciplinary action and requests such representation. The NASA Office of Inspector General (OIG) began investigating a government employee. An investigator from the OIG’s office interviewed the employee and, while a union representative was allowed to attend the interview, the representative’s participation was curtailed. Because of this limitation on the representative’s participation, the union filed an unfair labor charge with the Federal Labor Relations Authority (FLRA).

**ISSUE:** Whether the NASA OIG investigator was a “representative” of NASA under the terms of the FSLMRS, so that the employee had a right to union representation during the interview?

**HELD:** Yes. The NASA OIG investigator qualified as a “representative” of NASA under the terms of the law.

**DISCUSSION:** The statute refers to “representatives of the agency,” and is not limited solely to those individuals who have management responsibilities. The term “representative” therefore includes OIG investigators of NASA. Because the employee was entitled to union representation, the investigator’s action in preventing active union representative participation was a violation of the FSLMRS.



## 8. Miranda Exceptions

*Harris v. New York*  
401 U.S. 222, 91 S. Ct. 643 (1971)

**FACTS:** The defendant was on trial for selling a controlled substance to an undercover police officer. At the time of his arrest, police secured statements from the defendant in violation of his Miranda protections. The defendant testified at trial that the contents of the bag sold to the officer were represented as a controlled substance but was actually baking powder. This testimony contradicted those statements obtained in violation of his Miranda rights. On cross-examination, the prosecution asked the defendant if he recalled making incriminating statements after his arrest. The defendant testified that he could not recall those statements.

**ISSUE:** Whether the government can introduce statements that were obtained in violation of the defendant's Miranda rights to impeach his testimony?

**HELD:** Yes. The government is permitted to introduce statements that were obtained in violation of the defendant's Miranda rights but only for the limited purposes of impeaching his testimony.

**DISCUSSION:** The prosecution may not use Miranda-tainted statements in its case-in-chief. However, that does not preclude the use of these statements altogether. The Court noted that the impeachment process serves an invaluable function to the jury in assessing a witness' credibility. The defendant's right to testify does not include a right to commit perjury. Provided that the statements were trustworthy, such evidence can be used to impeach the defendant's testimony.



*New York v. Quarles*  
467 U.S. 649, 104 S. Ct. 2626 (1984)

**FACTS:** A woman approached two officers, told them she had just been sexually assaulted, provided a description of the suspect, and stated the suspect had entered a nearby supermarket carrying a gun. One of the officers went into the supermarket, saw Quarles, who matched the description given by the victim, and chased him to the back of the store. The officer ordered Quarles to stop, and upon frisking him, the officer discovered Quarles was wearing an empty shoulder holster. The officer handcuffed Quarles and asked him where the gun was located. Quarles nodded toward some empty cartons and stated “the gun is over there.” The officer found the gun in one of the boxes and arrested Quarles.

**ISSUE:** Whether the officer was required to read Quarles his Miranda warnings before asking him where the gun was located?

**HELD:** No. The interest of public safety allowed the officer to ask about the gun without first reading Quarles his Miranda warnings.

**DISCUSSION:** Quarles was in custody for Miranda purposes when the officer asked him where the gun was located. Nonetheless, the Court held that there is an overriding “public safety” exception to the requirement that Miranda warnings be provided before a custodial interrogation. The Court concluded that Miranda warnings are not required when “police officers ask questions reasonably prompted by a concern for public safety.” Here, the officer was “confronted with the immediate necessity of ascertaining the whereabouts of a gun which [he] had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket.” While the gun remained concealed in the supermarket, it posed numerous dangers to public safety. The officer “needed an answer to his question not simply to make his case against [the defendant], but to insure that further danger to the public did not result from the concealment of the gun in a public area.”

## NOTES



## **X. SIXTH AMENDMENT RIGHT TO COUNSEL**

### **A. Attachment of Right**

*Kirby v. Illinois*  
406 U.S. 682, 92 S. Ct. 1877 (1972)

**FACTS:** The victim of a robbery was called to the police station for the purpose of identifying the defendant as a robber. The defendant had been arrested in connection with an unrelated criminal offense. At the time of the confrontation the defendant had not been advised of the right to counsel, nor did he ask for or receive legal assistance.

**ISSUE:** Whether the defendant was entitled to representation during the “show-up” under the Sixth Amendment?

**HELD:** No. The government had not yet initiated the adversarial process against the defendant for the robbery.

**DISCUSSION:** A person’s Sixth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial itself. The right attaches at the time the process begins--whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. The defendant, in this case, had no Sixth Amendment right to counsel.



*Montejo v. Louisiana*  
556 U.S. 778, 129 S. Ct. 2079 (2009)

**FACTS:** The defendant was charged with first degree murder and appointed counsel at a preliminary hearing. Later that day, police read him his Miranda rights, and he agreed to

accompany them to locate the murder weapon. During the trip, the defendant wrote an inculpatory apology letter to the victim's widow. When he returned from the trip, the defendant met his court-appointed lawyer for the first time. The letter was admitted at trial over defense objection.

**ISSUE:** Whether police may initiate interrogation of a defendant once he has been appointed counsel at arraignment or a similar proceeding?

**HELD:** Yes. Police may initiate interrogation of a defendant who has been appointed counsel unless he actually requests a lawyer or otherwise asserts his Sixth Amendment right to counsel.

**DISCUSSION:** The Court overturned its earlier decision in Michigan v. Jackson in which it held that if police initiate interrogation of a defendant after he has asserted his right to counsel at an arraignment or similar proceeding, any waiver of his right to counsel is invalid. The purpose of the rule was to prevent the police from badgering a defendant into changing his mind about his Sixth Amendment rights. A defendant who has simply been appointed an attorney and has never asked for counsel, however, has not necessarily made up his mind about his rights. The requirement that police advise a defendant of his Miranda rights prior to custodial interrogation and obtain a valid waiver is sufficient protection against such badgering.



*Rothgery v. Gillespie County*  
554 U.S. 191, 128 S. Ct. 2578 (2008)

**FACTS:** Officers made a warrantless arrest of the defendant on a charge of felon in possession of a firearm, relying upon erroneous information that he had been previously convicted of a felony. They promptly brought the accused before a magistrate judge, where a probable cause determination was made, bail set, and formal notice of the charges given. No prosecutor was involved in or aware of the charges or

proceeding. The defendant was conditionally released on posting a surety bond. Since he could not afford an attorney, he made multiple requests for one to be appointed, all to no avail. Six months later, he was indicted for the same offense, rearrested, and jailed on \$15,000 bail. Being indigent and unable to post bail, he remained jailed for three months. After the county did appointed the defendant counsel, he quickly won a bail reduction, securing his release. He assembled documentation of the lack of a prior felony conviction, and had the charges dismissed. He then sued under §1983 for violation of his Sixth Amendment right to counsel.

**ISSUE:** Whether the Sixth Amendment right to counsel always attaches at an accused's initial appearance.

**HELD:** Yes. An initial appearance automatically triggers the defendant's Sixth Amendment right to counsel.

**DISCUSSION:** Even without a prosecutor's knowledge of, involvement in, or commitment to a charge against an accused, the first appearance of an accused on charges before a judge triggers the Sixth Amendment right to the assistance of counsel. This is true even when the proceeding is not formally labeled an "initial appearance." An accusation filed with a judicial officer is sufficiently formal, and bringing a defendant before a court for initial appearance signals a sufficient commitment to prosecute. Therefore, "[a] criminal defendant's initial appearance before a judicial officer, where he learns of the charges against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger the Sixth Amendment right to counsel."



*United States v. Gouveia*  
467 U.S. 180, 104 S. Ct. 2292 (1984)

**FACTS:** Four defendants, all of whom were inmates in a federal prison, were placed in administrative detention in individual cells pending the investigation of a fellow inmate's

death. They remained in administrative detention without appointed counsel for approximately 19 months before their indictment for murder and their arraignment, when counsel was appointed for them.

**ISSUE:** Whether the defendants were entitled to appointed counsel during their administrative detention?

**HELD:** No. The Sixth Amendment right to counsel is not effective until the government has initiated adversarial proceedings.

**DISCUSSION:** The Court held that the defendants were not constitutionally entitled to the appointment of counsel while they were in administrative segregation and before any adversary judicial proceedings had been initiated against them. The right to counsel attaches only at or after the initiation of adversary judicial proceedings against a defendant. This interpretation of the Sixth Amendment right to counsel is consistent not only with the literal language of the Amendment, which requires the existence of both a “criminal [prosecution]” and an “accused,” but also with the purposes that the right to counsel serves, including assuring aid at trial and at “critical” pretrial proceedings when the accused is confronted with the intricacies of criminal law or with the expert advocacy of the public prosecutor, or both.



## **B. Critical Stages**

### **1. Questioning**

*Brewer v. Williams*  
430 U.S. 387, 97 S. Ct. 1232 (1977)

**FACTS:** The defendant was suspected of abducting and murdering a 10-year old girl. He was arrested, arraigned, and committed to jail 160 miles away from the crime scene. His attorney advised him not to make any statements. The officers

accompanying the defendant on his return trip agreed not to question him during the trip. One of the officers, which knew that the defendant was a former mental patient and was deeply religious, engaged him in a conversation covering a wide range of topics, including religion. The officer delivered what has been referred to as the “Christian burial speech.” He addressed the defendant as “Reverend” and said:

I want to give you something to think about.... They are predicting several inches of snow for tonight...you are the only person that knows where this little girl’s body is.... And since we are going right past the area...I feel we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl.... We should stop and locate it...rather than waiting until... a snowstorm....

The officer stated: “I do not want you to answer me.... Just think about it....” The defendant made incriminating statements and directed the officers to evidence and the victim’s body.

**ISSUE:** Whether the defendant was “questioned” within the meaning of the Sixth Amendment?

**HELD:** Yes. The officer’s actions were designed to motivate the defendant into revealing information.

**DISCUSSION:** The right to counsel means at least that a person is entitled to the help of a lawyer at or after the time judicial proceedings have been commenced against him, whether by way of formal charge, preliminary hearing, indictment, information or arraignment. The Court found little doubt that the officer deliberately set out to elicit information from the defendant just as surely as, and perhaps more effectively than, if he had formally interrogated him. The “Christian burial speech” was equivalent to questioning. As the defendant had been interrogated without his attorney present, the officer violated his Sixth Amendment right to assistance of counsel.



*Patterson v. Illinois*  
487 U.S. 285, 108 S. Ct. 2389 (1988)

**FACTS:** The defendant was arrested as a result of a gang fight in which one member of a rival gang was killed. Following his arrest, the defendant was advised of and waived his Miranda rights. He then acknowledged his involvement in the fight, but denied culpability in the murder. Two days later, while still in custody, the defendant was indicted. The officer that had initially questioned the defendant removed him from his jail cell and told the defendant that, because he had been indicted, he was being moved. When he learned that one particular gang member had not been indicted, the defendant asked the officer, “Why wasn’t he indicted, he did everything?” The defendant then began to explain his involvement in the crime. At that point, the officer interrupted the defendant and handed him a Miranda waiver form. The defendant initialed each of the warnings, signed the waiver form, and gave a lengthy statement implicating himself in the murder. Later that day, the defendant gave a second incriminating statement to a prosecutor. Before doing so, the defendant had again been advised of his Miranda rights and waived them. At trial, the defendant claimed that, because he had been indicted and had a Sixth Amendment right to counsel, the officer and the prosecuting attorney could not initiate an interrogation with him. The defendant also contended that while Miranda warnings are sufficient to waive a suspect’s Fifth Amendment rights, they are insufficient to waive the Sixth Amendment right to counsel.

- ISSUES:**
1. Once the Sixth Amendment right to counsel attaches, is the government prohibited from questioning a suspect?
  2. Whether a waiver of Miranda rights is sufficient to waive a suspect’s Sixth Amendment right to counsel?

- HELD:**
1. No. Even though the Sixth Amendment right to counsel attaches, the government is not barred from questioning a suspect in all cases.
  2. Yes. A suspect can effectively waive his Sixth Amendment right to counsel by waiving those rights via the Miranda waiver form.

**DISCUSSION:** Because the defendant had been indicted at the time he was interrogated by the officer and the prosecutor, he had a Sixth Amendment right to have the assistance of counsel at both interrogations. However, the fact that the defendant's Sixth Amendment right to counsel was in existence at the time of the questioning does not mean that he exercised that right. In this case, the defendant never sought to exercise his right to have counsel present at either interrogation. "Had the defendant indicated he wanted the assistance of counsel, the authorities' interview with him would have stopped, and further questioning would have been forbidden (unless the defendant called for such a meeting)."

The Court held that "as a general matter, an accused who is admonished with the warnings required by Miranda has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on that basis will be considered a knowing and intelligent one." First, the accused is specifically notified of his right to counsel in the Miranda warnings. Second, the accused is advised of the "ultimate adverse consequence" of proceeding without a lawyer, namely, that any statement he chooses to make can be used against him in any subsequent criminal proceedings. However, the Court made clear that there are circumstances where the post-indictment questioning of a suspect will not survive a Sixth Amendment challenge, even though the challenged practice would be constitutional under Miranda. For example, the Court has "permitted a Miranda waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning," whereas under the Sixth Amendment this waiver would not be valid. Also, "a

surreptitious conversation between an undercover police officer and an unindicted suspect would not give rise to any Miranda violation as long as the ‘interrogation’ was not in a custodial setting; however, once the accused is indicted, such questioning would be prohibited.”



*United States v. Henry*  
447 U.S. 264, 100 S. Ct. 2183 (1980)

**FACTS:** The defendant was indicted and arrested for armed robbery of a bank. While he was in jail pending trial, government agents contacted an informant who was then an inmate confined in the same cellblock as the defendant. An officer instructed the informant to be alert to any statements made by prisoners but not to initiate conversations with or question the defendant regarding the charges against him. After the informant had been released from jail, he reported to the officer that he and the defendant had engaged in conversation and that the defendant made incriminating statements about the robbery. The officer paid the informant for furnishing the information.

**ISSUE:** Whether the use of the informant infringed on the defendant’s Sixth Amendment right to counsel?

**HELD:** Yes. By intentionally creating a situation likely to induce the defendant to make incriminating statements without the assistance of counsel, the government had violated defendant’s Sixth Amendment right to counsel.

**DISCUSSION:** The Court noted that the defendant’s Sixth Amendment right to counsel had attached at the time he made the statements. Further, the Court held that the government’s specific mention of the defendant to the undercover informant, who was paid on a contingency fee basis, constituted the type of affirmative steps to secure incriminating information from defendant outside the presence of his counsel. Under these



facts, that the informant was acting under instructions as a paid informant for the government, and that the defendant was in custody and under indictment at the time, incriminating statements were “deliberately elicited” from the defendant within the meaning of Massiah. This is the type of evidence collection prohibited by the Sixth Amendment.



*Kuhlmann v. Wilson*  
477 U.S. 436, 106 S. Ct. 2616 (1986)

**FACTS:** The defendant was arrested for murder. After his initial appearance, he was placed in a holding cell with a government informant. The informant was to listen to the defendant’s comments and report them to the police. He was not to ask any questions but to “keep his ears open.” The defendant made several incriminating statements to the informant.

**ISSUE:** Whether the government deprived the defendant of his right to counsel by placing an informant in his jail cell?

**HELD:** No. The government is not compelled to ignore the statements of a defendant.

**DISCUSSION:** Once the right to counsel has attached, the government is precluded from deliberately eliciting incriminating statements in the absence of the defendant’s lawyer. While the Court held in United States v. Henry that informants that use their positions of trust to elicit remarks are engaged in interrogation, that did not occur here. The defendant must show the government took some action that was deliberately designed to elicit incriminating statements.



*Fellers v. United States*  
540 U.S. 519, 124 S. Ct. 1019 (2004)

**FACTS:** A grand jury indicted the defendant for conspiracy to distribute a controlled substance. Officers went to his home and informed the defendant that he had been indicted, that they had a warrant for his arrest and they wanted to talk to him about his participation. The officers explained that the indictment referred to the defendant's association with others, and named four individuals. The defendant made incriminating statements about his involvement with these individuals. The officers took the defendant to a local jail and then, for the first time, advised him of his Miranda rights. The defendant signed Miranda waiver form and repeated his incriminating remarks.

**ISSUE:** Whether the defendant's statements made at his home were the result of adversarial government questioning in violation of the Sixth Amendment?

**HELD:** Yes. The government deliberately elicited incriminating information from the defendant after the adversarial process had been initiated and without counsel present or obtaining the defendant's waiver of counsel.

**DISCUSSION:** An indictment initiates the adversarial process. From that moment onward, the government is prohibited from deliberately eliciting incriminating information from a defendant unless the defendant waives his right to assistance of counsel (Sixth Amendment). The Court had no doubt that the government deliberately elicited information from the defendant at his home. In fact, the officers told the defendant that they wanted to speak to him about his involvement in the crime for which he had been indicted. These statements were taken in violation of the defendant's Sixth Amendment right to have counsel present.

As for the defendant's statements made at the jailhouse, the Court noted that it had not had the occasion to consider whether the Fifth Amendment's Elstad taint rule (from Oregon

v. Elstad (1985)) was applicable to a Sixth Amendment violation. The Court sent this issue back to the appellate court for further review.



## 2. Lineups

*Gilbert v. California*  
388 U.S. 263, 87 S. Ct. 1951 (1967)

**FACTS:** The defendant was suspected of various robberies in which the robber used a handwritten note to demand money. He was arrested and indicted. Approximately 16 days after his indictment and after he had been appointed counsel, police officers required the defendant to participate in a lineup without notice to his counsel. Numerous witnesses identified the defendant during this lineup and later identified him in court.

**ISSUE:** Whether the post-indictment lineup, conducted without notice to the defendant's appointed counsel, violated the defendant's Sixth Amendment right to counsel?

**HELD:** Yes. The defendant had a right to have counsel present at all critical stages, including lineups.

**DISCUSSION:** "Post-indictment pretrial lineups at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution." Accordingly, the accused had a Sixth Amendment right to counsel at this proceeding. The "conduct of such a lineup without notice to and in the absence of the defendant's appointed counsel denied him his Sixth Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the defendant by witnesses who attended the lineup."



*United States v. Wade*  
388 U.S. 218, 87 S. Ct. 1926 (1967)

**FACTS:** Several weeks after the defendant was indicted for robbery he was, without notice to his appointed counsel, placed in a lineup. Each person in the lineup wore strips of tape on his face, as the robber allegedly had done. Upon direction each repeated words like those the robber allegedly had used. Two witnesses identified the defendant as the robber.

**ISSUE:** Whether the defendant was deprived of his Sixth Amendment right to counsel at the lineup?

**HELD:** Yes. Once the Sixth Amendment right to counsel attaches, the defendant is entitled to have counsel present at all critical stages.

**DISCUSSION:** The Sixth Amendment guarantees an accused the right to counsel at trial and any critical confrontation by the prosecution. This includes pretrial proceedings where the results could determine his fate and where the absence of counsel might deny his right to a fair trial. A post-indictment lineup is a critical confrontation at which the defendant is entitled to the aid of counsel. There is a great possibility of unfairness to the accused in lineups because of how they are frequently conducted: the dangers inherent in eyewitness identification, the suggestibility inherent in the context of the confrontations, and the unlikelihood that the accused can reconstruct what occurred in later hearings.



### **C. Right to Counsel**

*Massiah v. United States*  
377 U.S. 201, 84 S. Ct. 1199 (1964)

**FACTS:** The defendant was indicted, along with another individual, for violating narcotics laws. The defendant retained a lawyer, pled not guilty, and was released on bail. Shortly after

the defendant was released, the other individual agreed to cooperate with the government in their continued investigation of the defendant. This individual permitted an officer to install a radio transmitter under the front seat of his automobile that would allow the agent to monitor conversations carried on in the vehicle. One evening, the individual and the defendant had a lengthy conversation in the vehicle that was overheard by the officer. During this conversation, the defendant made several incriminating statements. The statements made by the defendant were used to convict him at his subsequent trial.

**ISSUE:** Whether the defendant's statements to the individual, after indictment and in the absence of his counsel, were obtained in violation of the Sixth Amendment?

**HELD:** Yes. The defendant has a Sixth Amendment right to the presence of counsel during any government questioning during the adversarial process related to those charges pending in the adversarial process.

**DISCUSSION:** A defendant's Sixth Amendment right to counsel attaches at the beginning of the "adversarial judicial process." Once the adversarial judicial process begins, a defendant has a right to have counsel present at all "critical stages" of the process, including when any agent of the government questions the defendant. In this case, the defendant was denied the basic protections of the Sixth Amendment "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."



## D. Crime Specific

*Maine v. Moulton*

474 U.S. 159, 106 S. Ct. 477 (1985)

**FACTS:** The defendant and co-defendant Colson were indicted for possession of stolen automobiles and parts. They appeared with their attorneys at arraignment and were released on bail. Before trial, Colson and his lawyers met with the police and Colson confessed to his participation with the defendant in the pending charges. He agreed to testify against the defendant and cooperate with the investigation. Colson also consented to having a recording device placed on his telephone to record his conversations with the defendant and to wear a body wire transmitter to record a meeting with the defendant during which he would discuss the pending charges. The defendant made incriminating statements during an encounter with Colson.

**ISSUE:** Whether the defendant's Sixth Amendment right to counsel was violated by admission at trial of incriminating statements made to a government informant after indictment?

**HELD:** Yes. The defendant has a right to the presence of counsel for any government questioning that occurs after the Sixth Amendment has attached.

**DISCUSSION:** The Sixth Amendment guarantees the right to assistance of counsel. This assistance is not limited to participation in the trial but encompasses all critical stages (court hearings, lineups and government questioning). The right to counsel attaches at or after the time that adversarial judicial proceedings have been initiated. This occurs at the indictment or the filing of an information. This can occur at the initial appearance if the defendant expresses a desire to be represented by counsel. The co-defendant's participation in the meeting was the "functional equivalent" of interrogation and violates this Sixth Amendment right. However, incriminating statements pertaining to other crimes, as to which the Sixth

Amendment right has not yet attached, are admissible at a trial for those offenses.



*Texas v. Cobb*  
532 U.S. 162, 121 S. Ct. 1335 (2001)

**FACTS:** While under arrest for an unrelated offense, the defendant confessed to a home burglary. However, he denied knowledge of a woman and child's disappearance from the home. He was indicted for the burglary, and counsel was appointed to represent him. He later confessed to his father that he had killed the woman and child, and his father then contacted the police. While in custody, the defendant waived his Miranda rights and confessed to the murders. This confession was used against him in the murder trial. The defendant argued that the government deprived him of his Sixth Amendment right to counsel since the adversarial process had been initiated for a related offense (the burglary).

**ISSUE:** Whether the officers must provide counsel for closely related but uncharged criminal matters if counsel already represents the defendant?

**HELD:** No. The Sixth Amendment right to counsel only attaches to the crimes for which a defendant has been formally charged.

**DISCUSSION:** The Supreme Court held that, regardless of whether the murder charge was closely related factually to the burglary offense, the right to counsel was specific to the charged offense. Since the two offenses required different elements of proof, they are separate offenses. As prosecution had not been initiated for the murder offense at the time of the interrogation, no Sixth Amendment right to counsel had attached to it. The defendant had no right to the presence of his previously appointed counsel during the interrogation concerning the murder charge, and the confession resulting from that interrogation was admissible.

Although the Sixth Amendment right to counsel clearly attaches only to charged offenses, the Court has recognized that the definition of an “offense” is not limited to the four corners of a charging document. The test to determine whether there are two different offenses or only one is whether each provision requires proof of a fact which the other does not. See Blockburger v. United States, 284 U.S. 299 (1932). The Blockburger test has been applied to delineate the scope of the Fifth Amendment’s Double Jeopardy Clause, which prevents multiple or successive prosecutions for the “same offense.” When the Sixth Amendment right to counsel attaches, it encompasses offenses that, even if not formally charged, would be considered the same offense under the Blockburger test.



### **E. Confrontation Clause**

*Melendez-Diaz v. Massachusetts*  
557 U.S. 305, 129 S. Ct. 2527 (2009)

**FACTS:** The government tried the defendant for distributing a controlled substance. At trial, the government placed into evidence bags seized during the arrest, and three “certificates of analysis” demonstrating the results of a forensic analysis performed on the contents. The certificates, sworn to before a notary public, described the weight and stated that the bags contained a substance found to be cocaine. These certificates were by analysts at the government laboratory.

**ISSUE:** Whether the certificates were “testimonial” evidence, requiring the analysts to testify subject to cross examination?

**HELD:** Yes. These notarized certificates are affidavits, which were created by the government to establish a fact at trial, are testimonial in nature and are subject to the Confrontation Clause.



**DISCUSSION:** The Court relied on its decision in Crawford v. Washington, 541 U.S. 36 (2004) in affirming that the Sixth Amendment Confrontation Clause, at a minimum, “guarantees a defendant's right to confront those “who ‘bear testimony’ against him.” The Court found that “[T]here is little doubt that the documents at issue in this case fall within the ‘core class of testimonial statements’...” As affidavits, such as these here, that are created to establish evidence in a criminal proceeding are “testimonial,” their submission alone, absent some other rule or standard of law, fails to meet the Sixth Amendment standard. The Sixth Amendment “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination... (citing Crawford).”



*Bullcoming v. New Mexico*  
564 U.S. 647, 131 S. Ct. 2705 (2011)

**FACTS:** The defendant was arrested and charged with driving while intoxicated. At his trial, the trial court permitted the government to admit as evidence a forensic laboratory report which indicated the defendant’s intoxication. The prosecution did not call the analyst that created and signed the report, but rather, brought forward another analyst that was familiar with the laboratory’s procedures.

**ISSUE:** Whether the Sixth Amendment’s Confrontation Clause requires the government to produce the testimony of the analyst that obtained the results found in the report?

**HELD:** Yes. Neither the report nor a knowledgeable surrogate is a satisfactory substitute for effective cross-examination guaranteed by the Sixth Amendment.

**DISCUSSION:** The Court has consistently held “[A]s a rule, if an out-of-court statement is testimonial in nature, it may not

be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.” A statement is “testimonial in nature” if its primary purpose is to prove “past events potentially relevant to later criminal prosecution.” This rule is designed to protect the defendant’s Sixth Amendment’s Confrontation Clause right to challenge adversarial testimonial evidence. The Court refused to create a “forensic evidence” exception to this rule.



*Michigan v. Bryant*  
562 U.S. 344, 131 S. Ct. 1143 (2011)

**FACTS:** Officers found a shooting victim mortally wounded. The victim told the officers that he had been shot by the defendant. He died soon thereafter. At the defendant’s trial, the officers testified as to what the deceased shooting victim had said and the defendant was found guilty of second-degree murder.

**ISSUE:** Whether the trial court’s admission of these statements denied the defendant of his right to confront his accuser?

**HELD:** No. The circumstances of the interaction between the victim and the officers was to enable the government in an ongoing emergency, so the statements were not “testimonial statements.”

**DISCUSSION:** The Court noted that the “[C]onfrontation Clause of the Sixth Amendment states: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” In Crawford v. Washington, the Court “limited the Confrontation Clause’s reach to testimonial statements and held that in order for testimonial evidence to be admissible, the Sixth Amendment ‘demands what the common law required: unavailability and a prior opportunity for cross-examination.’”

The Court determined that if the “‘primary purpose’ of an interrogation is ‘to enable police assistance to meet an ongoing emergency,’ (quoting Davis v. Washington)” the resulting statements are non-testimonial. In determining the “primary purpose,” reviewing courts are to look at “[t]he circumstances in which an encounter occurs-e.g., at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards...” Of course, “the existence of an ‘ongoing emergency’ at the time of an encounter between an individual and the police is among the most important circumstances informing the ‘primary purpose’ of an interrogation.



*Hardy v. Cross*  
565 U.S. 65, 132 S. Ct. 490 (2011)

**FACTS:** The victim of a sexual assault testified against the defendant in a trial that was later declared a mistrial. The government decided to retry the defendant the following year, but the victim could no longer be found despite constant efforts to locate her. The government asked to have her declared “unavailable for trial” so that her prior testimony could be introduced at the subsequent assault trial.

**ISSUE:** Whether the government can use prior testimony of a witness it can no longer locate?

**HELD:** Yes. If the government has made a good faith effort to locate the witness and the defendant had a prior opportunity to cross-examine that witness, the prior testimony can be admitted.

**DISCUSSION:** As a matter of constitutional procedure, the defendant has a right to confront those that bear witness against him. The defendant has a right to cross-examine those witnesses. However, if the defendant has previously confronted the witness, and that witness later becomes unavailable for trial, the Court has held that the prior testimony can be admitted into evidence. The government’s responsibility to

demonstrate that a witness is unavailable for trial is the duty of good faith to inquire about the location of the witness. The Court noted that “the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising.”



## **XI. ADDITIONAL CASES OF INTEREST**

### **A. Use of Force**

*Graham v. Connor*  
490 U.S. 386, 109 S. Ct. 1865 (1989)

**FACTS:** Graham, a diabetic, felt the onset of an insulin reaction and desired to purchase some orange juice to counteract the reaction. Berry, a friend of the Graham's, drove him to a convenience store. Graham, concerned about the number of people ahead of him at the checkout line, rushed out of the store and returned to Berry's automobile. He asked Berry to take him to a friend's house. Officer Connor observed Graham hastily enter and leave the store and became suspicious. Officer Connor made an investigative stop of the automobile. Although Berry explained that his friend was suffering from a "sugar reaction," the officer ordered Berry and Graham to wait while he found out what happened in the convenience store. When the officer returned to his patrol car to call for backup, Graham got out of the car, ran around it twice, and sat down on the curb, where he passed out briefly. A number of other police officers responded to the officer's request for backup. One of the officers rolled Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry's pleas to get him some sugar. Another officer said "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M. F. but drunk. Lock the S.B. up." Several officers then lifted Graham up from behind, carried him over to Berry's car, and placed him face down on its hood. Regaining consciousness, Graham asked the officers to check in his wallet for a diabetic decal that he carried. One of the officers told him to "shut up" and shoved his face down against the hood of the car. Four officers grabbed Graham and threw him headfirst into the police car. A friend of Graham's brought some orange juice to the car, but the officers refused to let him have it. After receiving a report that Graham had done nothing wrong at the convenience store, the officers drove him home and released him. Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he

also claimed to have developed a permanent loud ringing in his right ear. He sued the officers under Title 42 U.S.C. § 1983, alleging that they had used excessive force in making the investigatory stop.

**ISSUE:** Whether the constitutional standard governs a citizen's claim that a law enforcement officer used excessive force is "reasonableness?"

**HELD:** Yes. Claims of excessive use of force in the course of making an arrest, investigatory stop, or other "seizure" of a person are examined under the Fourth Amendment's "objective reasonableness" standard.

**DISCUSSION:** When an excessive force claim arises in the context of an arrest or investigatory stop, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons ... against unreasonable ... seizures." Accordingly, all claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other "seizure" should be analyzed under the Fourth Amendment and its "reasonableness" standard. Further, the "reasonableness" of a particular seizure depends not only on when it is made, but also on how it is carried out. The Supreme Court has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to affect it.

In determining whether the use of force in a given situation was "reasonable," courts consider all of the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. For example, the

Fourth Amendment is not necessarily violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation. Finally, as in other Fourth Amendment contexts, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.



*Tennessee v. Garner*  
471 U.S. 1, 105 S. Ct. 1694 (1985)

**FACTS:** At about 10:45 p.m. two police officers were dispatched to answer a "proowler inside call." Upon arriving at the scene they saw a woman standing on her porch and gesturing toward the adjacent house. She told them she had heard glass breaking and that "they" or "someone" was breaking in next door. While one of the officers radioed the dispatcher to say that they were on the scene, the second officer went behind the house. He heard a door slam and saw someone run across the backyard. The fleeing suspect, the defendant, stopped at a 6-foot-high chain link fence at the edge of the yard. With the aid of a flashlight, the officer was able to see his face and hands. He saw no sign of a weapon, and, though not certain, was "reasonably sure" and "figured" that the defendant was unarmed. The officer testified he thought the defendant was 17 or 18 years old and about 5'5" or 5'7" tall. In fact, the defendant, an eighth-grader, was 15. He was 5'4" tall and weighed somewhere around 100 or 110 pounds. While the

defendant was crouched at the base of the fence, the officer called out “police, halt” and took a few steps toward him. The defendant began to climb over the fence. Convinced that if he made it over the fence he would elude capture, the officer shot him. The bullet hit the defendant in the back of the head. The defendant later died at a hospital. In using deadly force to prevent the escape, the officer was acting under the authority of a state statute and pursuant to his department’s policy. The statute provided that “[if], after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.” The department policy was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary. The defendant’s father brought suit under Title 42 U.S.C. § 1983, alleging, among other things, that his son’s Fourth Amendment rights had been violated by the use of deadly force in this situation.

**ISSUE:** Whether deadly force may be used to prevent the escape of an apparently unarmed suspected felon?

**HELD:** No. Deadly force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

**DISCUSSION:** Whenever an officer restrains the freedom of a person to walk away, he has “seized” that person. Apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. To determine the constitutionality of a seizure a court must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. The “reasonableness” of a seizure depends on not only when a seizure is made, but also how it is carried out.

Notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The use of deadly force to



prevent the escape of all felony suspects, without considering the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where 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. An officer may not seize an unarmed, non-dangerous suspect by shooting him dead. For this reason, the state statute was found to be unconstitutional insofar as it authorized the use of deadly force against such fleeing suspects.

It was not, however, unconstitutional on its face. Where an officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatened the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

In this case, the officer could not reasonably have believed that the defendant - young, slight, and unarmed - posed any threat. Indeed, the officer never attempted to justify his actions on any basis other than the need to prevent an escape. While the defendant was suspected of burglary, this fact could not, without regard to the other circumstances, automatically justify the use of deadly force. The officer did not have probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others.



*Scott v. Harris*  
550 U.S. 372, 127 S. Ct. 1769 (2007)

**FACTS:** In an effort to stop a speeding motorist, a police officer activated his blue flashing lights. The suspect sped away and the officer radioed for assistance and gave chase. The

pursuit resulted in dangerous maneuvers by the suspect, including damage to one of the officers' vehicles. "Six minutes and nearly 10 miles after the chase had begun," a police officer attempted a maneuver designed to cause the fleeing vehicle to spin to a stop. The result, however, was that the officer applied his bumper to the rear of the suspect's vehicle, who lost control of his vehicle and crashed. The suspect was "badly injured and was rendered a quadriplegic."

**ISSUE:** Whether it is reasonable for an officer to take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?

**HELD:** Yes. "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."

**DISCUSSION:** The defendant's actions "posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." The officers were justified in taking some action. The Court asked "how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person?" An appropriate analysis includes taking "into account not only the number of lives at risk, but also their relative culpability." In this instance, the defendant's actions place a significant number of persons in danger, and the officers' range of reasonable responses was limited. In this instance, ramming the vehicle was reasonable under the Fourth Amendment.



*Plumhoff v. Rickard*  
572 U.S. \_\_\_, 134 S. Ct. 2012 (2014)

**FACTS:** On July 18, 2004, around midnight, a police officer conducted a traffic stop on a car driven by Rickard because it had only one operating headlight. When Rickard failed to produce his driver's license, the officer asked him to step out of the car. Instead of stepping out, Rickard sped away. The officer pursued Rickard on an interstate highway along with officers in five other police cars. During the pursuit, Rickard was swerving through traffic at speeds over 100 miles per hour. After Rickard exited the interstate highway, he made a sharp turn causing contact between his car and one of the police cars. This contact caused Rickard's car to spin out into a parking lot and collide with Officer Plumhoff's police car. Officers Evans and Plumhoff got out of their cars and approached Rickard's car. Evans with gun in hand, pounded on the passenger side window of Rickard's car. At this point, Rickard's tires started spinning and his car was rocking back and forth, an indication that Rickard was using the accelerator even though his bumper was flush against the police car in front of him. Plumhoff fired three shots into Rickard's car, but Rickard put his car in reverse and turned around, forcing Ellis to step to the side to avoid being struck. As Rickard accelerated down the street away from the officers, two other officers fired 12 shots towards the fleeing suspect. Rickard lost control of the car and crashed into a building. Both Rickard and his passenger, Allen, died from a combination of gunshot wounds and injuries suffered in the crash.

Rickard's daughter sued Plumhoff and five other police officers claiming the officers violated the Fourth Amendment by using excessive force to stop Rickard.

**ISSUE:** Whether the Sixth Circuit improperly denied the officers qualified immunity by finding their use of force was unreasonable as a matter of law?

**HELD:** Yes. The officers' conduct did not violate the Fourth Amendment; therefore, the officers were entitled to qualified immunity.

**DISCUSSION:** Rickard led the officers on a chase with speeds exceeding 100 miles per hour and lasted over five minutes. During the chase, Rickard passed more than two dozen other vehicles, several of which were forced to alter their course. After Rickard's car collided with a police car and appeared to be stopped, Rickard resumed maneuvering his car in an attempt to escape. Under the circumstances, the court found Rickard's outrageously reckless driving posed a grave public safety risk. As a result, a reasonable officer could have concluded that Rickard was intent on resuming his flight, and if he were allowed to do so, he would once again pose a deadly threat for others on the road. Consequently, the court held the police officers acted reasonably by firing at Rickard to end that risk.

The court added the officers were justified in firing 15 shots at Rickard, stating, "If police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." Here, during the 10-second span when the officers fired their shots, Rickard continued to flee until he crashed. In addition, the court stated Allen's presence in the car had no bearing in the analysis of whether the officers acted reasonably by firing at Rickard because Fourth Amendment rights are personal and cannot be asserted by another person. As such, the court did not consider Allen's presence in the car when determining the reasonableness of the officers' actions.

Finally, the court held even if the officers' use of force against Rickard had been unreasonable, the officers would still have been entitled to qualified immunity. The court found that at the time of the incident, no clearly established law prohibited the officers from firing at a fleeing vehicle to prevent harm to others.



*City & Cnty. of San Francisco v. Sheehan*  
575 U.S. \_\_\_, 135 S. Ct. 1765 2015)

**FACTS:** Sheehan, a woman who suffered from mental illness, lived in a group home that accommodated such persons. Sheehan's social worker became concerned about her deteriorating condition because Sheehan was not taking her medications. When the social worker entered Sheehan's room, Sheehan told the social worker to get out. In addition, Sheehan told the social worker she had a knife and threatened to kill him. The social worker left Sheehan's room, cleared the building of other residents and called the police to help him transport Sheehan to a mental health facility for an involuntary commitment for evaluation and treatment.

When Officers Reynolds and Holder arrived, the social worker told them he had cleared the building of other residents. The social worker also told the officers the only way for Sheehan to leave her room was by using the main door, as the window in Sheehan's room could not be used as a means of escape without a ladder. The officers then entered Sheehan's room without a warrant to confirm the social worker's assessment, and to take Sheehan into custody. When Sheehan saw the officers, she grabbed a knife and threatened to kill them, stating she did not wish to be taken to a mental health facility. The officers went back into the hallway and closed the door to Sheehan's room. The officers called for back-up, but before other officers arrived, Reynolds and Holder drew their firearms and forced their way back into Sheehan's room. After Sheehan threatened the officers with a knife, the officers shot Sheehan five or six times. Sheehan survived and sued the city and the officers, claiming the officers violated her Fourth Amendment rights by entering her room without a warrant and using excessive force. Sheehan also claimed the officers did not follow department training on how to deal with mentally ill subjects.

- ISSUES:**
1. Whether Title II of the Americans with Disabilities Act (ADA) requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody.
  2. Whether it was clearly established that even where an exception to the warrant requirement applied, an entry into a residence could be unreasonable under the Fourth Amendment by reason of the anticipated resistance of an armed and violent suspect within.

- HELD:**
1. The Supreme Court dismissed the first question presented because at oral argument the city did not argue the issue presented in the question. Instead of arguing that the ADA did not apply to enforcement actions by law enforcement officers, the city conceded that the ADA might apply to arrests. The city then argued that in this case, the officers were not required to provide Sheehan an accommodation under the ADA because of the threat she posed to the officers. Because the Supreme Court does not usually decide questions of law that were not presented to, and ruled upon by a lower court, it decided to dismiss the first question presented by the city.
  2. No, it was not clearly established; therefore, the officers were entitled to qualified immunity.

**DISCUSSION:** The court held the case law relied upon by the Ninth Circuit in denying the officers qualified immunity did not clearly establish that it was unreasonable for the officers to forcibly enter the home of an armed, mentally ill suspect who

had been acting irrationally and threatening others when there was no objective need for immediate entry. In addition, even if the officers acted contrary to the training they received on how to deal with mentally ill subjects, the court held at the time of the incident it was not clearly established that the Fourth Amendment required the officers to accommodate Sheehan's mental illness before attempting to arrest her.



*Mullenix v. Luna*  
577 U. S. \_\_\_\_, 136 S. Ct. 305 (2015)

**FACTS:** At approximately 10:21 p.m., a police officer followed Leija to a fast food restaurant and attempted to arrest him on an outstanding misdemeanor arrest warrant. After some discussion with the officer, Leija fled in his vehicle with the officer in pursuit. A state trooper took the lead in the pursuit as Leija continued onto an interstate highway. Twice during the pursuit, Leija called the police dispatcher, claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit. The dispatcher relayed Leija's threats, along with a report that Leija might be intoxicated, to the officers.

Approximately eighteen minutes into the pursuit, Leija approached an overpass where an officer had deployed a spike strip in the roadway. In addition, Trooper Mullenix positioned himself on top of the overpass with an M-4 rifle. Mullenix fired six rounds at Leija's car, which then engaged the spike strip, hit the median and rolled over. Leija was pronounced dead at the scene. Leija's cause of death was later determined to be one of the shots fired by Mullenix.

Leija's estate sued Mullenix, claiming Mullenix violated the Fourth Amendment by using excessive force to stop Leija

**ISSUE:** Whether the officer was entitled to qualified immunity because his use of force was objectively reasonable.

**HELD:** Yes.

**DISCUSSION:** Qualified immunity protects officers from civil liability as long as long as their conduct does not violate a clearly established right. In the context of excessive force cases involving vehicle pursuits, the Supreme Court noted that existing case law was not sufficiently clear to put Mullenix on notice that his actions violated Leija’s Fourth Amendment right to be free from an unlawful seizure. Instead, the Court stated it has never found the use of deadly force in connection with a dangerous car chase to be a violation of the Fourth Amendment, let alone the basis for denying an officer qualified immunity.

In Scott v. Harris, the Court held an officer did not violate the Fourth Amendment by ramming a fleeing suspect whose reckless driving “posed an actual and imminent threat to the lives” of other motorists and the officers involved in the chase.

In Plumhoff v. Rickard, the Court reaffirmed Scott by holding that an officer acted reasonably when he fatally shot a fugitive who was “intent on resuming” a chase that “posed a deadly threat for others on the road.”

In this case, while Leija did not pass as many cars as the drivers in Scott or Plumhoff during the pursuit, Leija verbally threatened to kill any officers in his path, and he was about to come upon an officer as he approached the overpass. As a result, the Court held that Mullenix was entitled to qualified immunity.



*Kinglsey v. Hendrickson*  
576 U.S. \_\_\_, 135 S. Ct. 2466 (2015)

**FACTS:** Kingsley was arrested and detained in a county jail pending trial. Officers forcibly removed Kingsley from his cell after he refused to comply with instructions to remove a piece of paper that was covering the light fixture above his bed.



Kingsley later filed a lawsuit under 42 U.S.C. § 1983, alleging the officers used excessive force against him, in violation of the Fourteenth Amendment's Due Process Clause when they removed him from his cell.

The district court instructed the jury that to prevail, Kingsley had to establish the officers acted with malice and intended to harm Kingsley when they used force against him, a subjective standard. Kingsley disagreed, arguing the correct standard for judging a pretrial detainee's excessive force claim is objective reasonableness

**ISSUE:** In lawsuit for excessive use of force brought by a pre-trial detainee, whether the detainee must show the officers were subjectively aware their use of force was unreasonable, or only that the officers' use of that force was objectively unreasonable.

**HELD:** The appropriate standard to apply to a pretrial detainee's excessive force claim is objective reasonableness.

**DISCUSSION:** First, the Court noted this holding is consistent with precedent. In Bell v. Wolfish, the Court held a pretrial detainee could prevail on an excessive force claim by providing objective evidence the alleged use of force was not related to a legitimate governmental objective or that the force was excessive in relation to the alleged reason for its use.

Second, the Court held an objective standard is "workable," as many facilities, including the one in this case, train officers to interact with all detainees as if the officers' conduct is subject to an objective reasonableness standard.

Finally, the court held the use of an objective standard protects an officer who acts in "good faith." The court recognized that running a detention facility is difficult and that officers facing disturbances are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving. In addition, the court explained as part of the objective

reasonableness analysis, it is appropriate to give deference to a facility's policies and practices, which are in place to maintain order and institutional security.



## **B. Civil Liability**

*Bivens v. Six Unknown Named Agents of the Federal Bureau  
of Narcotics*  
403 U.S. 388, 91 S. Ct. 1999 (1971)

**FACTS:** Bivens sued federal agents under Title 42 U.S.C. § 1983 after they entered his apartment without a warrant. The agents searched his apartment, then placed him under arrest for violating narcotics laws. They placed Bivens in manacles in the presence of his wife and children. They also threatened to arrest his family. The agents took Bivens to the courthouse, then their headquarters. He was interrogated, fingerprinted, photographed, subjected to a visual strip search, and booked. The charges against Bivens were ultimately dismissed. Bivens alleged the search and his arrest were conducted “in an unreasonable manner.” Initially, the court dismissed Bivens’ lawsuit because Title 42 U.S.C. § 1983 was inapplicable to actions performed by federal officials. This ruling was affirmed by the court of appeals, and Bivens appealed to the Supreme Court.

**ISSUE:** Whether a violation of the Fourth Amendment by a federal official acting under color of federal authority gives rise to a cause of action for damages in federal court?

**HELD:** Yes. When a federal official acting under color of law violates the Fourth Amendment, a cause of action for damages may be pursued in federal court.

**DISCUSSION:** The Fourth Amendment guarantees to the people of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And where federally protected rights have been violated, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief to those who have been victimized. While the Fourth Amendment does not provide for its enforcement by an

award of money damages for the consequences of its violation, it is well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. Here, Bivens' complaint stated a cause of action under the Fourth Amendment, and he was entitled to recover money damages for any injuries he suffered as a result of the agents' violation of that Amendment.



*County Of Sacramento v. Lewis*  
523 U.S. 833; 118 S. Ct. 1708 (1998)

**FACTS:** After a failed attempt to stop two suspects on a motorcycle, a police officer pursued them at a high rate of speed. For 75 seconds over a course of 1.3 miles in a residential neighborhood, the motorcycle wove in and out of oncoming traffic, forcing two cars and a bicycle to swerve off of the road. The motorcycle and patrol car reached speeds up to 100 miles an hour, with the officer following at a distance as short as 100 feet (at that speed, his car would have required 650 feet to stop). The pursuit ended after the motorcycle tipped over. By the time the officer slammed on his brakes, the operator of the motorcycle was out of the way, but his passenger was not. The patrol car skidded into him at 40 miles an hour, causing fatal injuries. The decedent's family filed a lawsuit under Title 42 U.S.C. § 1983, alleging that decedent's Fourteenth Amendment substantive due process right to life had been violated.

**ISSUE:** Whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process in a high-speed automobile chase aimed at apprehending a suspected offender?

**HELD:** It depends. In high-speed automobile chases, the standard to be used in determining whether a

violation of the Fourteenth Amendment's substantive due process clause occurred is whether the officer's conduct "shocks the conscience."

**DISCUSSION:** The Supreme Court first noted that the Fourth Amendment's "objective reasonableness" test was inapplicable in this case, because no "seizure" had taken place. A police pursuit in attempting to seize a person does not amount to a "seizure" within the meaning of the Fourth Amendment. Similarly, no Fourth Amendment seizure would take place where a pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit, but accidentally stopped the suspect by crashing into him. A Fourth Amendment "seizure" occurs only when there is a governmental termination of freedom of movement through means intentionally applied.

Substantive due process claims protect the individual against arbitrary action of government officials. The Court has repeatedly recognized the "shocks the conscience" standard as appropriate in due process cases, and found it applicable here. In pursuit cases, a police officer deciding whether to give chase must balance on one hand the need to stop a suspect, and, on the other, the high-speed threat to all persons within the pursuit range. Accordingly, the Court held that high-speed chases with no intent to harm suspects do not give rise to liability under the Fourteenth Amendment. Here, the officer was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause the motorcycle operator's high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at excessive speeds. While prudence would have repressed the officer's response, the officer's instinct was to do his job as a law enforcement officer.



*Malley v. Briggs*  
475 U.S. 335; 106 S. Ct. 1092 (1986)

**FACTS:** Officers were conducting a court-authorized wiretap on the telephone of a suspect. A log sheet of one of the calls intercepted during this operation appeared to contain incriminating references to marijuana use. The officer in charge of the investigation reviewed this log sheet and another from a second call monitored the same day. Based on these two calls, he prepared felony complaints, along with unsigned warrants for the arrest of various people, and supporting affidavits describing the two intercepted calls. The judge issued over 20 arrest warrants for various individuals identified through the wiretap evidence. Ultimately, charges against Briggs and others were dropped when the grand jury did not return an indictment. A lawsuit was then brought pursuant to Title 42 U.S.C. § 1983, alleging that, by applying for arrest warrants, the officer had violated their Fourth and Fourteenth Amendment rights.

**ISSUE:** Whether immunity is proper for a law enforcement officer who causes a person to be unconstitutionally arrested by presenting a judge with a complaint and a supporting affidavit that fails to establish probable cause?

**HELD:** Yes. An officer who causes an unconstitutional arrest by presenting a judge with a complaint and supporting affidavit that fails to establish probable cause is entitled to “qualified” immunity, rather than “absolute” immunity.

**DISCUSSION:** The Court noted that, as the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law. Thus, a defendant will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue. However, if officers of reasonable competence could disagree on this issue, immunity should be granted.

Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost. The appropriate question to be answered in such cases is: whether a reasonably well-trained officer in the defendant's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. It is reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.



*Saucier v. Katz*  
533 U.S. 194, 121 S. Ct. 2151 (2001)

**FACTS:** Katz attended a speech by the Vice President to voice opposition to the possibility that an Army hospital might be used for animal experiments. During the speech, Katz attempted to unfurl a banner. Military police officers had been warned by superiors of the possibility of demonstrations, and Katz had been identified as a potential protestor. As Katz began placing the banner on the side of a fence, the military police officers grabbed him from behind, took the banner, and rushed him out of the area. Officers had each of Katz's arms, half-walking, half-dragging him, with his feet barely touching the ground. Katz was wearing a visible, knee-high leg brace, although one of the officers testified he did not remember noticing it at the time. The officers took Katz to a nearby military van, where, Katz claimed, he was shoved or thrown inside. As a result of the shove, Katz fell to the floor of the van, where he caught himself just in time to avoid any injury. At least one other protestor was arrested at about the same time as Katz. The officers drove Katz to a military police station, held him for a brief time, and then released him. Katz sued one of the officers for using excessive force during this encounter.

**ISSUE:** Whether the military police officer was entitled to qualified immunity on the claim of excessive force brought by Katz?

**HELD:** Yes. The military police officer was entitled to qualified immunity because there was no clearly established rule that prevented the officer from using the amount of force that he did in arresting Katz.

**DISCUSSION:** Even if a constitutional violation occurred, an officer is still entitled to qualified immunity if the right violated was not clearly established at the time. In determining whether a right is clearly established for qualified immunity purposes, the contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right. In excessive force cases, an officer might correctly perceive all of the relevant facts, but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

In this case, the Court first assumed, for the sake of argument, that a Fourth Amendment violation had occurred. They then addressed whether the military officer should reasonably have known that the force he used in this instance (primarily the shove of Katz into the van, although also in the manner in which he hurried Katz away from the speaking area) was excessive under the circumstances. In finding that the officer's conduct did not violate a clearly established right, the Court relied upon the following: First, the officer did not know the full extent of the threat Katz posed or how many other persons there might be who, in concert with Katz, posed a threat to the security of the Vice President. Second, there were other potential protestors in the crowd, and at least one other individual was arrested and placed into the van with Katz. Third, in carrying out the detention, as it was assumed the officers had the right to do, the officer was required to recognize the necessity to protect the Vice President by securing Katz and restoring order to the scene. Accordingly, it cannot be said there was a clearly established rule that would prohibit using the force the officer did to place Katz into the van to accomplish



these objectives. Finally, regarding the shove into the van, the Court reiterated that not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment.



*Reichle v. Howards*  
566 U.S. \_\_\_, 132 S. Ct. 2088 (2012)

**FACTS:** While protecting the Vice President during a public visit, officers overheard the defendant state "I'm going to ask [the Vice President] how many kids he's killed today." They monitored the defendant's actions more closely as he entered the line meet the Vice President. The defendant told the Vice President his "policies in Iraq are disgusting," who thanked him and moved along. The defendant touched the Vice President's shoulder as he departed. Shortly afterwards, an officer asked the defendant if he had assaulted the Vice President, which the defendant denied. The defendant also denied touching the Vice President. Confirming probable cause of the assault with another officer, the officer arrested for assault. These criminal charges were eventually dismissed but he defendant sued the officers for violating his Fourth Amendment right. He alleged that his arrest was motived by the exercise of his First Amendment rights.

**ISSUE:** Whether it was clearly established that an arrest supported by probable cause could violate the First Amendment?

**HELD:** No. The officers were entitled to rely on qualified immunity because it was not clear that an arrest based on probable cause could violate the First Amendment.

**DISCUSSION:** The Court had to consider a line of cases in which lower courts established the unlawfulness of arrests if done in retaliation of a First Amendment right. "In this Court's view, the presence of probable cause, while not a 'guarantee'

that retaliatory motive did not cause the prosecution, still precluded any prima facie inference that retaliatory motive was the but-for cause of the plaintiff's injury." Given that the officers had probable cause for the arrest, the Court was satisfied that they could rely on qualified immunity as a defense. "Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." "The 'clearly established' standard is not satisfied here. This Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause."



*Wood v. Moss*  
572 U.S. \_\_\_, 134 S. Ct. 2056 (2014)

**FACTS:** With permission from local law enforcement officials, a group of supporters and a group of protesters assembled on opposite sides of the street on which the President's motorcade was to travel. At the last minute, the President decided to make an unscheduled stop at a restaurant for dinner. As a result, the President's motorcade deviated from the planned route and proceeded to the outdoor dining area of the restaurant. After learning of the route change, the protestors moved down the sidewalk to the area in front of the restaurant, while the President's supporters remained at their original location. At their new location, the protesters had a direct line of sight to the outdoor patio where the President was located. At the direction of Secret Service agents, state and local police officers cleared the block on which the restaurant was located and moved the protesters two blocks away to a street beyond handgun or explosive reach of the President. The move placed the protesters one block farther away from the restaurant than the supporters. After the President dined, the motorcade left the restaurant and passed the President's supporters who had remained in their original location. The protesters remained two blocks away, beyond the President's sight.

The protestors sued the Secret Service agents, claiming the agents engaged in viewpoint discrimination, in violation of the First Amendment. Specifically, the protestors claimed the agents denied the protestors equal access to the President when the agents moved the protestors away from the restaurant while allowing the supporters to remain in their original location.

**ISSUE:** Whether the appellate court improperly denied qualified immunity to the Secret Service agents when it concluded that pro and anti-Bush demonstrators needed to be positioned an equal distance from the President while he was dining on the outdoor patio and then while he was traveling by motorcade?

**HELD:** Yes. The agents were entitled to qualified immunity.

**DISCUSSION:** Qualified immunity protects government officials from liability for civil damages unless the plaintiff can establish the official violated a statutory or constitutional right, and that the right was clearly established at the time of the incident.

First, the court stated it has never held a violation of a right guaranteed by the First Amendment gives rise to an implied cause of action for damages against federal officers. However, without deciding the issue, the court assumed an individual could sue a federal official for a First Amendment violation.

Next, the court held no clearly established law required Secret Service agents engaged in crowd control to ensure that groups with differing viewpoints are at comparable locations or maintain equal distances from the President. The court noted when the 200 to 300 protestors moved from their original location to the area closer to the restaurant, they were within weapons range and had a largely unobstructed view of the President on the restaurant's patio. Consequently, because of their location the protestors posed a potential security risk to the President. In contrast, the supporters, who remained in their original location, did not pose a security risk because a

large two-story building blocked their line of sight and weapons access to the patio where the President dined.



*Millbrook v. United States*  
569 U.S. \_\_\_, 133 S. Ct. 1441 (2013)

**FACTS:** A prisoner sued the federal government by alleging that, while in the custody of the Federal Bureau of Prisons he was sexually assaulted and verbally threatened by corrections officers. His lawsuit under the Federal Tort Claims Act (FTCA) was dismissed because the reviewing court held that, while the FTCA waives the government’s sovereign immunity for certain intentional acts, those acts must be alleged to have been committed while the officers are executing a search, seizing evidence, or making an arrest.

**ISSUE:** Whether the FTCA is applicable for the intentional torts conducted by law enforcement officers in activities other than executing a search, seizing evidence, or making an arrest?

**HELD:** Yes. Previous courts’ assertions that intentional torts are only actionable against the United States if conducted during a search, seizure or arrest are overturned.

**DISCUSSION:** The federal government cannot be subject to a lawsuit unless it has waived its sovereign immunity. Congress did this for negligent torts in the FTCA. Later, Congress waived the federal government’s sovereign immunity for intentional torts arising out of the wrongful conduct of law enforcement officers. This is known as the “law enforcement proviso.” This proviso allows persons to sue the federal government for six different intentional torts (including assault) based on the misconduct of federal law enforcement officers that occur within the scope of employment.

The Court found that the “plain language of the law

enforcement proviso answers when a law enforcement officer's 'acts or omissions' may give rise to an actionable tort claim under the FTCA." The Court found the additional requirement (that these alleged torts occur during a search, seizure or arrest) to have no support within the statute. "Congress has spoken directly to the circumstances in which a law enforcement officer's conduct may expose the United States to tort liability. Under the proviso, an intentional tort is not actionable unless it occurs while the law enforcement officer is 'acting within the scope of his office or employment.'"



### C. Brady Material

*Brady v. Maryland*  
373 U.S. 83; 83 S. Ct. 1194 (1963)

**FACTS:** The defendant and his companion, Boblit, were found guilty of murder in the first degree and were sentenced to death. Their trials were separate, with the defendant being tried first. At his trial, the defendant took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. The defendant's counsel conceded that his client was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment." Prior to the trial, the defendant's counsel had requested the prosecution to allow him to examine Boblit's out-of-court statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit confessed to the actual homicide, was not provided to the defense and did not come to the defendant's attention until after he had been tried, convicted, sentenced, and his conviction had been affirmed. The defendant requested a new trial based on the newly discovered evidence.

**ISSUE:** Whether the government's failure to provide the companion's confession to the defendant violated the Due Process Clause of the Fourteenth Amendment?

**HELD:** Yes. The government's failure to provide evidence to the defendant that would have been useful to the defense violated the Due Process Clause of the Fourteenth Amendment.

**DISCUSSION:** Society wins not only when the guilty are convicted, but when criminal trials are fair. The administration of justice suffers when the accused are treated unfairly. A prosecution that withholds evidence from a defendant which would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. Accordingly, the Court held the suppression by the prosecution of evidence

favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.



*Banks v. Dretke*  
540 U.S. 668, 124 S. Ct. 1256 (2004)

**FACTS:** Before the defendant’s murder trial, the government provided the defendant with the following statement “[W]e will, without the necessity of motions[,] provide you with all discovery to which you are entitled.” Thereafter, the government presented two witnesses to the jury and failed to draw attention to their false testimony. One witness falsely stated he was not a paid informant and another witness perjured himself about his pretrial preparation. The witness testified on three occasions that “he had not talked to anyone about his testimony.” However, the witness actually engaged in at least one “pretrial practice sessio[n]” in which prosecutors and a police officer coached him.

**ISSUE:** Whether the government’s concealment of offering a witness that was a paid informant and its involvement in coaching a witness is exculpatory evidence subject to Brady v. Maryland?

**HELD:** Yes. The government violates the principles of due process by allowing perjured testimony to be presented without challenge.

**DISCUSSION:** In Brady v. Maryland, the Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” In Strickler v. Greene, 527 U.S. 263 (1999), the Court further clarified that to establish an effective Brady claim, (1) the evidence must be favorable to the accused (2) the evidence must have been suppressed by the government (intentionally or unintentionally)

and (3) the accused must have been harmed as a result.

In this case, the Court found that the defendant demonstrated the standards for a Brady claim. A government witness that is a paid informant qualifies as evidence advantageous to the defendant. The prosecution repeatedly allowed false testimony to stand uncorrected. The government represented that it held nothing back yet was silent when its witnesses perjured themselves. The Court concluded that the defendant was harmed by these suppressions as he could not properly impeach key witnesses for the government.



*Giglio v. United States*  
405 U.S. 150; 92 S. Ct. 763 (1972)

**FACTS:** The defendant was charged with passing forged money orders. At his trial, the key government's key witness was named Taliento. Under cross-examination, Taliento denied that any promises had been made to him in exchange for his testimony, and the government attorney stated in his summation to the jury that Taliento "received no promises that he would not be indicted." The defendant was convicted. While his appeal was pending, the defendant discovered new evidence indicating the government had failed to disclose an alleged promise made to Taliento that he would not be prosecuted if he testified for the government.

**ISSUE:** Whether the government's failure to disclose evidence that could affect the credibility of its witness a violation of the Due Process Clause?

**HELD:** Yes. The government must disclose evidence that could affect the credibility of its witness.

**DISCUSSION:** In Brady v. Maryland, the Supreme Court held the suppression of material evidence justifies a new trial notwithstanding the good or bad faith of the prosecution. When the reliability of a given witness may determine guilt or



innocence, nondisclosure of evidence affecting credibility falls within this general rule. The Court does not, however, automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense, but not likely to have changed the verdict. A finding of materiality of the evidence is required under Brady. A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury.



*Smith v. Cain*  
565 U.S. 418, 132 S. Ct. 627 (2012)

**FACTS:** The defendant was convicted of several murders substantially based upon testimony from a witness who identified the defendant as the perpetrator. During the appeal process, the defendant obtained government records that included copies of the investigator's notes. The notes indicated that on the night of the murders, the witness could not provide a physical description of the perpetrator beyond the person's race, and that the witness did not see the perpetrator's face. The notes had not been provided to the defendant prior to trial.

**ISSUE:** Whether the notes constituted Brady material, requiring their disclosure to the defendant?

**HELD:** Yes. The notes were material to the defense and should have been turned over to the defendant.

**DISCUSSION:** The Court stated, "[U]nder Brady, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." Evidence is "material" under Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. This standard does not require a finding that the defendant would have been found not guilty, but only that confidence in the trial's outcome was undermined.



## **XII. OTHER CASES**

*Riverside v. McLaughlin*  
500 U.S. 44, 111 S. Ct. 1661 (1991)

**FACTS:** The County of Riverside, California combined probable cause determinations with its arraignment procedures. These arraignments must be conducted without unnecessary delay and, in any event, within two business days of arrest.

**ISSUE:** Whether the government is providing the defendant with an initial appearance “without unnecessary delay?”

**HELD:** It depends. There is a presumption that initial appearances occurring within 48 hours of arrest are timely.

**DISCUSSION:** The Court previously deciding against mandating jurisdictions to provide probable cause hearings immediately after taking a suspect into custody and completing booking procedures. The Court stated “...the Fourth Amendment permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system.” While expressing a desire to avoid providing a specific timeframe, the Court concluded that “a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of...” the Fourth Amendment. The Court found that initial appearances that occur within 48 hours of arrest are presumed to be timely. The “burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance” after 48 hours have elapsed.



*Sanchez-Llamas v. Oregon*  
548 U.S. 331, 126 S. Ct. 2669 (2006)

**FACTS:** After a gun battle with police in which an officer was wounded, police arrested the defendant, a Mexican national. Officers interrogated him through use of an interpreter, complying with the requirements of Miranda. However, the officers never informed him of his right to have the Mexican consulate notified of his detention, as required under Article 36 of the Vienna Convention on Consular Relations (VCCR). The defendant made admissions that the state sought to use at his trial for attempted murder and related offenses. The trial court denied a pre-trial motion to suppress the statements on grounds of involuntariness and the VCCR violation.

**ISSUE:** Whether violation of the consular notification provision of the VCCR requires suppression of a suspect's statements to police.

**HELD:** No. Unlike violations of Fifth and Sixth Amendment constitutional rights, violations of a treaty obligation under the VCCR do not require suppression or exclusion of evidence.

**DISCUSSION:** The VCCR itself does not mandate exclusion of evidence or any other specific remedy for violations of its provisions. Instead, U.S. law determines whether the exclusionary rule applies. U.S. courts do not invoke the remedy of exclusion lightly, due to the negative impact on law enforcement objectives and the court's own truth-finding function, and therefore primarily limit its use to deter constitutional violations in the gathering of evidence. The VCCR notification provision has little connection to evidence or statements obtained by police. Foreign nationals in U.S. Territory have all due process protections, including Fifth and Sixth Amendment rights, which adequately protect the same interests as the VCCR provision. A defendant whose consular notification rights under the VCCR were violated may raise a broader challenge to the voluntariness of any statements obtained.



*Snyder v. Phelps*  
562 U.S. 443, 131 S. Ct. 1207 (2011)

**FACTS:** For more than 20 years, the members of a church have publicized their message by picketed over 600 funerals for military service members. During one of these pickets, congregation members picketed on public land adjacent to public streets near a U.S. Marine’s funeral. The picketers had notified the authorities prior to the funeral of its intent to picket at the time of the funeral, and the picketers complied with direction in presenting their protest. None of the picketers entered the funeral site property, appeared at the cemetery, shouted or use profanity, nor was there any demonstration of violence.

**ISSUE:** Whether the church’s demonstration near a funeral is protected under the First Amendment?

**HELD:** Yes. Speech that is directed at the matters of public concern is at the heart of the protection of the First Amendment.

**DISCUSSION:** The Court held that First Amendment speech issues turn “largely on whether that speech is of public or private concern, as determined by all the circumstances of the case.” The Court identified two instances in which speech is a matter of public concern: first, “when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’” [quoting *Connick v. Myers*, 461 U.S. 138 (1983)], and when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,” [quoting *San Diego v. Roe*, 543 U.S. 77 (2004)]. The inappropriate or controversial nature of the speech is not relevant to the determination of whether it is directed at a public concern.

In this case, even though the church’s demonstration was connected to a funeral, the Court held that this, by itself, did

not alter the nature of its public speech. The church's signs, exhibited on a public land next to a public street, reflected condemnation of much in society. The church's lawful choice of where to present these concerns did not modify its public concern to a private one.



*Smith v. United States*  
568 U.S. \_\_\_, 133 S. Ct. 714 (2013)

**FACTS:** The defendant was tried for conspiracy and murder. He presented evidence to the jury that he had ended his participation in the ongoing conspiracy and that the statute-of-limitations had closed off the government's prosecution on those grounds. The defendant then asserted that the burden of proof shifted to the government to disprove his affirmative defense.

**ISSUE:** Whether placing the burden of proof of a withdrawal on the defendant is a violation of his due process rights?

**HELD:** No. Due process does not require the government to disprove the absence of any possible affirmative defense that might be employed.

**DISCUSSION:** The Court simply dismissed the defendant's position by stating that "[A]llocating to a defendant the burden of proving withdrawal does not violate the Due Process Clause." The government "must prove beyond a reasonable doubt" every element of a crime, but once it has done so, "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required," citing Patterson v. New York, 432 U.S. 197 (1977). The Court refused to extend such a rule in this case.



## NOTES

## **XIII. ADDITIONAL RESOURCES**

### **A. The United States Constitution**

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

#### **ARTICLE I.**

**SECTION 1.** All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

**SECTION 2.** [1] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration

shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

**SECTION 3.** [1] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

[2] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5] The Senate shall chuse their other Officers, and also a



President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

**SECTION 4.** [1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

**SECTION 5.** [1] Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[2] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

[3] Each House shall keep a Journal of its Proceedings, and

from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

**SECTION 6.** [1] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

**SECTION 7.** [1] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be

reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3] Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

**SECTION 8.** [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2] To borrow Money on the credit of the United States;

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[7] To establish Post Offices and post Roads;

[8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9] To constitute Tribunals inferior to the supreme Court;

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13] To provide and maintain a Navy;

[14] To make Rules for the Government and Regulation of the land and naval Forces;

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and

other needful Buildings;--And

[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

**SECTION 9.** [1] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2] The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3] No Bill of Attainder or ex post facto Law shall be passed.

[4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5] No Tax or Duty shall be laid on Articles exported from any State.

[6] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

[7] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any

present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

**SECTION 10.** [1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

[3] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## **ARTICLE II.**

**SECTION 1.** [1] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

[2] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[3] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an

Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

[4] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[5] No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[6] In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of

Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[8] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

**SECTION 2.** [1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[2] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting



Commissions which shall expire at the End of their next Session.

**SECTION 3.** He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

**SECTION 4.** The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

### **ARTICLE III.**

**SECTION 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

**SECTION 2.** [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States,

Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

**SECTION 3.** [1] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

#### **ARTICLE IV.**

**SECTION 1.** Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

**SECTION 2.** [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another

State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

**SECTION 3.** [1] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

**SECTION 4.** The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

## **ARTICLE V.**

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided

that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

#### **ARTICLE VI.**

[1] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

#### **ARTICLE VII.**

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

**ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE  
CONSTITUTION OF THE UNITED STATES OF AMERICA,  
PROPOSED BY CONGRESS, AND RATIFIED BY THE  
LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO  
THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.**

**AMENDMENT I [1791]**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**AMENDMENT II [1791]**

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

**AMENDMENT III [1791]**

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

**AMENDMENT IV [1791]**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**AMENDMENT V [1791]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

nor shall private property be taken for public use without just compensation.

**AMENDMENT VI [1791]**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**AMENDMENT VII [1791]**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

**AMENDMENT VIII [1791]**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**AMENDMENT IX [1791]**

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

**AMENDMENT X [1791]**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

**AMENDMENT XI [1798]**

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

**AMENDMENT XII [1804]**

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;--The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.--The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such numbers be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

**AMENDMENT XIII [1865]**

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

**AMENDMENT XIV [1868]**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the



same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

#### **AMENDMENT XV [1870]**

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

#### **AMENDMENT XVI [1913]**

The Congress shall have power to lay and collect taxes on incomes, from whatever sources derived, without apportionment among the several States, and without regard to any census or enumeration.

#### **AMENDMENT XVII [1913]**

[1] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

[2] When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to

make temporary appointments until the people fill the vacancies by election as the legislature may direct.

[3] This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

#### **AMENDMENT XVIII [1919]**

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

#### **AMENDMENT XIX [1920]**

[1] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

[2] Congress shall have power to enforce this article by appropriate legislation.

#### **AMENDMENT XX [1933]**

Section 1. The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

#### **AMENDMENT XXI [1933]**

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

**AMENDMENT XXII [1951]**

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

**AMENDMENT XXIII [1961]**

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

**AMENDMENT XXIV [1964]**

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or

Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or any other tax.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

**AMENDMENT XXV [1967]**

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take the office upon confirmation by a majority vote of both houses of Congress.

Section 3. Whenever the President transmits to the President Pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmits to the President Pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President Pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmits within four days to the President Pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is

unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

**AMENDMENT XXVI [1971]**

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

**AMENDMENT XXVII [1992]**

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

**B. DOJ Guidance re: Use of Race/Other Factors by  
Federal Law Enforcement Agencies**

U.S. Department of Justice

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**GUIDANCE FOR FEDERAL LAW  
ENFORCEMENT AGENCIES REGARDING  
THE USE OF RACE, ETHNICITY, GENDER,  
NATIONAL ORIGIN, RELIGION, SEXUAL  
ORIENTATION, OR GENDER IDENTITY**



December 2014

## INTRODUCTION AND EXECUTIVE SUMMARY

This Guidance supersedes the Department of Justice’s 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies. It builds upon and expands the framework of the 2003 Guidance, and it reaffirms the Federal government’s deep commitment to ensuring that its law enforcement agencies conduct their activities in an unbiased manner. Biased practices, as the Federal government has long recognized, are unfair, promote mistrust of law enforcement, and perpetuate negative and harmful stereotypes. Moreover—and vitally important—biased practices are ineffective. As Attorney General Eric Holder has stated, such practices are “simply not good law enforcement.”

Law enforcement practices free from inappropriate considerations, by contrast, strengthen trust in law enforcement agencies and foster collaborative efforts between law enforcement and communities to fight crime and keep the Nation safe. In other words, fair law enforcement practices are smart and effective law enforcement practices.

Even-handed law enforcement is therefore central to the integrity, legitimacy, and efficacy of all Federal law enforcement activities. The highest standards can—and should—be met across all such activities. Doing so will not hinder—and, indeed, will bolster—the performance of Federal law enforcement agencies’ core responsibilities.

This new Guidance applies to Federal law enforcement officers performing Federal law enforcement activities, including those related to national security and intelligence, and defines not only the circumstances in which Federal law enforcement officers may take into account a person’s race and ethnicity—as the 2003 Guidance did—but also when gender, national origin, religion, sexual orientation, or gender identity may be taken into account. This new Guidance also applies to state and local law enforcement officers while participating in Federal law enforcement task forces. Finally, this Guidance promotes training and accountability, to ensure that its contents are understood and implemented appropriately.

Biased law enforcement practices, as the 2003 Guidance recognized with regard to racial profiling, have a terrible cost, not only for individuals but also for the Nation as a whole. This new Guidance reflects the Federal government’s ongoing commitment to keeping the Nation safe while



upholding our dedication to the ideal of equal justice under the law.

Two standards in combination should guide use by Federal law enforcement officers of race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity in law enforcement or intelligence activities:

- In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity to any degree, except that officers may rely on the listed characteristics in a specific suspect description. This prohibition applies even where the use of a listed characteristic might otherwise be lawful.
- In conducting all activities other than routine or spontaneous law enforcement activities, Federal law enforcement officers may consider race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons possessing a particular listed characteristic to an identified criminal incident, scheme, or organization, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity. In order to rely on a listed characteristic, law enforcement officers must also reasonably believe that the law enforcement, security, or intelligence activity to be undertaken is merited under the totality of the circumstances, such as any temporal exigency and the nature of any potential harm to be averted. This standard applies even where the use of a listed characteristic might otherwise be lawful.

## DISCUSSION

The Constitution protects individuals against the invidious use of irrelevant individual characteristics. See Whren v. United States, 517 U.S. 806, 813 (1996). Such characteristics should never be the sole basis for a law enforcement action. This Guidance sets out requirements beyond the Constitutional minimum that shall apply to the use of race, ethnicity, gender, national origin,<sup>1</sup> religion, sexual orientation, and gender identity by Federal

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<sup>1</sup> As used in this Guidance, “national origin” refers to an individual’s, or his or her ancestor’s, country of birth or origin, or an individual’s possession of the physical, cultural or linguistic characteristics commonly associated with a particular country. It does not refer to an

law enforcement officers.<sup>2</sup> This Guidance applies to such officers at all times, including when they are operating in partnership with non-Federal law enforcement agencies.

## **I. GUIDANCE FOR FEDERAL LAW ENFORCEMENT OFFICERS**

### **A. Routine or Spontaneous Activities in Domestic Law Enforcement**

**In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity to any degree, except that officers may rely on the listed characteristics in a specific suspect description. This prohibition applies even where the use of a listed characteristic might otherwise be lawful.**

Law enforcement agencies and officers sometimes engage in law enforcement activities, such as traffic and foot patrols, that generally do not involve either the ongoing investigation of specific criminal activities or the prevention of catastrophic events or harm to national or homeland security. Rather, their activities are typified by spontaneous action in response to the activities of individuals whom they happen to encounter in the course of their patrols and about whom they have no information other than their observations. These general enforcement responsibilities should be carried out without any consideration of race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity.

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individual's "nationality" (i.e., country of citizenship or country of which the person is deemed a national), which may be relevant to the administration and enforcement of certain statutes, regulations, and executive orders.

<sup>2</sup> This Guidance is intended only to improve the internal management of the executive branch. It is not intended to, and does not, create any right, benefit, trust, or responsibility, whether substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities, entities, officers, employees, or agents, or any person, nor does it create any right of review in an administrative, judicial, or any other proceeding. This Guidance does not apply to Federal non-law enforcement personnel, including U.S. military, intelligence, or diplomatic personnel, and their activities. In addition, this Guidance does not apply to interdiction activities in the vicinity of the border, or to protective, inspection, or screening activities. All such activities must be conducted consistent with the Constitution and applicable Federal law and policy, in a manner that respects privacy, civil rights and civil liberties, and subject to appropriate oversight.

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- **Example:** While parked by the side of the George Washington Parkway, a Park Police Officer notices that nearly all vehicles on the road are exceeding the posted speed limit. Although each such vehicle is committing an infraction that would legally justify a stop, the officer may not use a listed characteristic as a factor in deciding which motorists to pull over. Likewise, the officer may not use a listed characteristic in deciding which detained motorists to ask to consent to a search of their vehicles.

Some have argued that overall discrepancies in certain crime rates among certain groups could justify using a listed characteristic as a factor in general traffic enforcement activities and would produce a greater number of arrests for non-traffic offenses (e.g., narcotics trafficking). We emphatically reject this view. Profiling by law enforcement based on a listed characteristic is morally wrong and inconsistent with our core values and principles of fairness and justice.

Even if there were overall statistical evidence of differential rates of commission of certain offenses among individuals possessing particular characteristics, the affirmative use of such generalized notions by law enforcement officers in routine, spontaneous law enforcement activities is tantamount to stereotyping. It casts a pall of suspicion over every member of certain groups without regard to the specific circumstances of a particular law enforcement activity, and it offends the dignity of the individual improperly targeted. Whatever the motivation, it is patently unacceptable and thus prohibited under this Guidance for law enforcement officers to act on the belief that possession of a listed characteristic signals a higher risk of criminality. This is the core of invidious profiling, and it must not occur.

The situation is different when an officer has specific information, based on trustworthy sources, to “be on the lookout” for specific individuals identified at least in part by a specific listed characteristic. In such circumstances, the officer is not acting based on a generalized assumption about individuals possessing certain characteristics; rather, the officer is helping locate specific individuals previously identified as involved in crime.

- **Example:** While parked by the side of the George Washington Parkway, a Park Police Officer receives an “All Points Bulletin” to be on the lookout for a fleeing bank robbery suspect, a man of a particular race and particular hair color in his 30s driving a blue automobile. The

officer may use this description, including the race and gender of the particular suspect, in deciding which speeding motorists to pull over.

**B. All Activities Other Than Routine or Spontaneous Law Enforcement Activities**

**In conducting all activities other than routine or spontaneous law enforcement activities, Federal law enforcement officers may consider race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons possessing a particular listed characteristic to an identified criminal incident, scheme, or organization, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity. In order to rely on a listed characteristic, law enforcement officers must also reasonably believe that the law enforcement, security, or intelligence activity to be undertaken is merited under the totality of the circumstances, such as any temporal exigency and the nature of any potential harm to be averted. This standard applies even where the use of a listed characteristic might otherwise be lawful.<sup>3</sup>**

As noted above, there are circumstances in which law enforcement officers engaged in activities relating to particular identified criminal incidents, schemes, organizations, threats to national or homeland security, violations of Federal immigration law, or authorized intelligence activities may consider personal identifying characteristics of potential suspects, including race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity. Common sense dictates that when a victim describes the assailant as possessing a certain characteristic, law enforcement officers may properly limit their search for suspects to persons possessing that

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<sup>3</sup> This Guidance does not prohibit the accommodation of religious beliefs and practices consistent with the U.S. Constitution and federal law. The Guidance also does not prohibit officials from considering gender when “the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated.” Rostker v. Goldberg, 453 U.S. 57, 79 (1981).

characteristic. Similarly, in conducting activities directed at a specific criminal organization or terrorist group whose membership has been identified as overwhelmingly possessing a listed characteristic, law enforcement should not be expected to disregard such facts in taking investigative or preventive steps aimed at the organization's activities.

Reliance upon generalized stereotypes involving the listed characteristics is absolutely forbidden. In order for law enforcement officers to rely on information about a listed characteristic, the following must be true:

- The information must be relevant to the locality or time frame of the criminal activity, threat to national or homeland security, violation of Federal immigration law, or authorized intelligence activity;
- The information must be trustworthy; and
- The information concerning identifying listed characteristics must be tied to a particular criminal incident, a particular criminal scheme, a particular criminal organization, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity.

Because law enforcement and intelligence actions are necessarily context-specific, in applying each of these factors, law enforcement officers may properly account for relevant facts and circumstances, such as any temporal exigency and the nature of any potential harm to be averted. However, in all cases, law enforcement officers must reasonably believe that the law enforcement or intelligence activity to be undertaken is merited under the totality of the circumstances.

The following policy statements more fully explain these principles.

**1. Law Enforcement Officers May Never Rely on Generalized Stereotypes, But May Rely Only on Specific Characteristic-Based Information**

This standard categorically bars the use of generalized assumptions based on listed characteristics.

- **Example:** In the course of investigating an auto theft ring in a Federal park, law enforcement officers could not properly choose to target

individuals of a particular national origin as suspects, based on a generalized assumption that those individuals are more likely to commit crimes.

This bar extends to the use of pretexts as an excuse to target minorities. Officers may not use such pretexts. This prohibition extends to the use of other, facially neutral factors as a proxy for overtly targeting persons because of a listed characteristic. This concern arises most frequently when aggressive law enforcement efforts are focused on “high crime areas.” The issue is ultimately one of motivation and evidence; certain seemingly characteristic-based efforts, if properly supported by reliable, empirical data, are in fact neutral.

- **Example:** In connection with a new initiative to increase drug arrests, law enforcement officers begin aggressively enforcing speeding, traffic, and other public area laws in a neighborhood predominantly occupied by people of a single race. The choice of neighborhood was not based on the number of 911 calls, number of arrests, or other pertinent reporting data specific to that area, but only on the general assumption that more drug-related crime occurs in that neighborhood because of its racial composition. This effort would be improper because it is based on generalized stereotypes.
- **Example:** Law enforcement officers seeking to increase drug arrests use tracking software to plot out where, if anywhere, drug arrests are concentrated in a particular city, and discover that the clear majority of drug arrests occur in particular precincts that happen to be neighborhoods predominantly occupied by people of a single race. So long as they are not motivated by racial animus, officers can properly decide to enforce all laws aggressively in that area, including less serious quality of life ordinances, as a means of increasing drug-related arrests. *See, e.g., United States v Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) (“We must be particularly careful to ensure that a ‘high crime’ area factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business, but is limited to specific, circumscribed locations where particular crimes occur with unusual regularity.”).

By contrast, where law enforcement officers are investigating a crime and have received specific information that the suspect possesses a certain

listed characteristic (e.g., direct observations by the victim or other witnesses), the officers may reasonably use that information, even if it is the only descriptive information available. In such an instance, it is the victim or other witness making the classification, and officers may use reliable incident-specific identifying information to apprehend criminal suspects. Officers, however, must use caution in the rare instance in which a suspect's possession of a listed characteristic is the only available information. Although the use of that information may not be unconstitutional, broad targeting of discrete groups always raises serious fairness concerns.

- **Example:** The victim of an assault describes her assailant as an older male of a particular race with a birthmark on his face. The investigation focuses on whether any men in the surrounding area fit the victim's description. Here investigators are properly relying on a description given by the victim, which included the assailant's race and gender, along with his age and identifying personal characteristic. Although the ensuing investigation affects individuals of a particular race and gender, that investigation is not undertaken with a discriminatory purpose. Thus use of race and gender as factors in the investigation, in this instance, is permissible.

## **2. The Information Must be Relevant to the Locality or Time Frame**

Any information that law enforcement officers rely upon concerning a listed characteristic possessed by persons who may be linked to specific criminal activities, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity must be locally or temporally relevant.

- **Example:** Five years ago, DEA issued an intelligence report that indicated that a drug ring whose members are known to be predominantly of a particular ethnicity is trafficking drugs in Charleston, SC. An agent operating in Los Angeles reads this intelligence report. In the absence of information establishing that this intelligence is also applicable in Southern California or at the present time, the agent may not use ethnicity as a factor in making local law enforcement decisions about individuals who are of the particular ethnicity that was predominant in the Charleston drug ring.

### 3. The Information Must be Trustworthy

Where the information relied upon by law enforcement officers linking a person possessing a listed characteristic to potential criminal activity, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity is unreliable or is too generalized and unspecific, reliance on that characteristic is prohibited.

- **Example:** ATF special agents receive an uncorroborated anonymous tip that a male of a particular ethnicity will purchase an illegal firearm at a Greyhound bus terminal in an ethnically diverse North Philadelphia neighborhood. Although agents surveilling the location are free to monitor the movements of whomever they choose, the agents are prohibited from using the tip information, without more, to target any males of that ethnicity in the bus terminal. Cf. Morgan v. Woessner, 997 F.2d 1244, 1254 (9th Cir. 1993) (finding no reasonable basis for suspicion where tip “made all black men suspect”). The information is neither sufficiently reliable nor sufficiently specific.

In determining whether information is trustworthy, an officer should consider the totality of the circumstances, such as the reliability of the source, the specificity of the information, and the context in which it is being used.

- **Example:** ICE receives an uncorroborated anonymous tip indicating that females from a specific Eastern European country have been smuggled into Colorado and are working at bars in a certain town. Agents identify a group of women wearing t-shirts with the logo of a local bar who seem to be speaking an Eastern European language. The agents approach the group to ask them questions about their immigration status. Because the women match the specific information provided by the tipster, the information is sufficient under the circumstances to justify the agents’ actions.

### 4. Characteristic-Based Information Must Always be Specific to Particular Suspects or Incidents; Ongoing Criminal Activities, Schemes, or Enterprises; a Threat to National or Homeland Security; a Violation of Federal Immigration Law, or an Authorized Intelligence Activity

These standards contemplate the appropriate use of both “suspect-specific” and “incident-specific” information. As noted above, where a crime



has occurred and law enforcement officers have eyewitness accounts including the race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity of the perpetrator, that information may be used. Law enforcement officers may also use reliable, locally or temporally relevant information linking persons possessing a listed characteristic to a particular incident, unlawful scheme, or ongoing criminal enterprise, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity—even absent a description of any particular individual suspect. In certain cases, the circumstances surrounding an incident, ongoing criminal activity, threat to national or homeland security, or violation of Federal immigration law will point strongly to a perpetrator possessing a specific listed characteristic, even though law enforcement officers lack an eyewitness account.

- **Example:** The FBI is investigating the murder of a known gang member and has information that the shooter is a member of a rival gang. The FBI knows that the members of the rival gang are exclusively members of a certain ethnicity. This information, however, is not suspect-specific because there is no description of the particular assailant. But because law enforcement officers have reliable, locally or temporally relevant information linking a rival group with a distinctive ethnic character to the murder, the FBI could properly consider ethnicity in conjunction with other appropriate factors in the course of conducting their investigation. Agents could properly decide to focus on persons dressed in a manner consistent with gang activity, but ignore persons dressed in that manner who do not appear to be members of that particular ethnicity.
- **Example:** Local law enforcement arrests an individual, and in the course of custodial interrogation the individual states that he was born in a foreign country and provides other information that reasonably leads local law enforcement to question his immigration status. Criminal background checks performed by the local law enforcement agency reveal that the individual was recently released from state prison after completing a lengthy sentence for aggravated sexual assault. Local law enforcement contacts ICE to inquire as to the individual's immigration status. When ICE's database check on the immigration status of the arrestee does not locate a record of the individual's lawful immigration status, ICE sends an officer to the jail to question the individual about his immigration status, whereupon the individual states that he entered the United States without

authorization and has never regularized his status. ICE assumes custody of the individual and processes him for removal from the United States. ICE properly relied on the facts presented to it, including that the arrestee was born in a foreign country, in searching its immigration database and conducting its subsequent investigation.

In addition, law enforcement officers may use a listed characteristic in connection with source recruitment, where such characteristic bears on the potential source's placement and access to information relevant to an identified criminal incident, scheme, or organization, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity.

- **Example:** A terrorist organization that is made up of members of a particular ethnicity sets off a bomb in a foreign country. There is no specific information that the organization is currently a threat to the United States. To gain intelligence on the evolving threat posed by the organization, and to gain insight into its intentions regarding the U.S. homeland and U.S. interests, the FBI may properly consider ethnicity when developing sources with information that could assist the FBI in mitigating any potential threat from the organization.

##### **5. Reasonably Merited Under the Totality of the Circumstances**

Finally, when a law enforcement officer relies on a listed characteristic in undertaking an action, that officer must have a reasonable belief that the action is merited under the totality of the circumstances. This standard ensures that, under the circumstances, the officer is acting in good faith when he or she relies in part on a listed characteristic to take action.

- **Example:** A law enforcement officer who is working as part of a federal task force has received a reliable tip that an individual intends to detonate a homemade bomb in a train station during rush hour, but the tip does not provide any more information. The officer harbors stereotypical views about religion and therefore decides that investigators should focus on individuals of a particular faith. Doing so would be impermissible because a law enforcement officer's stereotypical beliefs never provide a reasonable basis to undertake a law enforcement or intelligence action.

Note that these standards allow the use of reliable identifying

information about planned future crimes, attacks, or other violations of Federal law. Where officers receive a credible tip from a reliable informant regarding a planned crime or attack that has not yet occurred, the officers may use this information under the same restrictions applying to information obtained regarding a past incident. A prohibition on the use of reliable prospective information would severely hamper law enforcement efforts by essentially compelling law enforcement officers to wait for incidents to occur, instead of taking pro-active measures to prevent them from happening.

- **Example:** While investigating a specific drug trafficking operation, DEA special agents learn that a particular methamphetamine distribution ring is manufacturing the drug in California, and plans to have couriers pick up shipments at the Sacramento, California, airport and drive the drugs back to Oklahoma for distribution. The agents also receive trustworthy information that the distribution ring has specifically chosen to hire older women of a particular race to act as the couriers. DEA agents may properly target older women of that particular race driving vehicles with indicia such as Oklahoma plates near the Sacramento airport.

## 6. National and Homeland Security and Intelligence Activities

Since the terrorist attacks on September 11, 2001, Federal law enforcement agencies have used every legitimate tool to prevent future attacks and deter those who would cause devastating harm to our Nation and its people through the use of biological or chemical weapons, other weapons of mass destruction, suicide hijackings, or any other means. “It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)).

The years since September 11 have also demonstrated that Federal law enforcement officers can achieve this critical goal without compromising our cherished value of equal justice under the law. Every day, Federal law enforcement officers work to keep our Nation safe, and they do so without invidious profiling. The standard embodied in this Guidance thus applies to Federal law enforcement agencies’ national and homeland security operations, which will continue to focus on protecting the public while upholding our values.

National security, homeland security, and intelligence activities often are national in scope and focused on prevention of attacks by both known and unknown actors, not just prosecution. For example, terrorist organizations might aim to engage in acts of catastrophic violence in any part of the country (indeed, in multiple places simultaneously, if possible). These facts do not change the applicability of the Guidance, however. In order to undertake an action based on a listed characteristic, a law enforcement officer must have trustworthy information, relevant to the locality or time frame, linking persons possessing that characteristic to a threat to national security, homeland security, or intelligence activity, and the actions to be taken must be reasonable under the totality of the circumstances.

- **Example:** The FBI receives reliable information that persons affiliated with a foreign ethnic insurgent group intend to use suicide bombers to assassinate that country's president and his entire entourage during an official visit to the United States. Agents may appropriately focus investigative attention on identifying members of that ethnic insurgent group who may be present and active in the United States and who, based on other available information, might be involved in planning some such attack during the state visit.
- **Example:** A citizen of Country A, who was born in Country B, lawfully entered the United States on an F-1 student visa. The school that the individual was supposed to attend notifies ICE that he failed to register or attend the school once in the United States, in violation of the terms of his visa. ICE has intelligence that links individuals with ties to Country B who have registered at that school to a designated terrorist organization that has made statements about launching an attack against the United States. ICE selects the individual for investigation, identification, location, and arrest. Once taken into custody, the individual is questioned and a decision is made to place him in removal proceedings and to detain him during those proceedings. ICE's decision to prioritize this immigration status violator for investigation and arrest was proper because it was based upon a combination of the factors known about the individual, including his national origin, school affiliation, and behavior upon arrival in the United States.

Good law enforcement work also requires that officers take steps to know their surroundings even before there is a specific threat to national security. Getting to know a community and its features can be critical to

building partnerships and facilitating dialogues, which can be good for communities and law enforcement alike. Law enforcement officers may not, however, target only those persons or communities possessing a specific listed characteristic without satisfying the requirements of this Guidance.

- **Example:** An FBI field office attempts to map out the features of the city within its area of responsibility in order to gain a better understanding of potential liaison contacts and outreach opportunities. In doing so, the office acquires information from public sources regarding population demographics, including concentrations of ethnic groups. This activity is permissible if it is undertaken pursuant to an authorized intelligence or investigative purpose. The activity would not be permitted without such an authorized purpose or in circumstances that do not otherwise meet the requirements of this Guidance.

## **ADDITIONAL REQUIREMENTS**

In order to ensure its implementation, this Guidance finally requires that Federal law enforcement agencies take the following steps on training, data collection, and accountability.

### **Training**

Training provides agents and officers with an opportunity to dedicate their attention to a task, to learn about the factual application of theoretical concepts, and to learn from their colleagues. Training also provides an opportunity to ensure that consistent practices are applied across the agency.

Law enforcement agencies therefore must administer training on this Guidance to all agents on a regular basis, including at the beginning of each agent's tenure. Training should address both the legal authorities that govern this area and the application of this Guidance. Training will be reviewed and cleared by agency leadership to ensure consistency through the agency.

### **Data Collection**

Data collection can be a tremendously powerful tool to help managers assess the relative success or failure of policies and practices. At the same time, data collection is only useful to the extent that the collected data can be analyzed effectively and that conclusions can be drawn with confidence.

Each law enforcement agency therefore (i) will begin tracking complaints made based on the Guidance, and (ii) will study the implementation of this Guidance through targeted, data-driven research projects.

### **Accountability**

Accountability is essential to the integrity of Federal law enforcement agencies and their relationship with the citizens and communities they are sworn to protect. Therefore, all allegations of violations of this Guidance will be treated just like other allegations of misconduct and referred to the appropriate Department office that handles such allegations. Moreover, all violations will be brought to the attention of the head of the Department of which the law enforcement agency is a component.

## **C. DOJ Memo: Legal Ethics for Investigative Agents<sup>1</sup>**

There are many circumstances in which attorney conduct rules will or may have implications for investigative agents. The rules themselves are written by and for lawyers and are used to regulate the practice of law, although they require that lawyers take steps to ensure that agents and other non-lawyers with whom they are working also abide by the rules. Therefore, investigators should familiarize themselves with the requirements of these rules for two good reasons: 1) to make sure evidence is not excluded; and 2) to protect the reputations of your agencies. This memorandum is intended to give you some familiarity with those rules of professional conduct that most often come into play during investigations and to aid you in avoiding pitfalls in your investigative work.

### **I. What Are the Rules of Professional Conduct Anyway?**

In order to practice law, a lawyer must be a member of a state bar. Each bar has adopted a set of rules that lawyers must follow. The American Bar Association is a voluntary organization of lawyers that drafts model rules, which the various state bar organizations often adopt, in whole or in part. The rules in each jurisdiction are therefore unique, although there are general principles that apply in every jurisdiction. Failure to follow those rules can result in sanctions to the lawyer, including revocation of the lawyer's license to practice law.

### **II. How Is It That Lawyer's Rules Apply to Investigative Agents?**

There are two general rules of professional conduct that can make a lawyer responsible for the conduct of an investigative agent with whom the lawyer is working. One rule (Rule 8.4(a)) states that it is professional misconduct for a lawyer to violate the rules of professional conduct through the acts of another. The second rule (Rule 5.3(c)) states that a lawyer is responsible

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<sup>1</sup> This memorandum was prepared by the Professional Responsibility Advisory Office, United States Department of Justice, Washington, D.C.

for the conduct of a non-lawyer, if the lawyer supervised or ordered the conduct or “ratifies” the conduct or could have prevented or mitigated the effects of the conduct. While the government lawyers with whom you work do not directly supervise you, some judges may still hold them accountable for your conduct on account of the rules.<sup>2</sup> Oftentimes, the government lawyer will urge that, if a court finds a rule violation, any sanction be against the lawyer, not the case; but the court has discretion and sometimes does prohibit the lawyer from using evidence obtained by an agent in violation of the rules. In addition, the cases differ about when a lawyer “ratifies” the conduct of an agent or other non-lawyer. This issue comes up at trial when a defendant moves to have evidence excluded on the ground that the use of the evidence obtained by an agent in violation of a rule constitutes a ratification. The courts and legal authorities disagree on the answer to the question, but it is important for you to recognize it as an issue.

There is also a more specific rule that requires that prosecutors take special precautions to make sure that investigative agents do not make pre-trial, out-of-court statements that would have a substantial likelihood of materially prejudicing a proceeding or that would have a substantial likelihood of heightening public condemnation of the accused (Rule 3.8(f)).

When investigative agents learn about all the different requirements of the attorney conduct rules, they sometimes argue that investigators should conduct their investigations totally independently of the lawyer and in this way avoid the constraints of the attorney conduct rules. As a practical matter, given the necessary involvement of attorneys in issuing grand jury subpoenas, seeking wiretap orders, and in other techniques used in investigating complex federal crimes, it may be impossible for an attorney not to be involved at the

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<sup>2</sup> Rule 5.3(b) states that a lawyer having direct supervisory power over a nonlawyer has to make reasonable efforts to ensure that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer.



investigative stage. Moreover, you should be aware that, no matter how independently the agents may try to operate, courts may still apply the attorney conduct rules, either when a lawyer is consulted on a legal issue, such as constitutional questions implicated in interviewing a suspect, or not, as when the lawyer simply tries to use the evidence.

### **III. What Exactly Do The Most Important and Relevant Rules Provide?**

For each of the following issues, you first should determine which rules of professional conduct apply and then examine the particular rule in question. You can do this by consulting an attorney in the governmental office who will handle the case.

#### **A. Contacts with Represented Persons.**

Every jurisdiction has a provision providing generally that a lawyer may not communicate with a person the lawyer knows to be represented about the subject matter of the representation (ABA Model Rule is 4.2). There are exceptions to this rule. The rule in every jurisdiction permits such a communication with the consent of the person's lawyer. The rule in every jurisdiction but two (Florida and Puerto Rico) contains language creating an exception for communications "authorized by law." The rule on its own, or read in conjunction with other rules (such as Rule 8.4(a) and 5.3(c) discussed earlier), would prohibit an agent working on a case with a lawyer from engaging in a communication when the lawyer could not.

This rule raises many questions, and there are numerous cases deciding issues relating to it. The answers to the questions differ, depending on the applicable rule and the case law in the relevant jurisdiction.

#### **\* How are you supposed to know when an individual is represented by a lawyer?**

You have to pay attention to what the individual says on this issue. Also, where the individual has a lawyer on one case, for

example, a state investigation of health care fraud, you probably should “know” that the individual is represented in your federal investigation of the same matter, unless there are good reasons not to think so, e.g., when a lawyer tells you he does not represent the individual in your investigation.

\* **What if the individual has been represented in the past by a lawyer?**

This fact alone would not be enough to know that the individual is or is not represented. However, if the lawyer continues to work for the individual, then that is a fact to be considered.

\* **If the “individual” is a corporation that employs a general counsel, does the general counsel necessarily represent that corporation on the matter you are investigating?**

Generally speaking, the fact that a corporation has a general counsel does not mean that the corporation is represented with respect to your investigation of a particular incident or practice.

\* **Which persons in the corporation does the corporation’s attorney represent?**

The answer to this question is going to depend on where the case is or will be tried, or where the lawyers are members of the bar. The states vary, and in some jurisdictions, such as D.C., only employees who have the power to bind the corporation with respect to the representation itself are covered by the rule’s prohibition. In other states, however, even some low-level employees are considered to be represented by the corporation’s attorney.

\* **Is a former employee considered to be represented by corporation’s attorney?**

In many jurisdictions, but not all, a former employee is not considered to be represented by the corporation’s attorney. That means that you are free to communicate with former

employees about most things but not about “privileged matters.”

- \* **Is it necessary to ask every individual if he or she is represented?**

It usually is not necessary to ask every individual; that answer would change if you have reason to believe that someone is represented. In that case, you should inquire.

- \* **If a corporate employee has his own counsel who would permit you to communicate with the individual, do you also have to get the consent of the corporation’s attorney?**

In many jurisdictions, but not all, if a corporate employee has separate counsel, then you may properly communicate with the individual if you have the consent of that person’s separate counsel.

- \* **Can the individual consent to the communication or does the lawyer have to consent?**

No. Only the lawyer can consent.

- \* **Since the rule only prohibits communications about the subject matter of the representation, are you permitted to talk with the individual about a different but related subject?**

That depends on the relationship between the two.

- \* **What is considered a “communication”? (Is a letter a communication? Can you just listen?)**

Listening and writing or receiving a letter are communications.

- \* **Does the rule even apply before an individual is charged with a crime or a law suit is filed?**

The answer to this question varies, depending on which state’s rules apply and on the stage of the investigation.

**\* When are you “authorized by law” to communicate with a represented person?**

This phrase has been interpreted to mean that you may communicate with a represented individual if a specific law, a court order, or a previous decision of the court in that jurisdiction would permit it.

**\* If the rule applies to post-indictment communications with represented persons, and the rule applies to agents who are working with lawyers, is it permissible for agents who arrest an indicted defendant to give Miranda warnings and get a statement from him?**

This is a difficult question, not susceptible to a short answer and included here so that you think about it. A few states’ rules specifically permit post-arrest Mirandized communications with represented individuals; on the other hand, at least one federal case suggests that it is impermissible.

**B. You Must Not Use a Method of Obtaining Evidence That Violates the Rights of Another Person.**

Most jurisdictions have a rule or a number of rules that, read together, prohibit a lawyer and an agent working with a lawyer from obtaining evidence by violating the “legal rights” of another person (ABA Model Rule 4.4(a)). The “legal rights” of a third person include constitutional and statutory rights and rights recognized by case law, including privileges. For example, this rule has been used to prevent a lawyer from reviewing and copying psychiatric records of a litigant. It would prohibit you from asking questions if the answer would be privileged and the person you are asking does not have the power to waive the privilege. The most common way in which this rule would come into play is if, in the course of an investigation, you lawfully obtain information that is “privileged.” You may not always be able to determine in advance whether a document was intended to be privileged (and was inadvertently disclosed or was released by unauthorized persons), but there are some indicia that should put you on notice to ask some questions about the

document. For example, if a document is on a lawyer's stationery, is addressed to a client of the lawyer, and contains a notice such as "Confidential Attorney-Client Privileged Document" then you have some idea that there might be a claim that it is privileged. Before you read that document and before you integrate it into the file, it would be smart to find out how the document came into your possession. If the client waived the privilege (as, for example, a corporation may agree to do during an investigation), there is no reason not to read it. However, if the client did not waive the privilege, there are jurisdictions that would require you to return the document and also to refrain from using it. If you have not separated out such a document and it is later found to be privileged, you then would be hard pressed to establish that the information in it did not affect other parts of the investigation. Not every jurisdiction has such a rule, and so it is important to know what the applicable jurisdiction requires.

### **C. Trial Publicity Rules**

Every jurisdiction has a rule (either a rule of professional conduct or a court rule) that provides that a lawyer should not make a statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or should know that the statement will have a substantial likelihood of prejudicing an adjudicative proceeding (ABA Model Rule 3.6). Here, again, the rule applies to agents working with lawyers. There is another rule applicable to prosecutors (ABA Model Rule 3.8) that specifically requires the prosecutor to make efforts to prevent investigators and other law enforcement personnel from making statements outside the courtroom that the lawyer could not make. This second rule explains that prosecutors and agents properly may make statements that inform the public about the investigation if those statements serve a legitimate law enforcement purpose but should refrain from making statements outside the courtroom that "have a substantial likelihood of heightening public condemnation of the accused." You should be aware that, in some jurisdictions, the rules do not permit an attorney (or an agent working with the attorney) to identify or display the

items seized at the time of arrest or in connection with a search warrant.

Since the publicity rules are designed to assure fair proceedings, it is not surprising that the penalty for a violation of the rules can result in reversal of a conviction.

#### **D. You Must Always Be Honest With the Court.**

Every court requires those who appear before it to be honest (ABA Model Rule 3.3). Honesty means more than simply telling the truth. It may require you to make a statement, rather than leave the court with an erroneous impression. It may require you to correct the record in the court, even sometimes after a case has been closed. While you may know that the legal authorities hold sacrosanct the attorney-client relationship -- that is in part the reason for prohibiting a lawyer from disclosing the confidences of a client -- you may not know that in many jurisdictions a duty of candor to the court trumps even the a duty of confidentiality to a client. This rule is particularly exacting when the government lawyer is the only one presenting evidence to the court, that is, when involved in an ex parte proceeding.

You may be surprised to learn that the candor rule applies whenever the government lawyer, through you, supplies information to the court, such as when you prepare an affidavit that is filed with the court. If the affidavit does not tell the whole story, then the case could suffer consequences. Candor issues arise in many different circumstances.

Here are some examples:

- \* Where a confidential informant identifies herself while on the stand and under oath with a name supplied by your agency but that is not her real name.
- \* Where an affidavit in support of a wiretap does not contain a complete picture of previous methods tried and failed and alternative options for the government to obtain

the information without the wiretap.

- \* Where, after testifying in a deposition, a government witness discovers that the information provided in the deposition was incorrect.

In each of these circumstances, both your cases and your reputation can suffer from the potential consequences of such non-disclosures.

#### **E. Practice of Law and Negotiation of Agreements**

Every jurisdiction has its own definition of what constitutes the practice of law and provides that only those properly authorized may practice in that jurisdiction; some jurisdictions have criminal statutes prohibiting the unauthorized practice of law. We refer to such rules here because investigative agents who give advice to persons about possible violations of various laws, who assist in the preparation or interpretation of legal documents, or who “negotiate” criminal penalties may be engaged in the unauthorized practice of law. Only government lawyers may properly negotiate pleas of guilty, cases of civil settlement, or the granting of immunity. Agents who attempt to negotiate on behalf of the government not only may subject themselves to penalties, but they also may undermine the cases they are attempting to resolve.

## NOTES



**D. DOJ Memo re: Consensual Monitoring**

**Office of Attorney General  
May 30, 2002<sup>1</sup>**

**MEMORANDUM FOR THE HEADS AND INSPECTORS  
GENERAL OF EXECUTIVE DEPARTMENTS AND AGENCIES**

**FROM : THE ATTORNEY GENERAL**

**SUBJECT: Procedures for Lawful, Warrantless Monitoring  
of Verbal Communications**

By Memorandum dated October 16, 1972, the Attorney General directed all federal departments and agencies to obtain Department of Justice authorization before intercepting verbal communications without the consent of all parties to the communication. This directive was clarified and continued in force by the Attorney General's Memorandum of September 2, 1980, to Heads and Inspectors General of Executive Departments and agencies. It was then superseded with new authorization procedures and relevant rules and guidelines, including limitations on the types of investigations requiring prior written approval by the Department of Justice, in the Attorney General's Memorandum of November 7, 1983.<sup>2</sup>

The Attorney General's Memorandum of January 20, 1998, superseded the aforementioned directives. It continued most of the authorization procedures established in the November 7, 1983, Memorandum, but reduced the sensitive circumstances under which prior written approval of senior officials of the Department of Justice's Criminal Division is required. At the same time, it continued to require oral authorization from Department of Justice attorneys, ordinarily local Assistant

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<sup>1</sup> As of January 2017, this memorandum remains the DOJ controlling authority on consensual monitoring.

<sup>2</sup> As in all of the prior memoranda except for the one dated October 16, 1972, this memorandum only applies to the consensual monitoring of oral, nonwire communications, as discussed below. "Verbal" communications will hereinafter be referred to as oral.

United States Attorneys, before the initiation of the use of consensual monitoring in all investigations not requiring prior written approval. In addition, that Memorandum reduced and eventually eliminated the reporting requirement imposed on departments and agencies. These changes reflected the results of the exercise of the Department's review function over many years, which showed that the departments and agencies had uniformly been applying the required procedures with great care, consistency, and good judgment, and that the number of requests for consensual monitoring that were not approved had been negligible.

This Memorandum updates and in some limited respects modifies the Memorandum of January 20, 1998. The changes are as follows:

First, Parts III.A.(8) and V. of the January 20, 1998, Memorandum required concurrence or authorization for consensual monitoring by the United States Attorney, an Assistant United States Attorney, or the previously designated Department of Justice attorney responsible for a particular investigation (for short, a "trial attorney"). This Memorandum provides instead that a trial attorney must advise that the monitoring is legal and appropriate. This continues to limit monitoring to cases in which an appropriate attorney agrees to the monitoring, but makes it clear that this function does not establish a supervisory role or require any involvement by the attorney in the conduct of the monitoring. In addition, for cases in which this advice cannot be obtained from a trial attorney for reasons unrelated to the legality or propriety of the monitoring, this Memorandum provides a fallback procedure to obtain the required advice from a designated attorney of the Criminal Division of the Department of Justice. Where there is an issue as to whether providing the advice would be consistent with applicable attorney conduct rules, the trial attorney or the designated Criminal Division attorney should consult with the Department's Professional Responsibility Advisory Office.

Second, Part V. of the Memorandum of January 20, 1998, required that an agency head or his or her designee give oral

authorization for consensual monitoring, and stated that “[a]ny designee should be a high-ranking supervisory official at headquarters level.” This rule was qualified by Attorney General Order No. 1623-92 of August 31, 1992, which, in relation to the Federal Bureau of Investigation (FBI), authorized delegation of this approval function to Special Agents in Charge. Experience has shown that the requirement of Special Agent in Charge approval can result in a loss of investigative opportunities because of an overly long approval process, and indicates that allowing approval by Assistant Special Agents in Charge would facilitate FBI investigative operations. Assistant Special Agents in Charge are management personnel to whom a variety of supervisory and oversight responsibilities are routinely given; generally, they are directly involved and familiar with the circumstances relating to the propriety of proposed uses of the consensual monitoring technique. Part V. is accordingly revised in this Memorandum to provide that the FBI Director’s designees for purposes of oral authorization of consensual monitoring may include both Special Agents in Charge and Assistant Special Agents in Charge. This supersedes Attorney General Order No. 1623-92, which did not allow delegation of this function below the level of Special Agent in Charge.

Third, this Memorandum omits as obsolete Part VI. of the Memorandum of January 20, 1998. Part VI. imposed a reporting requirement by agencies concerning consensual monitoring but rescinded that reporting requirement after one year.

The Fourth Amendment to the United States Constitution, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 U.S.C. §2510, et seq.), and the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §1801, et seq.) permit government agents, acting with the consent of a party to a communication, to engage in warrantless monitoring of wire (telephone) communications and oral, nonwire communications. See United States v. White, 401 U.S. 745 (1971); United States v. Caceres, 440 U.S. 741 (1979). Similarly, the Constitution and federal statutes permit federal agents to engage in warrantless monitoring of oral, nonwire communications when the

communicating parties have no justifiable expectation of privacy.<sup>3</sup> Because such monitoring techniques are particularly effective and reliable, the Department of Justice encourages their use by federal agents for the purpose of gathering evidence of violations of federal law, protecting informants or undercover law enforcement agents, or fulfilling other, similarly compelling needs. While these techniques are lawful and helpful, their use in investigations is frequently sensitive, so they must remain the subject of careful, self-regulation by the agencies employing them.

The sources of authority for this Memorandum are Executive Order No. 11396 (“Providing for the Coordination by the Attorney General of Federal Law Enforcement and Crime Prevention Programs”); Presidential Memorandum (“Federal Law Enforcement Coordination, Policy and Priorities”) of September 11, 1979; Presidential Memorandum (untitled) of June 30, 1965, on, inter alia, the utilization of mechanical or electronic devices to overhear nontelephone conversations; the Paperwork Reduction Act of 1980 and the Paperwork Reduction Reauthorization Act of 1986, as amended; and the inherent authority of the Attorney General as the chief law enforcement officer of the United States.

## **I. DEFINITIONS**

As used in this Memorandum, the term “agency” means all of the Executive Branch departments and agencies, and specifically includes United States Attorneys’ Offices which utilize their own investigators, and the Offices of the Inspectors General.

As used in this Memorandum, the terms “interception” and “monitoring” mean the aural acquisition of oral communications

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<sup>3</sup> As a general rule, nonconsensual interceptions of wire communications violate 18 U.S.C. § 2511 regardless of the communicating parties’ expectation of privacy, unless the interceptor complies with the court-authorization procedures of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2510, et seq.) or with the provisions of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801 et seq.).

by use of an electronic, mechanical, or other device. Cf. 18 U.S.C. § 2510(4).

As used in this Memorandum, the term “public official” means an official of any public entity of government, including special districts, as well as all federal, state, county, and municipal governmental units.

## **II. NEED FOR WRITTEN AUTHORIZATION**

### **A. Investigations Where Written Department of Justice Approval is Required**

A request for authorization to monitor an oral communication without the consent of all parties to the communication must be approved in writing by the Director or Associate Director of the Office of Enforcement Operations, Criminal Division, U.S. Department of Justice, when it is known that:

- (1) the monitoring relates to an investigation of a member of Congress, a federal judge, a member of the Executive Branch at Executive Level IV or above, or a person who has served in such capacity within the previous two years;
- (2) the monitoring relates to an investigation of the Governor, Lieutenant Governor, or Attorney General of any State or Territory, or a judge or justice of the highest court of any State or Territory, and the offense investigated is one involving bribery, conflict of interest, or extortion relating to the performance of his or her official duties;
- (3) any party to the communication is a member of the diplomatic corps of a foreign country;
- (4) any party to the communication is or has been a member of the Witness Security

Program and that fact is known to the agency involved or its officers;

- (5) the consenting or nonconsenting person is in the custody of the Bureau of Prisons or the United States Marshals Service; or
- (6) the Attorney General, Deputy Attorney General, Associate Attorney General, any Assistant Attorney General, or the United States Attorney in the district where an investigation is being conducted has requested the investigating agency to obtain prior written consent before conducting consensual monitoring in a specific investigation.

In all other cases, approval of consensual monitoring will be in accordance with the procedures set forth in part V. below.

**B. Monitoring Not Within Scope of Memorandum**

Even if the interception falls within one of the six categories above, the procedures and rules in this Memorandum do not apply to:

- (1) extraterritorial interceptions;
- (2) foreign intelligence interceptions, including interceptions pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801, et seq.);
- (3) interceptions pursuant to the court-authorization procedures of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 U.S.C. § 2510, et seq.);
- (4) routine Bureau of Prisons monitoring of oral

communications that are not attended by a justifiable expectation of privacy;

- (5) interceptions of radio communications; and
- (6) interceptions of telephone communications.

### **III. AUTHORIZATION PROCEDURES AND RULES**

#### **A. Required Information**

The following information must be set forth in any request to monitor an oral communication pursuant to part II.A.:

- (1) Reasons for the Monitoring. The request must contain a reasonably detailed statement of the background and need for the monitoring.
- (2) Offense. If the monitoring is for investigative purposes, the request must include a citation to the principal criminal statute involved.
- (3) Danger. If the monitoring is intended to provide protection to the consenting party, the request must explain the nature of the danger to the consenting party.
- (4) Location of Devices. The request must state where the monitoring device will be hidden: on the person, in personal effects, or in a fixed location.
- (5) Location of Monitoring. The request must specify the location and primary judicial district where the monitoring will take place. A monitoring authorization is not restricted to the original district. However, if the location of monitoring changes, notice should be promptly given to the approving official. The record maintained on the request should

reflect the location change.

- (6) Time. The request must state the length of time needed for the monitoring. Initially, an authorization may be granted for up to 90 days from the day the monitoring is scheduled to begin. If there is the need for continued monitoring, extensions for additional periods of up to 90 days may be granted. In special cases (e.g., “fencing” operations run by law enforcement agents or long-term investigations that are closely supervised by the Department’s Criminal Division) authorization for up to 180 days may be granted with similar extensions.
- (7) Names. The request must give the names of persons, if known, whose communications the department or agency expects to monitor and the relation of such persons to the matter under investigation or to the need for the monitoring.
- (8) Attorney Advice. The request must state that the facts of the surveillance have been discussed with the United States Attorney, an Assistant United States Attorney, or the previously designated Department of Justice attorney responsible for a particular investigation, and that such attorney advises that the use of consensual monitoring is appropriate under this Memorandum (including the date of such advice). The attorney must also advise that the use of consensual monitoring under the facts of the investigation does not raise the issue of entrapment. Such statements may be made orally. If the attorneys described above cannot provide the advice for reasons unrelated to the legality or propriety of the



consensual monitoring, the advice must be sought and obtained from an attorney of the Criminal Division of the Department of Justice designated by the Assistant Attorney General in charge of that Division. Before providing such advice, a designated Criminal Division Attorney shall notify the appropriate United States Attorney or other attorney who would otherwise be authorized to provide the required advice under this paragraph.

- (9) Renewals. A request for renewal authority to monitor oral communications must contain all the information required for an initial request. The renewal request must also refer to all previous authorizations and explain why an additional authorization is needed, as well as provide an updated statement that the attorney advice required under paragraph (8) has been obtained in connection with the proposed renewal.

## **B. Oral Requests**

Unless a request is of an emergency nature, it must be in written form and contain all of the information set forth above. Emergency requests in cases in which written Department of Justice approval is required may be made by telephone to the Director or an Associate Director of the Criminal Division's Office of Enforcement Operations, or to the Assistant Attorney General, the Acting Assistant Attorney General, or a Deputy Assistant Attorney General for the Criminal Division, and should later be reduced to writing and submitted to the appropriate headquarters official as soon as practicable after authorization has been obtained. An appropriate headquarters filing system is to be maintained for consensual monitoring requests that have been received and approved in this manner. Oral requests must include all the information required for written requests as set forth above.

### **C. Authorization**

Authority to engage in consensual monitoring in situations set forth in part II.A. of this Memorandum may be given by the Attorney General, the Deputy Attorney General, the Associate Attorney General, the Assistant Attorney General or Acting Assistant Attorney General in charge of the Criminal Division, a Deputy Assistant Attorney General in the Criminal Division, or the Director or an Associate Director of the Criminal Division's Office of Enforcement Operations. Requests for authorization will normally be submitted by the headquarters of the department or agency requesting the consensual monitoring to the Office of Enforcement Operations for review.

### **D. Emergency Monitoring**

If an emergency situation requires consensual monitoring at a time when one of the individuals identified in part III.B. above cannot be reached, the authorization may be given by the head of the responsible department or agency, or his or her designee. Such department or agency must then notify the Office of Enforcement Operations as soon as practicable after the emergency monitoring is authorized, but not later than three working days after the emergency authorization.

The notification shall explain the emergency and shall contain all other items required for a nonemergency request for authorization set forth in part III.A. above.

## **IV. SPECIAL LIMITATIONS**

When a communicating party consents to the monitoring of his or her oral communications, the monitoring device may be concealed on his or her person, in personal effects, or in a fixed location. Each department and agency engaging in such consensual monitoring must ensure that the consenting party will be present at all times when the device is operating. In addition, each department and agency must ensure: (1) that no agent or person cooperating with the department or agency trespasses while installing a device in a fixed location, unless

that agent or person is acting pursuant to a court order that authorizes the entry and/or trespass, and (2) that as long as the device is installed in the fixed location, the premises remain under the control of the government or of the consenting party. See United States v. Yonn, 702 F.2d 1341, 1347 (11th Cir.), cert. denied, 464 U.S. 917 (1983) (rejecting the First Circuit's holding in United States v. Padilla, 520 F.2d 526 (1st Cir. 1975), and approving use of fixed monitoring devices that are activated only when the consenting party is present). But see United States v. Shabazz, 883 F. Supp. 422 (D. Minn. 1995).

Outside the scope of this Memorandum are interceptions of oral, nonwire communications when no party to the communication has consented. To be lawful, such interceptions generally may take place only when no party to the communication has a justifiable expectation of privacy,<sup>4</sup> or when authorization to intercept such communications has been obtained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2510, et seq.) or the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801 et seq.). Each department or agency must ensure that no communication of any party who has a justifiable expectation of privacy is intercepted unless proper authorization has been obtained.

#### **V. PROCEDURES FOR CONSENSUAL MONITORING WHERE NO WRITTEN APPROVAL IS REQUIRED**

Prior to receiving approval for consensual monitoring from the head of the department or agency or his or her designee, a representative of the department or agency must obtain advice that the consensual monitoring is both legal and appropriate from the United States Attorney, an Assistant United States Attorney, or the Department of Justice attorney responsible for a particular investigation. The advice may be obtained orally from the attorney. If the attorneys described above cannot

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<sup>4</sup> For example, burglars, while committing a burglary, have no justifiable expectation of privacy. Cf. United States v. Pui Kan Lam, 483 F.2d 1202 (2d. Cir. 1973), cert. denied, 415 U.S. 984 (1974).

provide this advice for reasons unrelated to the legality or propriety of the consensual monitoring, the advice must be of Executive Departments and Agencies sought and obtained from an attorney of the Criminal Division of the Department of Justice designated by the Assistant Attorney General in charge of that Division. Before providing such advice, a designated Criminal Division Attorney shall notify the appropriate United States Attorney or other attorney who would otherwise be authorized to provide the required advice under this paragraph.

Even in cases in which no written authorization is required because they do not involve the sensitive circumstances discussed above, each agency must continue to maintain internal procedures for supervising, monitoring, and approving all consensual monitoring of oral communications. Approval for consensual monitoring must come from the head of the agency or his or her designee. Any designee should be a high-ranking supervisory official at headquarters level, but in the case of the FBI may be a Special Agent in Charge or Assistant Special Agent in Charge.

Similarly, each department or agency shall establish procedures for emergency authorizations in cases involving non-sensitive circumstances similar to those that apply with regard to cases that involve the sensitive circumstances described in part III.D., including obtaining follow-up oral advice of an appropriate attorney as set forth above concerning the legality and propriety of the consensual monitoring.

Records are to be maintained by the involved departments or agencies for each consensual monitoring that they have conducted. These records are to include the information set forth in part III.A. above.

## **VI. GENERAL LIMITATIONS**

This Memorandum relates solely to the subject of consensual monitoring of oral communications except where otherwise indicated. This Memorandum does not alter or supersede any current policies or directives relating to the subject of obtaining necessary approval for engaging in nonconsensual electronic surveillance or any other form of nonconsensual interception.

## **E. Giglio Policy**

### **Office of the Attorney General Washington, D.C. 20530**

Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses<sup>1</sup>

#### **Preface**

The following policy is established for: the Federal Bureau of Investigation, Drug Enforcement Administration, Immigration and Naturalization Service, the United States Marshals Service, the Department of Justice Office of the Inspector General, and the Department of Justice Office of Professional Responsibility (“the investigative agencies”). It addresses their disclosure of potential impeachment information to the United States Attorneys’ Offices and Department of Justice litigating sections with authority to prosecute criminal cases (“Department of Justice prosecuting offices”). The purpose of this policy is to ensure that prosecutors receive sufficient information to meet their obligations under *Giglio v. United States*, 405 U.S. 150 (1972), while protecting the legitimate privacy rights of Government employees.<sup>2</sup>

The exact parameters of potential impeachment information are not easily determined. Potential impeachment information, however, has been generally defined as impeaching information which is material to the defense. This information may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness’ credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness’ character for truthfulness; (c) prior

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<sup>1</sup> Located at the DOJ website: <http://www.justice.gov/ag/policy-regarding-disclosure-prosecutors-potential-impeachment-information-concerning-law>

<sup>2</sup> This policy is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. *United States v. Caceres*, 440 U.S. 741 (1979).

inconsistent statements; and (d) information that may be used to suggest that a witness is biased.

This policy is not intended to replace the obligation of individual agency employees to inform prosecuting attorneys with whom they work of potential impeachment information prior to providing a sworn statement or testimony in any investigation or case. In the majority of investigations and cases in which agency employees may be affiants or witnesses, it is expected that the prosecuting attorney will be able to obtain all potential impeachment information directly from agency witnesses during the normal course of investigations and/or preparation for hearings or trials.

### **Procedures for Disclosing Potential Impeachment Information Relating to Department of Justice Employees**

1. Obligation to Disclose Potential Impeachment Information. It is expected that a prosecutor generally will be able to obtain all potential impeachment information directly from potential agency witnesses and/or affiants. Each investigative agency employee is obligated to inform prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case. Each investigative agency should ensure that its employees fulfill this obligation. Nevertheless, in some cases, a prosecutor may also decide to request potential impeachment information from the investigative agency. This policy sets forth procedures for those cases in which a prosecutor decides to make such a request.
2. Agency Officials. Each of the investigative agencies shall designate an appropriate official(s) to serve as the point(s) of contact concerning Department of Justice employees' potential impeachment information ("the Agency Official"). Each Agency Official shall consult periodically with the relevant Requesting Officials about Supreme Court caselaw, circuit caselaw, and district court rulings and

practice governing the definition and disclosure of impeachment information.

3. Requesting Officials. Each of the Department of Justice prosecuting offices shall designate an appropriate senior official(s) to serve as the point(s) of contact concerning potential impeachment information (“the Requesting Official”). Each Requesting Official shall inform the relevant Agency Officials about Supreme Court caselaw, circuit caselaw, and district court rulings and practice governing the definition and disclosure of impeachment information.
4. Request to Agency Officials. When a prosecutor determines that it is necessary to request potential impeachment information from an Agency Official(s) relating to an agency employee identified as a potential witness or affiant (“the employee”) in a specific criminal case or investigation, the prosecutor shall notify the appropriate Requesting Official. Upon receiving such notification, the Requesting Official may request potential impeachment information relating to the employee from the employing Agency Official(s) and the designated Agency Official(s) in the Department of Justice Office of the Inspector General (“OIG”) and the Department of Justice Office of Professional Responsibility (“DOJ-OPR”).
5. Agency Review and Disclosure. Upon receiving the request described in Paragraph 4, the Agency Official(s) from the employing agency, the OIG and DOJ-OPR shall each conduct a review, in accordance with its respective agency plan, for potential impeachment information regarding the identified employee. The employing Agency Official(s), the OIG, and DOJ-OPR shall advise the Requesting Official of: (a) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry; (b) any past or pending criminal charge brought against the employee; and (c) any credible allegation of misconduct that reflects upon the

truthfulness or possible bias of the employee that is the subject of a pending investigation.

6. Treatment of Allegations Which Are Unsubstantiated, Not Credible, or Have Resulted in Exoneration. Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information. Upon request, such information which reflects upon the truthfulness or bias of the employee, to the extent maintained by the agency, will be provided to the prosecuting office under the following circumstances: (a) when the Requesting Official advises the Agency Official that it is required by a Court decision in the district where the investigation or case is being pursued; (b) when, on or after the effective date of this policy: (i) the allegation was made by a federal prosecutor, magistrate judge, or judge; or (ii) the allegation received publicity; (c) when the Requesting Official and the Agency Official agree that such disclosure is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the agency witness; or (d) when disclosure is otherwise deemed appropriate by the agency. The agency is responsible for advising the prosecuting office, to the extent determined, whether any aforementioned allegation is unsubstantiated, not credible, or resulted in the employee's exoneration.

Note: With regard to allegations disclosed to a prosecuting office under this paragraph, the head of the prosecuting office shall ensure that special care is taken to protect the confidentiality of such information and the privacy interests and reputations of agency employee-witnesses, in accordance with paragraph 13 below. At the conclusion of the case, if such information was not disclosed to the defense, the head of the prosecuting office shall ensure that all materials received from an investigative agency regarding the allegation, including any and all copies, are expeditiously returned to the investigative agency. This does not prohibit a prosecuting



office from keeping motions, responses, legal memoranda, court orders, and internal office memoranda or correspondence, in the relevant criminal case file(s).

7. Prosecuting Office Records. Department of Justice prosecuting offices shall not retain in any system of records that can be accessed by the identity of an employee, potential impeachment information that was provided by an agency, except where the information was disclosed to defense counsel. This policy does not prohibit Department of Justice prosecuting offices from keeping motions and Court orders and supporting documents in the relevant criminal case file.
8. Copies to Agencies. When potential impeachment information received from Agency Officials has been disclosed to a Court or defense counsel, the information disclosed, along with any judicial rulings and related pleadings, shall be provided to the Agency Official that provided the information and to the employing Agency Official for retention in the employing agency's system of records. The agency shall maintain judicial rulings and related pleadings on information that was disclosed to the Court but not to the defense in a manner that allows expeditious access upon the request of the Requesting Official.
9. Record Retention. When potential impeachment information received from Agency Officials has been disclosed to defense counsel, the information disclosed, along with any judicial rulings and related pleadings, may be retained by the Requesting Official, together with any related correspondence or memoranda, in a system of records that can be accessed by the identity of the employee.
10. Updating Records. Before any federal prosecutor uses or relies upon information included in the prosecuting office's system of records, the Requesting Official shall contact the relevant Agency Official(s) to determine the

status of the potential impeachment information and shall add any additional information provided to the prosecuting office's system of records.

11. Continuing Duty to Disclose. Each agency plan shall include provisions which will assure that, once a request for potential impeachment information has been made, the prosecuting office will be made aware of any additional potential impeachment information that arises after such request and during the pendency of the specific criminal case or investigation in which the employee is a potential witness or affiant. A prosecuting office which has made a request for potential impeachment information shall promptly notify the relevant agency when the specific criminal case or investigation for which the request was made ends in a judgment or declination, at which time the agency's duty to disclose shall cease.
12. Removal of Records upon Transfer, Reassignment, or Retirement of Employee. Upon being notified that an employee has retired, been transferred to an office in another judicial district, or been reassigned to a position in which the employee will neither be an affiant nor witness, and subsequent to the resolution of any litigation pending in the prosecuting office in which the employee could be an affiant or witness, the Requesting Official shall remove from the prosecuting office's system of records any record that can be accessed by the identity of the employee.
13. Prosecuting Office Plans to Implement Policy. Within 120 days of the effective date of this policy, each prosecuting office shall develop a plan to implement this policy. The plan shall include provisions that require: (a) communication by the prosecuting office with the agency about the disclosure of potential impeachment information to the Court or defense counsel, including allowing the agency to express its views on whether certain information should be disclosed to the Court or

defense counsel; (b) preserving the security and confidentiality of potential impeachment information through proper storage and restricted access within a prosecuting office; (c) when appropriate, seeking an ex parte, in camera review and decision by the Court regarding whether potential impeachment information must be disclosed to defense counsel; (d) when appropriate, seeking protective orders to limit the use and further dissemination of potential impeachment information by defense counsel; and, (e) allowing the relevant agencies the timely opportunity to fully express their views.

14. Investigative Agency Plans to Implement Policy. Within 120 days of the effective date of this policy, each of the investigative agencies shall develop a plan to effectuate this policy.

Date: 12/9/96<sup>3</sup>

This policy is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. United States v. Caceres, 440 U.S. 741 (1979).

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<sup>3</sup> This policy remains in effect as of January 2017.

## NOTES

## F. Glossary of Terms

**Accused:** The person accused of the commission of a federal crime. Use of this term does not imply the person under investigation is guilty of any crime. After a person is indicted by the grand jury, that person is referred to as the “defendant.”

**Amicus Brief:** A legal argument provided to an appellate court by a non-party. Amicus means, literally, friend of the court. The court retains discretion on the acceptance of an amicus brief.

**Attorney Work Product:** Tangible material collected or prepared by a party in expectation of litigation. Under the work product rule, this material is not subject to the rules of discovery unless the opposing party can demonstrate undue hardship.

**Attorney-Client Privilege:** A client’s privilege to refuse to disclose or prevent another from disclosing confidential communications between the client and the attorney.

**Bill of Attainder:** A special act of a legislature declaring persons guilty of offenses without conviction or the due course of judicial proceedings. Bills of Attainder are prohibited by the U.S. Constitution (Article I, Section 9).

**Case-in-Chief:** The portion of a court proceeding in which the party with the burden of proof (the government in criminal cases) presents its evidence in support of its allegation(s). In a criminal trial, the U.S. Attorney presents the government’s case-in-chief through direct examination of prosecution witnesses.

**Challenge for Cause:** In a jury trial, each party is permitted to strike (challenge) potential jurors from sitting on the jury. A challenge for cause is an appeal to a judge to remove a potential juror because of a specific reason (for example, the juror cannot hear the case fairly, knows one of the persons expected to participate in the trial, or has a vested interest in the outcome of the proceeding). Compare to a peremptory challenge.

**Charge to the Grand Jury:** Given by the judge presiding over the selection and organization of the grand jury, the charge is the court’s instructions to the grand jury as to its duties,

functions, and obligations, and how to best perform them.

**Criminal Complaint**: A formal charging document that sets out the facts and cause of action (establishing probable cause) that the government alleges are sufficient to support a claim against the charged party (the defendant).

**Deliberations**: The discussion by the grand jury members as to whether or not to return an indictment on a given charge against an accused. During deliberations no one except the grand jury members may be present.

**District**: The geographical area over which the federal district court where the grand jury sits and the grand jury itself have jurisdiction. The territorial limitations of the district will be explained to the grand jury by the district judge.

**En Banc**: Literally means “on a bench.” Typically means an appellate court will re-hear a panel (generally three judges) decision with all members of the court’s participation.

**Evidence**: Testimony of witnesses, documents, and exhibits as presented to the grand jury by an attorney for the government or otherwise properly brought before it. In some instances, the person under investigation may also testify.

**Federal**: The national government as distinguished from the state governments.

**Grand Jury**: Consists of sixteen (to form a quorum) to twenty-three members, summoned to review complaints and accusations in criminal cases. Upon the vote of twelve jurors, issues an indictment. Governed by the Fed.R.Crim.P. 6.

**Grand Jurors’ Immunity**: Immunity is granted to all grand jurors for their authorized actions while serving on a federal grand jury and means that no grand juror may be penalized for actions taken within the scope of his or her service as a grand juror.

**Habeas Corpus**: Latin translation for “you have the body.” A Writ of Habeas Corpus is a court order to a party to bring forth the body, to show cause concerning the lawfulness of possessing the body. This is a legal appeal to a court to obtain release from unlawful custody. The privilege of the Writ of

Habeas Corpus is preserved in the Constitution at Article I, Section 9.

**Indictment:** The written formal charge of a crime by the grand jury, returned when 12 or more grand jurors vote in favor of it.

**Information:** The written formal charge of crime by the United States Attorney, filed against an accused who, if charged with a serious crime, must have knowingly waived the requirements that the evidence first be presented to a grand jury.

**“No Bill”:** Also referred to as “not a true bill,” the “no bill” is the decision by the grand jury not to indict a person.

**Peremptory Challenge:** The right of a party to challenge a potential juror without having to provide grounds for removing that potential juror from further consideration. Each side has 20 peremptory challenges when the government seeks the death penalty. In other felony cases, the government has 6 peremptory challenges and the defendant has 10 peremptory challenges. Challenges are governed by Fed.R.Crim.P. 24. Compare to challenges for cause.

**Petit Jury:** The trial jury, composed of 12 members, that hears a case after indictment and renders a verdict or decision after hearing the prosecution’s entire case and whatever evidence the defendant chooses to offer.

**Probable Cause:** The finding necessary in order to return an indictment against a person accused of a federal crime. A finding of probable cause is proper only when the evidence presented to the grand jury, without any explanation being offered by the accused, persuades 12 or more grand jurors that a federal crime has probably been committed by the person accused.

**Quorum for Grand Jury to Conduct Business:** Sixteen of the 23 members of a federal grand jury must at all times be present at a grand jury session in order for the grand jury to be able to conduct business.

**United States Attorney:** The chief legal officer for the United States government in each federal district.

## NOTES



## G. Wray Memorandum on Garrity / Kalkines Warnings



U.S. Department of Justice

Criminal Division

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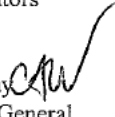
Assistant Attorney General

Washington, D.C. 20530

May 6, 2005

### MEMORANDUM

**To:** All Federal Prosecutors

**From:** Christopher A. Wray   
Assistant Attorney General

**Re:** The Increasing Role of the Offices of Inspector General, and Uniform Advice of Rights Forms for Interviews of Government Employees

This memorandum is intended to highlight the increasing role of the Offices of Inspector General in the investigation of criminal conduct involving federal employees and agencies, and to provide you with information regarding the advice of rights forms that should be used by Inspector General agents when interviewing government employees.

#### Increased Role of the Offices of Inspector General

Over the past several years, we have seen a substantial increase in the role and presence of the Offices of Inspector General in the investigation of criminal conduct involving federal departments and agencies. The Offices of Inspector General have embraced their increased role, and they have been provided with additional tools to help them. First, the Homeland Security Act provided statutory law enforcement powers to Inspector General agents, including additional authority to carry firearms, make arrests, and execute search warrants. The Attorney General promulgated detailed guidelines for Inspector General agents in exercising these new powers, and the guidelines provide that Inspector General agents should receive additional law enforcement training on a regular basis. The Inspector General Criminal Investigator Training Academy has crafted a detailed training regimen to satisfy the Attorney General's requirements and to insure that Inspector General agents have the knowledge and skills that they need to carry out their expanding duties.

In addition, the Offices of Inspector General have been authorized to conduct undercover operations, and the Public Integrity Section is working closely with the Inspector General Community to develop a comprehensive set of undercover guidelines that will provide effective procedures for the initiation and completion of undercover operations by the Offices of Inspector General.

In light of the increased presence and role of the Offices of Inspector General, you should anticipate more frequent contact with Inspector General agents, and I encourage each U.S. Attorney's Office to reach out to their offices in your districts in order to establish an effective partnership with them.

#### Uniform Advice of Rights Forms

I also wish to bring to your attention an issue that is presented whenever Inspector General agents interview government employees. In 1967, the Supreme Court held that if government employees are compelled to answer questions under the threat of losing their government employment, then the government may not use the employees' statements or any evidence derived from those statements in any criminal prosecution. Garrity v. New Jersey, 385 U.S. 493 (1967). Such statements are effectively "immunized." This type of immunity will be found if an employee has an objectively reasonable belief that he or she will be disciplined if he or she refuses to answer questions. The risk of creating such immunity is particularly acute when interviews are conducted by Inspector General agents because they handle both criminal investigations and investigations that lead to administrative discipline.

In order to address these concerns, when a federal employee is interviewed during the course of an investigation being conducted by an Office of Inspector General, the agents should provide the employee with an advice of rights form that is designed to preserve the government's ability to use the employee's statements by advising the employee that the interview is voluntary and that the employee will not be disciplined solely for refusing to answer questions. This is commonly referred to as the "Garrity" warning.

On the other hand, in investigations where the government has chosen to forgo any criminal prosecution of a government employee, and instead pursue administrative remedies and discipline, the government may compel the employee to answer questions. Under well-established case law, in such instances the employee must be assured that his or her statements may not be used against the employee in any criminal proceeding. Kalkines v. United States, 472 F.2d 1391 (Ct. Cl. 1973). To address this issue, when Inspector General agents wish to compel a federal employee to answer questions, they provide the employee with a warning form that is commonly referred to as a "Kalkines" warning. If an employee refuses to answer questions when presented with the Kalkines warning, the employee may be terminated for that refusal. Any answers that the employee provides may be used for administrative purposes, but not for any

criminal prosecution. If an employee lies during a compelled interview, however, the employee may be prosecuted for lying. In any interview of a government employee by an Inspector General agent, either the Garrity or the Kalkines warnings should be given. In custodial interviews, of course, the employees should also be provided with Miranda warnings.

Recently, the President's Council on Integrity and Efficiency formed a working group including representatives from the Inspector General community and the Public Integrity Section to examine the advice of rights forms that are currently being used by the Offices of Inspector General. The group found a patchwork of different forms, many of which contain language that is outdated and unnecessary. As a result, the working group devised uniform Garrity and Kalkines advice of rights forms, and those forms have now been approved by the Attorney General. Copies of the uniform advice of rights forms are attached for your reference. Although it remains the responsibility of the individual Offices of Inspector General to prepare and issue the advice of rights forms, they should be encouraged to use these uniform advice of rights forms as models.

#### Conclusion

The Offices of Inspector General have assumed a greater role in the investigation of criminal activity that affects the integrity, security, and effective operation of the federal government. We welcome their commitment to addressing this serious criminal activity, and I encourage all of you to establish strong working relationships with the Offices of Inspector General in your districts.

Attachments

**WARNINGS AND ASSURANCES TO EMPLOYEE REQUESTED TO PROVIDE  
INFORMATION ON A VOLUNTARY BASIS (GARRITY)**

You are being asked to provide information as part of an investigation being conducted by the Office of the Inspector General into alleged misconduct and/or improper performance of official duties. This investigation is being conducted pursuant to the Inspector General Act of 1978, as amended.

This is a voluntary interview. Accordingly, you do not have to answer questions. No disciplinary action will be taken against you solely for refusing to answer questions.

Any statement you furnish may be used as evidence in any future criminal proceeding or agency disciplinary proceeding, or both.

**ACKNOWLEDGMENT**

I understand the warnings and assurances stated above and I am willing to make a statement and answer questions. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

\_\_\_\_\_  
**Office of Inspector General  
Special Agent**

\_\_\_\_\_  
**Employee's Signature**

**Witness:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Time:** \_\_\_\_\_

**Location:** \_\_\_\_\_

**WARNINGS AND ASSURANCES TO EMPLOYEE REQUIRED TO  
PROVIDE INFORMATION (KALKINES)**

You are being asked to provide information as part of an investigation being conducted by the Office of the Inspector General into alleged misconduct and/or improper performance of your official duties. The investigation involves the following:

\_\_\_\_\_

\_\_\_\_\_

The purpose of this interview is to obtain information which will assist in the determination of whether administrative action is warranted. This investigation, is being conducted pursuant to the Inspector General Act of 1978, as amended.

- You are going to be asked a number of specific questions concerning the performance of your official duties.
- You have a duty to reply to these questions, and agency disciplinary action, including dismissal, may be undertaken if you refuse to answer, or fail to reply fully and truthfully.
- The answers you furnish and any information or evidence resulting therefrom may be used in the course of civil or administrative proceedings.
- Neither your answers nor any information or evidence which is gained by reason of such statements can be used against you in any criminal proceedings, except that if you knowingly and willfully provide false statements or information in your answers, you may be criminally prosecuted for that action.

**ACKNOWLEDGMENT**

\_\_\_\_\_  
**Office of Inspector General  
Special Agent**

\_\_\_\_\_  
**Employee's Signature**

**Witness:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Time:** \_\_\_\_\_

**Location:** \_\_\_\_\_

## NOTES

## H. Fisher Letter on Garrity / Kalkines Warnings



U.S. Department of Justice

Criminal Division

*Assistant Attorney General*

*Washington, D.C. 20530*

January 11, 2006

The Honorable Gregory H. Friedman  
Vice Chair, President's Council on Integrity and Efficiency  
Department of Energy, Office of Inspector General  
1000 Independence Avenue, SW  
Washington, DC 20585

The Honorable Barry R. Snyder  
Vice Chair, Executive Council on Integrity and Efficiency  
Federal Reserve Board, Office of Inspector General  
Mail Stop 300  
20th Street and Constitution Avenue, NW  
Washington, DC 20551

Dear Messrs. Vice Chairs:

This letter is intended to provide clarification to the members of the Inspector General community regarding the use of model Garrity and Kalkines advice of rights forms that were approved by the Attorney General in April 2005. The Department of Justice places great value on its partnership with the Inspector General community in the enforcement of federal law, and we welcome the opportunity to provide additional guidance on this important issue.

In 2004, the Assistant Inspector General for Investigations Subcommittee of the Investigations Committee, Presidents Council on Integrity and Efficiency (PCIE), established a working group to evaluate the existing Garrity and Kalkines warning forms being used by inspector general agents, and to develop model warning forms. The working group was headed by the Assistant Inspector General for Investigations at the Federal Deposit Insurance Corporation, and included representatives from several Offices of Inspector General and the Public Integrity Section of the Department of Justice.

The working group produced model Garrity and Kalkines forms, which were approved by Attorney General Alberto Gonzales on April 14, 2005. On May 6, 2005, my predecessor, Assistant Attorney General Christopher A. Wray, distributed a memorandum to all federal prosecutors highlighting the increasing role that Inspector General agents play in enforcing criminal law, and notifying federal prosecutors of the model Garrity and Kalkines warning forms.

I understand that members of the Inspector General community have expressed concerns regarding the interpretation of the Wray memorandum, and the proper use of the model warning forms. In particular, we have been asked whether the Offices of Inspector General are required to

adopt and use the model warning forms without modification, and whether Inspector General agents are required to provide warnings to government employees in every interview, regardless of whether the employee is a subject of investigation at the time of the interview. This letter is intended to provide clarification on those matters.

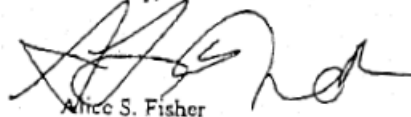
The primary goals of the working group were to achieve a greater degree of uniformity among the warning forms that are used by Inspector General agents in the various departments and agencies, and to make the forms more effective. In order to achieve those goals, the working group drafted models containing simplified and more streamlined warnings that would preserve the government's ability to use statements in criminal proceedings, and at the same time free the Offices of Inspector General from the obligation to include in their warnings the unnecessary and stark language that applies in the custodial interrogation setting under Miranda v. Arizona. It is our hope that the Offices of Inspector General will find the model warning forms helpful, and they are encouraged to use the models. The Wray memorandum recognized, however, that it remains the responsibility of the Offices of Inspector General to prepare specific advice of rights forms for use in their agencies, and we understand that individual Offices of Inspector General may find a need to modify the model warnings to fit the particular investigative needs within their agencies. There is no prohibition against doing so.

The Wray memorandum also emphasized the importance of providing appropriate warnings to government employees who are interviewed by inspector general agents. As you know, when a government employee is interviewed without the proper warnings, the resulting statement may be deemed compelled, which forecloses our ability to bring criminal charges and may taint an entire investigation or prosecution. In order to minimize this risk, consistent with the guidance issued by Attorney General Civiletti in 1980, the Wray memorandum encouraged the use of Garrity warnings whenever inspector general agents conduct interviews of government employees. We continue to believe that the use of such warnings is the best and preferred practice.

We recognize, however, that the Offices of Inspector General serve many functions in their agencies, and that they must maintain the ability to gather information effectively from witnesses who are government employees. The Wray memorandum was not intended undermine or change the existing authority of the Offices of Inspector General to exercise their professional judgment regarding the specific circumstances under which the Garrity warnings must be given.

I hope that this clarification will be of assistance. We look forward to continuing our strong working relationship with the Inspector General community.

Sincerely,



Alice S. Fisher  
Assistant Attorney General



## I. DHS - Use of Deadly Force Policy

*Secretary*


U.S. Department of Homeland Security  
Washington, DC 20528



**Homeland  
Security**

July 1, 2004

MEMORANDUM FOR: Deputy Secretary  
Under Secretaries  
Director, U.S. Secret Service  
Commandant, U.S. Coast Guard  
Assistant Secretary, ICE  
Commissioner, CBP  
Acting Administrator, TSA

FROM: Tom Ridge 

SUBJECT: Use of Deadly Force Policy

Attached is the Department of Homeland Security (DHS) Use of Deadly Force Policy which I issued today. The policy, applicable to all DHS law enforcement officers and agents, is intended to provide the standard for all DHS components. Officials and supervisors should take appropriate steps to ensure that pre-existing use of force policies comply with this new standard and incorporate its core principles.

The following Use of Deadly Force Policy was developed by a Task Force comprised of DHS headquarters and component representatives to unify to the extent feasible and practicable existing DHS agency policies. The resulting umbrella policy reflects the components' different law enforcement missions and activities, and permits the agencies to adopt more detailed operational guidance with DHS approval.

DEPARTMENT OF HOMELAND SECURITY POLICY ON THE  
USE OF DEADLY FORCE

June 25, 2004

By virtue of the authority vested in the Secretary of the Department of Homeland Security, including the authority vested by 6 U.S.C. §112(a), I hereby establish a Department of Homeland Security policy on the use of deadly force for law enforcement. The policy set forth herein is intended to set uniform standards and provide broad guidelines for the use of force by law enforcement officers and agents of the Department of Homeland Security performing law enforcement missions. The provisions of this Order apply to all law enforcement officers and agents of the Department of Homeland Security.

I. GENERAL PRINCIPLES

Law enforcement officers and agents of the Department of Homeland Security may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.

A. Fleeing subjects. Deadly force may not be used solely to prevent the escape of a fleeing suspect.

B. Firearms may not be fired solely to disable moving vehicles, vessels, aircraft, and other conveyances, except as follows:

1. United States Secret Service agents and officers, in exercising the United States Secret Service's protective responsibilities, may discharge firearms to disable moving vehicles, vessels, and other conveyances. United States Secret Service agents and officers may discharge firearms to disable aircraft in flight, only if the use of deadly force against the occupants of the aircraft would be authorized under this policy.

2. U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection and U.S. Coast Guard law enforcement officers and agents, when conducting maritime law enforcement, may fire firearms to disable moving vessels or other conveyances.

C. If feasible and if to do so would not increase the danger to the officer or others, a warning to submit to the authority of the officer shall be given prior to the use of deadly force.

D. Warning shots are not permitted, except as follows:

1. Warning shots may be used by United States Secret Service agents and officers in exercising the United States Secret Service's protective responsibilities.

2. Warning shots may be used by U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection and U.S. Coast Guard law enforcement officers and agents when conducting maritime law enforcement only as a signal to a vessel to stop.

3. Warning shots may be used by U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection and U.S. Coast Guard law enforcement officers and agents when conducting aviation law enforcement operations only as a signal to an aircraft to change course and follow direction to leave airspace.

E. Officers will be trained in alternative methods and tactics for handling resisting subjects which must be used when the use of deadly force is not authorized by this policy.

## II. GUIDELINES

A. Homeland Security Directorates and Agencies shall, to the extent necessary, supplement this policy with policy statements or guidance consistent with this policy. Such policy statements shall be subject to review and approval by appropriate departmental offices, including the Office of General Counsel, to ensure consistency with law and departmental standards and policies.

B. The respective Homeland Security Directorate Under Secretaries, the Commandant of the United States Coast Guard, and the Director of the United States Secret Service shall approve guidelines for weaponless control techniques, intermediate weapons, and firearms or lethal weapons with non-lethal munitions, in accordance with this policy and that directorate's or agency's unique law enforcement mission, training, and equipment.

## III. MILITARY ACTIVITIES

This policy shall not apply to the United States Coast Guard when engaged in warfighting, the military defense of the United States, or other military activities where Standing Rules of Engagement apply or to other operations at sea addressed by other policies or direction.

## IV. SAVINGS

To the extent agency and component policies and procedures in place prior to the creation of the Department of Homeland Security are consistent with this policy, they remain in full force and effect unless otherwise revoked or modified.

## V. APPLICATION OF THE POLICY

This Policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

A handwritten signature in black ink that reads "Tom Ridge" with a long horizontal line extending to the right from the end of the name.

Tom Ridge

## J. DHS – Public Safety Exception Policy

Office of the Secretary  
U.S. Department of Homeland  
Security  
Washington, DC 20528



Homeland  
Security

October 22, 2010

MEMORANDUM FROM THE SECRETARY

A handwritten signature in black ink, appearing to read "John Negroponte", written over the word "SECRETARY" in the memorandum header.

TO: All Component Heads

SUBJECT: DHS Policy: Public Safety Custodial Interrogation of Certain  
Terrorism Suspects

1. The primary mission of DHS is to prevent terrorist attacks within the United States and reduce the vulnerability of the United States to terrorism. We will use all lawful and appropriate means available to identify, locate, detain, and, consistent with the guidance herein, interrogate terrorism suspects.

2. Safety of the public is paramount. When conducting custodial interrogations, I expect and require officers and agents of this Department to use all lawful and appropriate means to gather terrorist threat information, particularly when such information could contribute to alleviating or neutralizing an imminent threat to the safety of the public or to law enforcement officers.

3. Ordinarily, interrogation of terrorism suspects is conducted by a Joint Terrorism Task Force (JTTF), which includes individuals trained and equipped to investigate terrorism cases. Consistent with existing federal law, regulations, and policy, all DHS law enforcement officers and agents must immediately notify the appropriate JTTF upon identifying any individual who is engaged in terrorist activities or in acts in preparation for terrorist activities and closely coordinate in such cases with the FBI, including with respect to arrest and interrogation of such individuals.

4. However, when DHS law enforcement officers and agents detain a terrorism suspect in circumstances that give rise to an immediate concern for the safety of the public or the agents, and it would be dangerous to wait for the JTTF to respond before questioning the individual, the officers should ask the suspect any questions that are reasonably prompted by this concern. Agents should ask any and all questions that are reasonably prompted by an immediate concern for the safety of the public or the arresting agents without advising the arrestee of his *Miranda* rights.<sup>1</sup> Consistent with operational requirements, the agents must consult with the JTTF (which

<sup>1</sup> The Supreme Court held in *New York v. Quarles*, 467 U.S. 649 (1984), that if law enforcement officials engage in custodial interrogation of an individual that is "reasonably prompted by a concern for the public safety," any statements the individual provides in the course of such interrogation shall not be inadmissible in any criminal proceeding on the basis that the warnings described in *Miranda v. Arizona*, 384 U.S. 436 (1966), were not provided.

will consult with DOJ/the U.S. Attorney's Office) as soon as possible concerning the appropriate scope of any public safety interrogation, and in any case should stop interrogation and seek further guidance from the JTTF once they believe any public safety questions have been exhausted.

5. The determination whether particular unwarned questions are justified on public safety grounds must always be made on a case-by-case basis based on all the facts and circumstances. In light of the magnitude and complexity of the threat often posed by terrorist organizations, particularly international terrorist organizations, and the nature of their attacks, the circumstances surrounding an arrest of an operational terrorist may warrant significantly more extensive public safety interrogation without *Miranda* warnings than would be permissible in an ordinary criminal case. Depending on the facts, such interrogation might include, for example, questions about possible impending or coordinated terrorist attacks; the location, nature, and threat posed by weapons that might pose an imminent danger to the public; and the identities, locations, and activities or intentions of accomplices who may be plotting additional imminent attacks.

6. Federal law requires DHS to provide advisories or warnings regarding the threat or risk that acts of terrorism will be committed on the homeland to federal, state, local, and tribal government authorities and to the people of the United States, as appropriate. Accordingly, and in addition to any other reporting requirements internal or external to DHS, Components shall report immediately to the Secretary through the operational chain of command or via the National Operations Center any encounters with terrorism suspects that reasonably prompt an immediate concern for public safety. Component heads shall ensure that operational reporting procedures do not delay the receipt of these reports by the Secretary and the FBI.

7. Component heads shall provide interim in-service training on this policy to all DHS law enforcement officers and agents within 30 days of the date of this memorandum. The Federal Law Enforcement Training Center and DHS Component training facilities shall amend, as appropriate, all relevant curricula to include training on this policy within 90 days of the date of this memorandum. In accomplishing our mission, we must ensure that efforts and activities aimed at securing the homeland do not diminish the civil rights and civil liberties of persons we encounter.

8. This policy statement is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies or personnel, or any person.

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The Court noted that this exception to the *Miranda* rule is a narrow one and that "in each case it will be circumscribed by the [public safety] exigency which justifies it." 467 U.S. at 657.

## **K. DOJ Memo for Prosecutors re: Criminal Discovery**

### **165 Guidance for Prosecutors Regarding Criminal Discovery**

January 4, 2010

#### **MEMORANDUM FOR DEPARTMENT PROSECUTORS**

FROM: David W. Ogden  
Deputy Attorney General

SUBJECT: Guidance for Prosecutors  
Regarding Criminal Discovery

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. § 3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. See USAM 9-5.001. In order to meet discovery obligations in a given case, Federal prosecutors must be familiar with these authorities and with the judicial interpretations and local rules that discuss or address the application of these authorities to particular facts. In addition, it is important for prosecutors to consider thoroughly how to meet their discovery obligations in each case. Toward that end, the Department has adopted the guidance for prosecutors regarding criminal discovery set forth below. The guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice. The guidance is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. See *United States v. Caceres*, 440 U.S. 741 (1979).

The guidance was developed at my request by a working group of experienced attorneys with expertise regarding criminal discovery issues that included attorneys from the Office of the Deputy Attorney General, the United States Attorneys' Offices, the Criminal Division, and the National Security Division. The working group received comment from the Office of the Attorney General, the Attorney General's Advisory Committee, the Criminal Chiefs Working Group, the Appellate Chiefs Working Group, the Professional Responsibility Advisory Office, and the Office of Professional Responsibility. The working group produced this consensus document intended to assist Department prosecutors to understand their obligations and to manage the discovery process.

By following the steps described below and being familiar with laws and policies regarding discovery obligations, prosecutors are more likely to meet all legal requirements, to make considered decisions about disclosures in a particular case, and to achieve a just result in every case. Prosecutors are reminded to consult with the designated criminal discovery coordinator in their office when they have questions about the scope of their discovery obligations. Rules of Professional Conduct in most jurisdictions also impose ethical obligations on prosecutors regarding discovery in criminal cases. Prosecutors are also reminded to contact the Professional Responsibility Advisory Office when they have questions about those or any other ethical responsibilities.

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## **Department of Justice Guidance for Prosecutors Regarding Criminal Discovery**

### **Step 1: Gathering and Reviewing Discoverable Information<sup>[FN1]</sup>**

#### **A. Where to look—The Prosecution Team**

Department policy states:

It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

USAM 9-5.001. This search duty also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

In most cases, "the prosecution team" will include the agents and law enforcement officers within the relevant district working on the case. In multi-district investigations, investigations that include both Assistant United States Attorneys and prosecutors from a Department litigating component or other United States Attorney's Office (USAO), and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes.

Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include:



- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- Whether the prosecutor knows of and has access to discoverable information held by the agency;
- Whether the prosecutor has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the prosecutor has been shared with the agency;
- Whether a member of an agency has been made a Special Assistant United States Attorney;
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor's control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, prosecutors should make sure they understand the law in their circuit and their office's practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over *Brady* and *Giglio* issues and avoid surprises at trial.

Although the considerations set forth above generally apply in the context of national security investigations and prosecutions, special complexities arise in that context. Accordingly, the Department expects to issue additional guidance for such cases. Prosecutors should begin considering potential discovery obligations early in an investigation that has national security implications and should also carefully evaluate their discovery obligations prior to filing charges. This evaluation should consider circuit and district precedent and include consultation with national security experts in their own offices and in the National Security Division.

## **B. What to Review**

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed.<sup>[FN2]</sup> The review process should cover the following areas:

1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions,<sup>[FN3]</sup> the prosecutor should be granted access to the substantive case file and any other file or document the prosecutor has reason to believe may contain discoverable information related to the matter being prosecuted.<sup>[FN4]</sup> Therefore, the prosecutor can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the prosecutor should request access to files and/or production of all potentially discoverable material. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, emails, etc. should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. Prosecutors should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.
2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, prosecutors are entitled to access to the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity, and other agreements, validation assessments, payment information, and other

potential witness impeachment information should be included within this review.

If a prosecutor believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting the review of such a file.

Prosecutors should take steps to protect non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety.

Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc. As discussed more fully below in Step 2, in cases involving a large volume of potentially discoverable information, prosecutors may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations: If a prosecutor has determined that a regulatory agency such as the SEC is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Of course, if a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, prosecutors may very well want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a qui tam case, the civil case files should also be reviewed.

5. Substantive Case-Related Communications: "Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among prosecutors and/or agents, (2) between prosecutors

and/or agents and witnesses and/or victims, and (3) between victim witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

Prosecutors should also remember that with few exceptions (see, e.g., Fed.R.Crim.P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

6. Potential *Giglio* Information Relating to Law Enforcement Witnesses: Prosecutors should have candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues, and they should follow the procedure established in USAM 9-5.100 whenever necessary before calling the law enforcement employee as a witness. Prosecutors should be familiar with circuit and district court precedent and local practice regarding obtaining *Giglio* information from state and local law enforcement officers.

7. Potential *Giglio* Information Relating to Non-Law Enforcement Witnesses and Fed.R.Evid. 806 Declarants: All potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

- Prior inconsistent statements (possibly including inconsistent attorney proffers, see *United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008))
- Statements or reports reflecting witness statement variations (see below)
- Benefits provided to witnesses including:
  - Dropped or reduced charges

- Immunity
- Expectations of downward departures or motions for reduction of sentence
- Assistance in a state or local criminal proceeding
- Considerations regarding forfeiture of assets
- Stays of deportation or other immigration status considerations
- S-Visas
- Monetary benefits
- Non-prosecution agreements
- Letters to other law enforcement officials (e.g. state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf
- Relocation assistance
- Consideration or benefits to culpable or at risk third-parties
- Other known conditions that could affect the witness's bias such as:
  - Animosity toward defendant
  - Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
  - Relationship with victim
  - Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)
- Prior acts under Fed.R.Evid. 608
- Prior convictions under Fed.R.Evid. 609
- Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events

8. Information Obtained in Witness Interviews: Although not required by law, generally speaking, witness interviews[FN5] should be memorialized by the agent.[FN6] Agent and

prosecutor notes and original recordings should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Whenever possible, prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, prosecutors should try to have another office employee present. Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed.

- a. Witness Statement Variations and the Duty to Disclose: Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information.
- b. Trial Preparation Meetings with Witnesses: Trial preparation meetings with witnesses generally need not be memorialized. However, prosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM 9-5.001 even if the information is first disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness's prior statements, prosecutors should consider whether memorialization and disclosure is necessary consistent with the provisions of subparagraph (a) above.
- c. Agent Notes: Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. Prosecutors should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Fed.R.Crim.P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed.R.Crim.P. 16(a)(1)(B). See, e.g., *United States v. Clark*, 385 F.3d 609, 619-20 (6th Cir. 2004)

and *United States v. Vaffee*, 380 F.Supp.2d II, 12-14 (D. Mass. 2005).

### **Step 2: Conducting the Review**

Having gathered the information described above, prosecutors must ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying potentially discoverable information, prosecutors should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence. Such broad disclosure may not be feasible in national security cases involving classified information.

### **Step 3: Making the Disclosures**

The Department's disclosure obligations are generally set forth in Fed.R.Crim.P. 16 and 26.2, 18 U.S.C. § 3500 (the Jencks Act), *Brady*, and *Giglio* (collectively referred to herein as "discovery obligations"). Prosecutors must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. In addition, prosecutors should be aware that USAM 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*. Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations. If a prosecutor chooses this course, the defense should be advised that the prosecutor is electing to produce discovery beyond what is required under the circumstances of the case but is not committing to any discovery obligation beyond the discovery obligations set forth above.

- A. Considerations Regarding the Scope and Timing of the Disclosures: Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations. But when considering providing discovery beyond that required by the discovery obligations or providing

discovery sooner than required, prosecutors should always consider any appropriate countervailing concerns in the particular case, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case. In most jurisdictions, reports of interview (ROIs) of testifying witnesses are not considered Jencks material unless the report reflects the statement of the witness substantially verbatim or the witness has adopted it. The Working Group determined that practices differ among the USAOs and the components regarding disclosure of ROIs of testifying witnesses. Prosecutors should be familiar with and comply with the practice of their offices.

Prosecutors should never describe the discovery being provided as "open file." Even if the prosecutor intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for failure to disclose documents, e.g. agent notes or internal memos, that the court may deem to have been part of the "file." When the disclosure obligations are not clear or when the considerations above conflict with the discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures.

- B. Timing: Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. See USAM 9-5.001. Section 9-5.001 also notes, however, that witness security, national security, or other issues may require that disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act. Prosecutors should be attentive to controlling law in their circuit and district governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing.

Prosecutors should consult the local discovery rules for the district in which a case has been indicted. Many districts have broad, automatic discovery rules that require Rule 16 materials to be produced without a request by the defendant and within a specified time



frame, unless a court order has been entered delaying discovery, as is common in complex cases. Prosecutors must comply with these local rules, applicable case law, and any final court order regarding discovery. In the absence of guidance from such local rules or court orders, prosecutors should consider making Rule 16 materials available as soon as is reasonably practical but must make disclosure no later than a reasonable time before trial. In deciding when and in what format to provide discovery, prosecutors should always consider security concerns and the other factors set forth in subparagraph (A) above. Prosecutors should also ensure that they disclose Fed.R.Crim.P. 16(a)(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Fed.R.Crim.P. 16(b)(1).

Discovery obligations are continuing, and prosecutors should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed.

- C. Form of Disclosure: There may be instances when it is not advisable to turn over discoverable information in its original form, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents, confidential source documents, Suspicious Activity Reports, etc. If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language, where pertinent, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant.

#### **Step 4: Making a Record**

One of the most important steps in the discovery process is keeping good records regarding disclosures. Prosecutors should make a record of when and how information is disclosed or otherwise made available. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other steps discussed above, and poor records can negate all of the work that went into taking the first three steps.

#### **Conclusion**

Compliance with discovery obligations is important for a number of reasons. First and foremost, however, such compliance will facilitate a fair and just result in every case, which is the Department's singular goal in pursuing a criminal prosecution. This guidance does not and could not answer every discovery question because those obligations are often fact

specific. However, prosecutors have at their disposal an array of resources intended to assist them in evaluating their discovery obligations including supervisors, discovery coordinators in each office, the Professional Responsibility Advisory Office, and online resources available on the Department's intranet website, not to mention the experienced career prosecutors throughout the Department. And, additional resources are being developed through efforts that will be overseen by a full-time discovery expert who will be detailed to Washington from the field. By evaluating discovery obligations pursuant to the methodical and thoughtful approach set forth in this guidance and taking advantage of available resources, prosecutors are more likely to meet their discovery obligations in every case and in so doing achieve a just and final result in every criminal prosecution. Thank you very much for your efforts to achieve those most important objectives.

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FN 1. For the purposes of this memorandum, "discovery" or "discoverable information" includes information required to be disclosed by Fed.R.Crim.P. 16 and 26.2, the Jencks Act, *Brady*, and *Giglio*, and additional information discloseable pursuant to USAM 9-5.001.

FN 2. How to conduct the review is discussed below.

FN 3. Exceptions to a prosecutor's access to Department law enforcement agencies' files are documented in agency policy, and may include, for example, access to a non-testifying source's files.

FN 4. Nothing in this guidance alters the Department's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM 9-5.100.

FN 5. "Interview" as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial matters. Potential witnesses may provide substantive information outside of a formal interview, however. Substantive, case-related communications are addressed above.

FN 6. In those instances in which an interview was audio or video recorded, further memorialization will generally not be necessary.

[added January 2010] [cited in USAM 9-5.001; 9-5.100]

## L. DOJ Memo re: eCommunications in Fed. Crim. Cases



U.S. Department of Justice

Office of the Deputy Attorney General

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The Deputy Attorney General


Washington, D.C. 20530

March 30, 2011

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL AND  
THE ASSISTANT ATTORNEYS GENERAL FOR THE  
CRIMINAL DIVISION  
NATIONAL SECURITY DIVISION  
CIVIL RIGHTS DIVISION  
ANTITRUST DIVISION  
ENVIRONMENTAL AND NATIONAL RESOURCES DIVISION  
TAX DIVISION

DIRECTOR, FEDERAL BUREAU OF INVESTIGATION  
ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION  
DIRECTOR, UNITED STATES MARSHALS SERVICE  
PRINCIPAL DEPUTY DIRECTOR, BUREAU OF ALCOHOL,  
TOBACCO, FIREARMS AND EXPLOSIVES  
DIRECTOR, BUREAU OF PRISONS

ALL UNITED STATES ATTORNEYS

FROM: James M. Cole   
Deputy Attorney General

SUBJECT: Guidance on the Use, Preservation, and Disclosure of Electronic  
Communications in Federal Criminal Cases

This memorandum supplements the January 4, 2010 Guidance for Prosecutors Regarding Criminal Discovery issued by Deputy Attorney General David W. Ogden (Ogden Memo), particularly section 1.B.5, Substantive Case-Related Communications, and is to be read in conjunction therewith.<sup>1</sup> The guidance contained herein is directed to all Department of Justice personnel and to all law enforcement personnel participating as members of a prosecution team.<sup>2</sup>

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<sup>1</sup> For guidance concerning cases involving national security information, *see* Acting Deputy Attorney General Gary G. Grindler's September 29, 2010 memorandum, "Policy and Procedures Regarding the Government's Duty to Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations."

<sup>2</sup> "Prosecution team" members include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. USAM 9-5.001. The Ogden Memo provides additional guidance where state and local law enforcement has any involvement in a criminal case, stating:

Subject: Guidance on the Use, Preservation, and Disclosure of  
Electronic Communications in Federal Criminal Cases

## I. Summary

This memorandum provides guidance for prosecution team members on the use and preservation of electronic communications (“e-communications”). The basic principles are simple. Prosecution team members should think about the content of any e-communication before sending it; use appropriate language; think about whether e-communication is appropriate to the circumstances, or whether an alternative form of communication is more appropriate; and determine in advance how to preserve potentially discoverable information.

## II. The Relationship Between the Government’s Legal Discovery Obligations, Department of Justice Discovery Policies, and This Guidance

The Government’s discovery obligations in federal criminal cases are set forth in constitutional case law, particularly *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972); the Jencks Act (18 U.S.C. 3500); Federal Rules of Criminal Procedure 16 and 26.2; and applicable rules of professional conduct.

Specific Department of Justice disclosure policies entitled Disclosure of Exculpatory and Impeachment Information (*Brady* policy) and Potential Impeachment Information Concerning Law Enforcement Witnesses (*Giglio* policy) are set forth in the United States Attorneys’ Manual (USAM) at Sections 9-5.001 and 9-5.100.

The purpose of this memorandum is to provide guidance to ensure that the Government meets its legal discovery obligations as applied to electronic communications.<sup>3</sup> As used in this guidance, the term “e-communications” includes emails, text messages, SMS (short message service), instant messages, voice mail, pin-to-pin communications, social networking sites, bulletin boards, blogs, and similar means of electronic communication. This memorandum also provides guidance on how e-communications should and should not be used during the investigation and prosecution of a federal criminal case. A failure to comply with the guidance

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In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor’s control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, prosecutors should make sure they understand the law in their circuit and their office’s practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over *Brady* and *Giglio* issues and avoid surprises at trial.

<sup>3</sup> This memorandum is solely intended to provide guidance to law enforcement personnel in order to attain compliance with the government’s criminal discovery obligations with regard to electronic communications. It does not create any right in any person or entity, and it is not enforceable in any criminal or civil case. *United States v. Caceres*, 440 U.S. 741 (1979).

Subject: Guidance on the Use, Preservation, and Disclosure of  
Electronic Communications in Federal Criminal Cases

contained in this memorandum may result in delay, expense, and other consequences prejudicial to a prosecution, but it does not necessarily mean that there has been or will be a violation of a disclosure obligation.

### **III. Guidance for Achieving Full Compliance with the Government's Legal Discovery Obligations Relating to Electronic Communications**

#### **A. Benefits and Risks of E-communications**

E-communications offer substantial benefits, including speed, sharing, and efficiency.

E-communications also present substantial risks. Because e-communications frequently are prepared and sent quickly and without supervisory review, they may not be as complete or accurate as more formal reports and may reflect a familiar or jovial tone. In court, defense counsel may try to use e-communications containing material inconsistencies, omissions, errors, incomplete statements, or jokes to impeach the credibility of a witness. Additionally, there is a risk that defense counsel will use poorly drafted e-communications between agents, witnesses, and/or prosecutors in court to create the false impression that they contain relevant or contradictory factual information. These risks can be particularly problematic in criminal prosecutions because, depending upon their content, e-communications may be discoverable under federal law.

Thus, prosecution team members should exercise the same care in generating case-related e-communications that they exercise when drafting more formal reports. All prosecution team members need to understand the risks of e-communications, the need to comply with agency rules regarding documentation and record-keeping during an investigation, the importance of careful and professional communication, and the obligation to preserve and produce such communications when appropriate.

#### **B. Categories of E-communications**

Case-related e-communications generally fall into four categories:

**Substantive communications.** "Substantive communications" include:

- factual information about investigative activity;
- factual information obtained during interviews or interactions with witnesses (including victims), potential witnesses, experts, informants, or cooperators;
- factual discussions related to the merits of evidence;

Subject: Guidance on the Use, Preservation, and Disclosure of  
Electronic Communications in Federal Criminal Cases

- factual information or opinions relating to the credibility or bias of witnesses, informants and potential witnesses;<sup>4</sup> and
- other factual information that is potentially discoverable under *Brady*, *Giglio*, Rule 16, or Rule 26.2 (Jencks Act).

Substantive communications or the information within them may be discoverable.

**Logistical communications.** “Logistical communications” include e-communications that contain travel information; identify dates, times and locations of hearings or meetings; transmit reports; etc. Generally, logistical communications are not discoverable.

**Privileged or protected communications.** “Privileged communications” include attorney-client privileged communications, attorney work product communications, and deliberative process privileged communications.<sup>5</sup> “Protected communications” are those covered by F.R.Crim.P. 16(a)(2).<sup>6</sup> Generally, these communications are not discoverable so long as any discoverable facts contained in them are disclosed in other materials produced in discovery.

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<sup>4</sup> For example, if a prosecutor or agent opines that an informant will make a “bad” witness because the informant has made prior inconsistent statements, the opinion itself is core work product that need not be disclosed to the defense, but the prior inconsistent statements should be disclosed if the informant testifies at trial. *See generally*, Discovery BlueBook § 6.12.5, *Opinion or Reputation Evidence Regarding Veracity*.

<sup>5</sup> Pursuant to applicable law, a privilege may apply to communications:

- a. between prosecutors on matters that require supervisory approval or legal advice, *e.g.*, prosecution memoranda, *Touhy* approval requests, *Giglio* requests, wire tap applications and reviews, and case strategy discussions;
- b. between prosecutors or agency counsel and other prosecuting office personnel, agents, or other agency personnel on case-related matters, including but not limited to organization, tasks that need to be accomplished, research, and analysis;
- c. between prosecutors and agency counsel or agency personnel (including agents) on legal issues relating to criminal cases, including, but not limited to, *Giglio* and *Touhy* requests; and
- d. from the prosecutor or agency counsel to an agent, other agency personnel, or prosecuting office personnel giving legal advice or requesting investigation of certain matters in anticipation of litigation (*e.g.*, “to-do” list).

If warranted, the sender of a privileged e-communication is encouraged to place a “privileged communication” warning on the communication to flag its privileged nature.

<sup>6</sup>*See, generally*, Discovery BlueBook 3.8, *Information Not Subject to Disclosure by the Government – Rule 16(a)(2)*.

Subject: Guidance on the Use, Preservation, and Disclosure of  
Electronic Communications in Federal Criminal Cases

**Mixed Communications.** A communication that contains a mix of the categories above may be partially discoverable and may need careful review by a prosecutor or review by a court before a final determination is made as to whether it should be disclosed in discovery.<sup>7</sup>

**C. Using E-communications**

The following guidance applies at all phases of a criminal case including investigation, trial preparation, trial, and after trial:

1. Prosecution team members should discuss and make sure they understand the e-communications and discovery policies and guidance applicable to their case.
2. Prosecution team members should only write and send e-communications that they would feel comfortable being displayed to the jury in court or in the media.
3. Prosecution team members should be particularly cautious in any e-communications with potential witnesses who are not law enforcement personnel, taking care to avoid substantive e-communications. Of course, any potentially discoverable information should be preserved, regardless of whether the communication is written or oral.
4. Substantive e-communications among prosecution team members should be avoided except when, to meet operational needs, they are the most effective means of communication. Examples include where prosecution team members are in different countries or time zones, or where other operational imperatives require such e-communications. Prosecution team members should consider whether a formal report would be a better way of ensuring accurate communication, clarifying a matter, or preserving potentially discoverable information. Again, potentially discoverable information should be preserved, regardless of whether the communication is written or oral.
5. Prosecution team members may use e-communications for logistical communications, for example, to schedule meetings with witnesses, agents, prosecutors, or other members of the prosecution team, or to transmit a formal report. However, prosecution team members should avoid including any substantive information in such e-communications.

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<sup>7</sup> For e-communications containing information to be produced in discovery, a prosecutor may make appropriate redactions, summarize the substance of an e-communication in a letter rather than disclosing the e-communication itself, seek a protective order, or take other safeguarding measures.

Subject: Guidance on the Use, Preservation, and Disclosure of  
Electronic Communications in Federal Criminal Cases

6. E-communications, like formal reports, should state facts accurately and completely; be professional in tone; and avoid witticism, careless commentary, opinion, or over-familiarity. E-communications should maintain and accurately reflect an arms-length relationship with potential witnesses who are not law enforcement personnel, including victims and informants.
7. Prosecution team members ordinarily should not include information in an e-communication that must be incorporated into a formal agency report, especially with regard to witness interviews or other communications containing a witness's or agent's factual recitations. If for some reason substantive case-related information must be contained in an e-communication, prosecution team members should ensure that the information is accurate and is included in any formal report required by agency policies. Material inconsistencies between an e-communication and a formal report, or omissions, errors, or incomplete statements in e-communications, may be impeachment information and may be used in cross-examination in court proceedings.
8. Prosecution team members should limit the subject matter of any e-communication to a single case at a time to make it easier to segregate e-communications by case.
9. Prosecution team members should inform individuals not on the prosecution team but otherwise involved in the case, including victims, witnesses, and outside experts, that e-communications are a written record that might be disclosed to the defendant and used for impeachment in court like any other written record.
10. Prosecution team members must comply with any applicable policies governing e-communications and should not use personally-owned electronic communication devices, personal email accounts, social networking sites, or similar accounts to transmit or post case-related information.
11. Prosecution team members should not post case-related or sensitive agency information on a non-agency website or social networking site. Information posted on publically accessible websites or social networking sites may be used to impeach the author.
12. Prosecution team members should send e-communications only to those individuals who have a need to know the information contained in the communication.



Subject: Guidance on the Use, Preservation, and Disclosure of  
Electronic Communications in Federal Criminal Cases

13. Prosecution team members should employ practices that will preserve any potentially discoverable information contained in e-communications. Preservation of e-communications in certain messaging formats (e.g., text, SMS, instant, PIN, etc.) may present unique challenges.<sup>8</sup> At present, the approaches to preserving potentially discoverable information in e-communications may include: incorporating any potentially discoverable information into a comprehensive report, capturing the message in some format that can be made available to the prosecutor, or preserving the e-communication itself. These approaches may evolve as technology changes and technical capabilities change.
14. The sender should notify recipients of any restrictions on forwarding e-communications that the sender wants observed.

#### **D. Preservation of E-communications**

There are three steps to proper handling of e-communications in criminal cases: preservation,<sup>9</sup> review, and disclosure. The number of e-communications preserved and reviewed likely will be greater than the number ultimately produced as discovery.

1. Who is responsible for preserving e-communications?

Each potentially discoverable e-communication should be preserved by each member of the prosecution team who is either (a) the creator/sender/forwarder of the e-communication, or (b) a primary addressee (*i.e.*, in the “To” line). If no member of the prosecution team is a sender or primary addressee of a substantive e-communication (*e.g.*, if an agent is cc’d on an email by a witness to a third party), then each member of the prosecution team who is a secondary addressee (*i.e.*, a “cc” or “bcc” recipient) should preserve the email. Although in some instances this practice will lead to preserving multiple copies of the same e-communication, it will ensure preservation.

2. When should e-communications be preserved?

To ensure that e-communications are properly preserved, prosecution team members should move and/or copy potentially discoverable e-communications, together with any potentially discoverable attachments and threads of related e-communications, from the user’s e-

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<sup>8</sup> Each component should provide guidance to affected employees on how to preserve the various messaging formats (text, SMS, IM, PIN, etc.), or any other e-communication that may contain potentially discoverable information. Where an e-communication containing potentially discoverable information cannot be preserved electronically or printed, the agency’s inability to do so should be documented so that the preservation approach can be explained in court.

<sup>9</sup> This guidance is concerned only with the Government’s criminal discovery obligations. It is not intended to address the requirements of the Federal Records Act, 44 U.S.C. §§ 3101 *et seq.*

Subject: Guidance on the Use, Preservation, and Disclosure of  
Electronic Communications in Federal Criminal Cases

communication account<sup>10</sup> to a secure permanent or semi-permanent storage location associated with the investigation and prosecution, or print and place them with the criminal case file as soon as possible but not later than 10 days after the e-communication is sent or received. Prosecution team members should ensure that such preservation occurs before the agency computer system automatically deletes the e-communication because of storage limitations or retention policies. Designated network locations that are not subject to automatic deletion may be a secure storage location for potentially discoverable e-communications.

3. Which e-communications should be preserved for later review?

During an investigation it is difficult to know which e-communications may be discoverable if the case is charged. Therefore, members of the prosecution team should err on the side of preservation when deciding which e-communications to preserve for review.

The following e-communications should be preserved for later review and possible disclosure to the defendant:

- Substantive e-communications created or received in the course of an investigation and prosecution.
- All e-communications sent to or received from potential witnesses who are not law enforcement personnel regardless of content.
- E-communications that contain both potentially privileged and unprivileged substantive information.

As discussed below in section II.E.2, agents and their supervisors should work with prosecutors to identify all e-communications that are particularly sensitive and deserve careful consideration before any determination is made to provide them to the defendant as discovery.

4. Which e-communications do not need to be preserved for later review?

Logistical communications between prosecution team members, *e.g.*, scheduling meetings or assigning tasks, generally do not need to be preserved and made available to the prosecutor for review because they are not discoverable unless something in their content suggests they should be disclosed under *Brady*, *Giglio*, *Jencks* or Rule 16.

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<sup>10</sup> With respect to emails, this includes the user's inbox, sent items, and deleted items.

Subject: Guidance on the Use, Preservation, and Disclosure of  
Electronic Communications in Federal Criminal Cases

5. How should e-communications be preserved?

When possible, e-communications should be preserved in their native electronic format to enable efficient discovery review. Otherwise, they should be printed and preserved.<sup>11</sup> E-communications that cannot be printed should be preserved in some other fashion, *e.g.*, a narrative report. For email, creation of electronic folders into which pertinent emails can be easily moved is the recommended method for preservation in native format.

6. How do parallel civil or administrative investigations/proceedings affect which e-communications should be preserved in a criminal case?

The best practices for parallel criminal, civil, and administrative proceedings vary from case to case. Be aware that civil proceedings may have different or broader preservation requirements; therefore, the prosecution team should consult with the lawyers handling the parallel proceedings for guidance on preserving e-communications in the early stages of parallel proceedings.

**E. Reviewing and Producing Discoverable E-communications to the Defendant**

1. Responsibilities of the Prosecutor

It is the prosecutor's responsibility to oversee the gathering, review and production of discovery.<sup>12</sup> In determining what will be disclosed in discovery, the prosecutor should ensure that each e-communication is evaluated, taking into consideration, among other things, what facts are reported, the author, whether the author will be a witness, whether it is inconsistent with other e-communications or formal reports, and whether it reflects bias, contains impeachment information, or contains any information (regardless of credibility or admissibility) that appears inconsistent with any element of the offense or the Government's theory of the case.

If the e-communication contains any particularly sensitive information (as described below), then the prosecutor should consider whether to file a motion for a protective order, seek supervisory approval to delay disclosure (in accordance with USAM § 9-5.001), make appropriate redactions, summarize the substance of an e-communication in a letter rather than disclosing the e-communication itself, or take other safeguarding measures.

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<sup>11</sup> Agencies may require some e-communications to be printed to paper to comply with the Federal Records Act. Notwithstanding paper copies, preserving e-communications in native electronic format still is appropriate, when feasible, to facilitate electronic review and to preserve metadata that, in rare circumstances, may be discoverable.

<sup>12</sup> When dealing with voluminous e-communications, the prosecution team should discuss and plan for a substantial lead time to gather and review the materials.

Subject: Guidance on the Use, Preservation, and Disclosure of  
Electronic Communications in Federal Criminal Cases

2. Responsibilities of the Prosecution Team

It is the responsibility of each member of the prosecution team to make available to the prosecutor all potentially discoverable e-communications so that the prosecutor can review them to determine what should be produced in discovery. The discovery obligation continues throughout the case. *See* Fed.R. Crim. P. 16(c).

Prosecution team members who submit potentially discoverable e-communications to the prosecutor should identify e-communications that deserve especially careful scrutiny by the prosecutor. For example, prosecution team members should identify e-communications the disclosure of which could:

- affect the safety of any person,
- reveal sensitive investigative techniques,
- compromise the integrity of another investigation, or
- reveal national security information.

## M. DOJ Memo re: Electronic Recording of Statements



U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director

Room 2261, RFK Main Justice Building  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

(202)

### MEMORANDUM: Sent via Electronic Mail

DATE: **MAY 12 2014**

TO: ALL UNITED STATES ATTORNEYS  
ALL FIRST ASSISTANT UNITED STATES ATTORNEYS  
ALL CRIMINAL CHIEFS  
ALL APPELLATE CHIEFS

FROM:   
Monty Wilkinson  
Director

SUBJECT: New Department Policy Concerning Electronic Recording of Statements

CONTACT: Andrew Goldsmith  
National Criminal Discovery Coordinator  
Office of the Deputy Attorney General  
Phone: (202) 514 -5705  
Email: [Andrew.Goldsmith@usdoj.gov](mailto:Andrew.Goldsmith@usdoj.gov)

David L. Smith  
Counsel for Legal Initiatives  
Phone: (202) 252-1326  
Email: [David.L.Smith2@usdoj.gov](mailto:David.L.Smith2@usdoj.gov)

Attached is a Memorandum from the Deputy Attorney General, outlining a new Department of Justice policy with respect to the electronic recording of statements. The policy establishes a presumption in favor of electronically recording custodial interviews, with certain exceptions, and encourages agents and prosecutors to consider taping outside of custodial interrogations. The policy will go into effect on Friday, July 11, 2014. Please distribute the Deputy Attorney General's Memorandum to all prosecutors in your office.

This policy resulted from the collaborative and lengthy efforts of a working group comprised of several United States Attorneys and representatives from the Office of the Deputy Attorney General, EOUSA, the Criminal Division, and the National Security Division, as well as the General Counsel, or their representatives, from the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Drug Enforcement Administration, and the United States Marshals Service.

Earlier today during a conference call with all United States Attorneys, the Deputy Attorney General discussed the background of the policy and explained its basic terms. The policy will be the subject of training provided by the Office of Legal Education, including 2014 LearnDOJ training videos.

Attachment

cc: All United States Attorneys' Secretaries



U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General


Washington, D.C. 20530

May 12, 2014

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL AND  
THE ASSISTANT ATTORNEYS GENERAL FOR THE  
CRIMINAL DIVISION  
NATIONAL SECURITY DIVISION  
CIVIL RIGHTS DIVISION  
ANTITRUST DIVISION  
ENVIRONMENT AND NATURAL RESOURCES DIVISION  
TAX DIVISION  
CIVIL DIVISION

DIRECTOR, FEDERAL BUREAU OF INVESTIGATION  
ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION  
DIRECTOR, UNITED STATES MARSHALS SERVICE  
DIRECTOR, BUREAU OF ALCOHOL, TOBACCO,  
FIREARMS AND EXPLOSIVES  
DIRECTOR, BUREAU OF PRISONS

ALL UNITED STATES ATTORNEYS

FROM: James M. Cole   
Deputy Attorney General

SUBJECT: Policy Concerning Electronic Recording of Statements

This policy establishes a presumption that the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the United States Marshals Service (USMS) will electronically record statements made by individuals in their custody in the circumstances set forth below.

This policy also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances where the presumption does not apply. The policy encourages agents and prosecutors to consult with each other in such circumstances.

This policy is solely for internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights or benefits, substantive or procedural,

Subject: Policy Concerning Electronic  
Recording of Statements

enforceable at law or in equity in any matter, civil or criminal, by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person, nor does it place any limitation on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

**I. Presumption of Recording.** There is a presumption that the custodial statement of an individual in a place of detention with suitable recording equipment, following arrest but prior to initial appearance, will be electronically recorded, subject to the exceptions defined below. Such custodial interviews will be recorded without the need for supervisory approval.

a. Electronic recording. This policy strongly encourages the use of video recording to satisfy the presumption. When video recording equipment considered suitable under agency policy is not available, audio recording may be utilized.

b. Custodial interviews. The presumption applies only to interviews of persons in FBI, DEA, ATF or USMS custody. Interviews in non-custodial settings are excluded from the presumption.

c. Place of detention. A place of detention is any structure where persons are held in connection with federal criminal charges where those persons can be interviewed. This includes not only federal facilities, but also any state, local, or tribal law enforcement facility, office, correctional or detention facility, jail, police or sheriff's station, holding cell, or other structure used for such purpose. Recording under this policy is not required while a person is waiting for transportation, or is en route, to a place of detention.

d. Suitable recording equipment. The presumption is limited to a place of detention that has suitable recording equipment. With respect to a place of detention owned or controlled by FBI, DEA, ATF, or USMS, suitable recording equipment means:

(i) an electronic recording device deemed suitable by the agency for the recording of interviews that,

(ii) is reasonably designed to capture electronically the entirety of the interview.

Each agency will draft its own policy governing placement, maintenance and upkeep of such equipment, as well as requirements for preservation and transfer of recorded content.

With respect to an interview by FBI, DEA, ATF, or USMS in a place of detention they do not own or control, but which has recording equipment, FBI, DEA, ATF, or USMS will each determine on a case by case basis whether that recording equipment meets or is equivalent to that agency's own requirements or is otherwise suitable for use in recording interviews for purposes of this policy.

e. Timing. The presumption applies to persons in custody in a place of detention with suitable recording equipment following arrest but who have not yet made an initial appearance before a judicial officer under Federal Rule of Criminal Procedure 5.



Subject: Policy Concerning Electronic  
Recording of Statements

f. Scope of offenses. The presumption applies to interviews in connection with all federal crimes.

g. Scope of recording. Electronic recording will begin as soon as the subject enters the interview area or room and will continue until the interview is completed.

h. Recording may be overt or covert. Recording under this policy may be covert or overt. Covert recording constitutes consensual monitoring, which is allowed by federal law. See 18 U.S.C. § 2511(2)(c). Covert recording in fulfilling the requirement of this policy may be carried out without constraint by the procedures and approval requirements prescribed by other Department policies for consensual monitoring.

**II. Exceptions to the Presumption.** A decision not to record any interview that would otherwise presumptively be recorded under this policy must be documented by the agent as soon as practicable. Such documentation shall be made available to the United States Attorney and should be reviewed in connection with a periodic assessment of this policy by the United States Attorney and the Special Agent in Charge or their designees.

a. Refusal by interviewee. If the interviewee is informed that the interview will be recorded and indicates that he or she is willing to give a statement but only if it is not electronically recorded, then a recording need not take place.

b. Public Safety and National Security Exception. Recording is not prohibited in any of the circumstances covered by this exception and the decision whether or not to record should wherever possible be the subject of consultation between the agent and the prosecutor. There is no presumption of electronic recording where questioning is done for the purpose of gathering public safety information under *New York v. Quarles*. The presumption of recording likewise does not apply to those limited circumstances where questioning is undertaken to gather national security-related intelligence or questioning concerning intelligence, sources, or methods, the public disclosure of which would cause damage to national security.

c. Recording is not reasonably practicable. Circumstances may prevent, or render not reasonably practicable, the electronic recording of an interview that would otherwise be presumptively recorded. Such circumstances may include equipment malfunction, an unexpected need to move the interview, or a need for multiple interviews in a limited timeframe exceeding the available number of recording devices.

d. Residual exception. The presumption in favor of recording may be overcome where the Special Agent in Charge and the United States Attorney, or their designees, agree that a significant and articulable law enforcement purpose requires setting it aside. This exception is to be used sparingly.

Subject: Policy Concerning Electronic  
Recording of Statements

**III. Extraterritoriality.** The presumption does not apply outside of the United States. However, recording may be appropriate outside the United States where it is not otherwise precluded or made infeasible by law, regulation, treaty, policy, or practical concerns such as the suitability of recording equipment. The decision whether to record an interview – whether the subject is in foreign custody, U.S. custody, or not in custody – outside the United States should be the subject of consultation between the agent and the prosecutor, in addition to other applicable requirements and authorities.

**IV. Administrative Issues.**

a. Training. Field offices of each agency shall, in connection with the implementation of this policy, collaborate with the local U.S. Attorney's Office to provide district-wide joint training for agents and prosecutors on best practices associated with electronic recording of interviews.

b. Assignment of responsibilities. The investigative agencies will bear the cost of acquiring and maintaining, in places of detention they control where custodial interviews occur, recording equipment in sufficient numbers to meet expected needs for the recording of such interviews. Agencies will pay for electronic copies of recordings for distribution pre-indictment. Post-indictment, the United States Attorneys' offices will pay for transcripts of recordings, as necessary.

**V. Effective Date.** This policy shall take effect on July 11, 2014.

## **N. DOJ Guidance re: Use of Cell Site Simulator Technology**

### **Department of Justice Policy Guidance: Use of Cell-Site Simulator Technology (9/3/15)**

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Cell-site simulator technology provides valuable assistance in support of important public safety objectives. Whether deployed as part of a fugitive apprehension effort, a complex narcotics investigation, or to locate or rescue a kidnapped child, cell-site simulators fulfill critical operational needs.

As with any law enforcement capability, the Department must use cell-site simulators in a manner that is consistent with the requirements and protections of the Constitution, including the Fourth Amendment, and applicable statutory authorities, including the Pen Register Statute. Moreover, any information resulting from the use of cell-site simulators must be handled in a way that is consistent with the array of applicable statutes, regulations, and policies that guide law enforcement in how it may and may not collect, retain, and disclose data.

As technology evolves, the Department must continue to assess its tools to ensure that practice and applicable policies reflect the Department's law enforcement and national security missions, as well as the Department's commitments to accord appropriate respect for individuals' privacy and civil liberties. This policy provides additional guidance and establishes common principles for the use of cell-site simulators across the Department.<sup>1</sup> The Department's individual law enforcement components may issue additional specific guidance consistent with this policy.

#### ***BACKGROUND***

Cell-site simulators, on occasion, have been the subject of misperception and confusion. To avoid any confusion here, this section provides information about the use of the equipment and defines the

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<sup>1</sup> This policy applies to the use of cell-site simulator technology inside the United States in furtherance of criminal investigations. While acting pursuant to the Foreign Intelligence Surveillance Act, Department of Justice components will make probable-cause based showing and appropriate disclosures to the court in a manner that is consistent with the guidance set forth in this policy.

capabilities that are the subject of this policy.

### *Basic Uses*

Law enforcement agents can use cell-site simulators to help locate cellular devices whose unique identifiers are already known to law enforcement, or to determine the unique identifiers of an unknown device by collecting limited signaling information from devices in the simulator user's vicinity. This technology is one tool among many traditional law enforcement techniques, and is deployed only in the fraction of cases in which the capability is best suited to achieve specific public safety objectives.

### *How They Function*

Cell-site simulators, as governed by this policy, function by transmitting as a cell tower. In response to the signals emitted by the simulator, cellular devices in the proximity of the device identify the simulator as the most attractive cell tower in the area and thus transmit signals to the simulator that identify the device in the same way that they would with a networked tower.

A cell-site simulator receives and uses an industry standard unique identifying number assigned by a device manufacturer or cellular network provider. When used to locate a known cellular device, a cell-site simulator initially receives the unique identifying number from multiple devices in the vicinity of the simulator. Once the cell-site simulator identifies the specific cellular device for which it is looking, it will obtain the signaling information relating only to that particular phone. When used to identify an unknown device, the cell-site simulator obtains signaling information from non-target devices in the target's vicinity for the limited purpose of distinguishing the target device.

### *What They Do and Do Not Obtain*

By transmitting as a cell tower, cell-site simulators acquire the identifying information from cellular devices. This identifying information is limited, however. Cell-site simulators provide only the relative signal strength and general direction of a subject cellular telephone; they do not function as a GPS locator, as they do not obtain or download any location information from the device or its applications. Moreover, cell-site simulators used by the Department must be configured as pen registers, and may not be used to collect the contents of any communication, in accordance with 18 U.S.C. § 3127(3). This includes any data contained on the phone itself: the simulator

does not remotely capture emails, texts, contact lists, images or any other data from the phone. In addition, Department cell-site simulators do not provide subscriber account information (for example, an account holder's name, address, or telephone number).

### ***MANAGEMENT CONTROLS AND ACCOUNTABILITY<sup>2</sup>***

Cell-site simulators require training and practice to operate correctly. To that end, the following management controls and approval processes will help ensure that only knowledgeable and accountable personnel will use the technology.

1. Department personnel must be trained and supervised appropriately. Cell-site simulators may be operated only by trained personnel who have been authorized by their agency to use the technology and whose training has been administered by a qualified agency component or expert.
2. Within 30 days, agencies shall designate an executive-level point of contact at each division or district office responsible for the implementation of this policy, and for promoting compliance with its provisions, within his or her jurisdiction.
3. Prior to deployment of the technology, use of a cell-site simulator by the agency must be approved by an appropriate individual who has attained the grade of a first-level supervisor. Any emergency use of a cell-site simulator must be approved by an appropriate second-level supervisor. Any use of a cell-site simulator on an aircraft must be approved either by the executive-level point of contact for the jurisdiction, as described in paragraph 2 of this section, or by a branch or unit chief at the agency's headquarters.

Each agency shall identify training protocols. These protocols must include training on privacy and civil liberties developed in consultation with the Department's Chief Privacy and Civil Liberties Officer.

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<sup>2</sup> This policy guidance is intended only to improve the internal management of the Department of Justice. It is not intended to and does not create any right, benefit, trust, or responsibility, whether substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities, entities officers, employees, or agents, or any person, nor does it create any right of review in an administrative, judicial, or any other proceeding.

## ***LEGAL PROCESS AND COURT ORDERS***

The use of cell-site simulators is permitted only as authorized by law and policy. While the Department has, in the past, appropriately obtained authorization to use a cell-site simulator by seeking an order pursuant to the Pen Register Statute, as a matter of policy, law enforcement agencies must now obtain a search warrant supported by probable cause and issued pursuant to Rule 41 of the Federal Rules of Criminal Procedure (or the applicable state equivalent), except as provided below.

As a practical matter, because prosecutors will need to seek authority pursuant to Rule 41 and the Pen Register Statute, prosecutors should, depending on the rules in their jurisdiction, either (1) obtain a warrant that contains all information required to be included in a pen register order pursuant to 18 U.S.C. § 3123 (or the state equivalent), or (2) seek a warrant and a pen register order concurrently. The search warrant affidavit also must reflect the information noted in the immediately following section of this policy ("Applications for Use of Cell-Site Simulators").

There are two circumstances in which this policy does not require a warrant prior to the use of a cell-site simulator.

### ***1. Exigent Circumstances under the Fourth Amendment***

Exigent circumstances can vitiate a Fourth Amendment warrant requirement, but cell-site simulators still require court approval in order to be lawfully deployed. An exigency that excuses the need to obtain a warrant may arise when the needs of law enforcement are so compelling that they render a warrantless search objectively reasonable. When an officer has the requisite probable cause, a variety of types of exigent circumstances may justify dispensing with a warrant. These include the need to protect human life or avert serious injury; the prevention of the imminent destruction of evidence; the hot pursuit of a fleeing felon; or the prevention of escape by a suspect or convicted fugitive from justice.

In this circumstance the use of a cell site simulator still must comply with the Pen Register Statute, 18U.S.C. § 3121, et seq., which ordinarily requires judicial authorization before use of the cell-site simulator, based on the government's certification that the information sought is relevant to an ongoing criminal investigation. In addition, in the subset of exigent situations where circumstances necessitate emergency pen register authority pursuant to 18 U.S.C. § 3125 (or the state equivalent), the emergency must be among those listed in Section 3125: immediate danger of death or serious bodily

injury to any person; conspiratorial activities characteristic of organized crime; an immediate threat to a national security interest; or an ongoing attack on a protected computer (as defined in 18 U.S.C. § 1030) that constitutes a crime punishable by a term of imprisonment greater than one year. In addition, the operator must obtain the requisite internal approval to use a pen register before using a cell-site simulator. In order to comply with the terms of this policy and with 18 U.S. C. § 3125,<sup>3</sup> the operator must contact the duty AUSA in the local U.S. Attorney's Office, who will then call the DOJ Command Center to reach a supervisory attorney in the Electronic Surveillance Unit (ESU) of the Office of Enforcement Operations.<sup>4</sup> Assuming the parameters of the statute are met, the ESU attorney will contact a DAAG in the Criminal Division<sup>5</sup> and provide a short briefing. If the DAAG approves, the ESU attorney will relay the verbal authorization to the AUSA, who must also apply for a court order within 48 hours as required by 18 U.S.C. § 3125. Under the provisions of the Pen Register Statute, use under the emergency pen-trap authority must end when the information sought is obtained, an application for an order is denied, or 48 hours have passed, whichever comes first.

2. *Exceptional Circumstances Where the Law Does Not Require a Warrant*

There may also be other circumstances in which, although exigent circumstances do not exist, the law does not require a search warrant and circumstances make obtaining a search warrant impracticable. In such cases, which we expect to be very limited, agents must first obtain approval from executive-level personnel at the agency's headquarters and the relevant U.S. Attorney, and then from a Criminal Division DAAG. The Criminal Division shall keep track of the number of times the use of a cell-site simulator is approved under this subsection, as well as the circumstances underlying each such use.

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<sup>3</sup> Knowing use of a pen register under emergency authorization without applying for a court order within 48 hours is a criminal violation of the Pen Register Statute, pursuant to 18 U.S.C. § 3125(c).

<sup>4</sup> In non-federal cases, the operator must contact the prosecutor and any other applicable points of contact for the state or local jurisdiction.

<sup>5</sup> In requests for emergency pen authority, and for relief under the exceptional circumstances provision, the Criminal Division DAAG will consult as appropriate with a National Security Division DAAG on matters within the National Security Division's purview.

In this circumstance, the use of a cell-site simulator still must comply with the Pen Register Statute, 18 U.S.C. § 3121, et seq., which ordinarily requires judicial authorization before use of the cell-site simulator, based on the government's certification that the information sought is relevant to an ongoing criminal investigation. In addition, if circumstances necessitate emergency pen register authority, the compliance with the provisions outlined in 18 U.S.C. § 3125 is required (see provisions in section 1 directly above).

### ***APPLICATIONS FOR USE OF CELL-SITE SIMULATORS***

When making any application to a court, the Department's lawyers and law enforcement officers must, as always, disclose appropriately and accurately the underlying purpose and activities for which an order or authorization is sought. Law enforcement agents must consult with prosecutors<sup>6</sup> in advance of using a cell-site simulator, and applications for the use of a cell-site simulator must include sufficient information to ensure that the courts are aware that the technology may be used.<sup>7</sup>

1. Regardless of the legal authority relied upon, at the time of making an application for use of a cell-site simulator, the application or supporting affidavit should describe in general terms the technique to be employed. The description should indicate that investigators plan to send signals to the cellular phone that will cause it, and non-target phones on the same provider network in close physical proximity, to emit unique identifiers, which will be obtained by the technology, and that investigators will use the information collected to determine information pertaining to the physical location of the target cellular device or to determine the currently unknown identifiers of the target device. If investigators will use the equipment to determine unique identifiers at multiple locations and/or multiple times at the same

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<sup>6</sup> While this provision typically will implicate notification to Assistant United States Attorneys, it also extends to state and local prosecutors, where such personnel are engaged in operations involving cell-site simulators.

<sup>7</sup> Courts in certain jurisdictions may require additional technical information regarding the cell-site simulator's operation (e.g., tradecraft, capabilities, limitations or specifications). Sample applications containing such technical information are available from the Computer Crime and Intellectual Property Section (CCIPS) of the Criminal Division. To ensure courts receive appropriate and accurate information regarding the technical information described above, prior to filing an application that deviates from the sample filings, agents or prosecutors must contact CCIPS, which will coordinate with appropriate Department components.



location, the application should indicate this also.

2. An application or supporting affidavit should inform the court that the target cellular device (e.g., cell phone) and other cellular devices in the area might experience a temporary disruption of service from the service provider. The application may also note, if accurate, that any potential service disruption to non-target devices would be temporary and all operations will be conducted to ensure the minimal amount of interference to non-target devices.
3. An application for the use of a cell-site simulator should inform the court about how law enforcement intends to address deletion of data not associated with the target phone. The application should also indicate that law enforcement will make no affirmative investigative use of any non-target data absent further order of the court, except to identify and distinguish the target device from other devices.

#### ***DATA COLLECTION AND DISPOSAL***

The Department is committed to ensuring that law enforcement practices concerning the collection or retention<sup>8</sup> of data are lawful, and appropriately respect the important privacy interests of individuals. As part of this commitment, the Department's law enforcement agencies operate in accordance with rules, policies, and laws that control the collection, retention, dissemination, and disposition of records that contain personal identifying information. As with data collected in the course of any investigation, these authorities apply to information collected through the use of a cell-site simulator. Consistent with applicable existing laws and requirements, including any duty to preserve exculpatory evidence,<sup>9</sup> the Department's use of cell-site simulators shall include the following practices:

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<sup>8</sup> In the context of this policy the terms "collection " and "retention" are used to address only the unique technical process of identifying dialing, routing addressing, or signaling information, as described by 18 U.S.C. § 3127(3), emitted by cellular devices. "Collection" means the process by which unique identifier signals are obtained; "retention" refers to the period during which the dialing, routing, addressing, or signaling information is utilized to locate or identify a target device, continuing until the point at which such information is deleted.

<sup>9</sup> It is not likely, given the limited type of data cell-site simulators collect (as discussed above), that exculpatory evidence would be obtained by a cell-site simulator in the course of criminal law enforcement investigations. As in other circumstances, however, to the extent investigators know or have reason to believe that information is exculpatory or impeaching they have a duty to memorialize that information.

1. When the equipment is used to locate a known cellular device, all data must be deleted as soon as that device is located, and no less than once daily.
2. When the equipment is used to identify an unknown cellular device, all data must be deleted as soon as the target cellular device is identified, and in any event no less than once every 30 days.
3. Prior to deploying equipment for another mission, the operator must verify that the equipment has been cleared of any previous operational data.

Agencies shall implement an auditing program to ensure that the data is deleted in the manner described above.

#### ***STATE AND LOCAL PARTNERS***

The Department often works closely with its State and Local law enforcement partners and provides technological assistance under a variety of circumstances. This policy applies to all instances in which Department components use cell-site simulators in support of other Federal agencies and/or State and Local law enforcement agencies.

#### ***TRAINING AND COORDINATION, AND ONGOING MANAGEMENT***

Accountability is an essential element in maintaining the integrity of our Federal law enforcement agencies. Each law enforcement agency shall provide this policy, and training as appropriate, to all relevant employees. Periodic review of this policy and training shall be the responsibility of each agency with respect to the way the equipment is being used (e.g., significant advances in technological capabilities, the kind of data collected, or the manner in which it is collected). We expect that agents will familiarize themselves with this policy and comply with all agency orders concerning the use of this technology.

Each division or district office shall report to its agency headquarters annual records reflecting the total number of times a cell-site simulator is deployed in the jurisdiction; the number of deployments at the request of other agencies, including State or Local law enforcement; and the number of times the technology is deployed in emergency circumstances.

Similarly, it is vital that all appropriate Department attorneys familiarize themselves with the contents of this policy, so that their court filings and disclosures are appropriate and consistent. Model materials will be

provided to all United States Attorneys ' Offices and litigating components, each of which shall conduct training for their attorneys.

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Cell-site simulator technology significantly enhances the Department's efforts to achieve its public safety and law enforcement objectives. As with other capabilities, the Department must always use the technology in a manner that is consistent with the Constitution and all other legal authorities. This policy provides additional common principles designed to ensure that the Department continues to deploy cell-site simulators in an effective, appropriate, and consistent way.

## NOTES

## O. DOJ Memo: Eyewitness Identification - Procedures for Conducting Photo Arrays



U. S. Department of Justice

Office of the Deputy Attorney General


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The Deputy Attorney General

Washington, D.C. 20530

January 6, 2017

MEMORANDUM FOR HEADS OF DEPARTMENT LAW ENFORCEMENT COMPONENTS  
ALL DEPARTMENT PROSECUTORS

FROM: Sally Q. Yates   
Deputy Attorney General

SUBJECT: Eyewitness Identification: Procedures for Conducting Photo Arrays

Eyewitness identifications play an important role in our criminal justice system, both by helping officers and agents identify suspects during an investigation and by helping juries determine guilt at trial. It is therefore crucial that the procedures law enforcement officers follow in conducting those identifications ensure the accuracy and reliability of evidence elicited from eyewitnesses.

There are several ways for law enforcement officers to test whether an eyewitness can identify a perpetrator, and the appropriate method for administering such a test varies depending on the circumstances. When the perpetrator is a stranger to the witness, the most common method involves the use of a “photo array,” whereby a law enforcement officer displays a photograph of the suspect along with images of similar looking individuals for comparison.<sup>1</sup> This type of identification procedure has become particularly popular in recent years, in part because it can be assembled quickly and does not require the physical presence of the suspect or other individuals for a live line-up.

The Department of Justice last addressed procedures for photo arrays in its 1999 publication, *Eyewitness Evidence: A Guide for Law Enforcement*. Research and practice have both evolved significantly since then. For example, a growing body of research has highlighted the importance of documenting a witness’s self-reported confidence at the moment of the initial identification, in part because such confidence is often a more reliable predictor of eyewitness accuracy than a witness’s confidence at the time of trial. Similarly, there has been an evolution in views on whether the “sequential” administration of a photo array (presenting the witness one photo at a time) results in more accurate identifications than a “simultaneous” administration (presenting all of the photos at once). At the end of this memorandum is a summary of these and other recent developments in the field of eyewitness identification.

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<sup>1</sup> A “photo array” is distinct from other law enforcement techniques involving photographs used to obtain investigative leads, such as “mug books” and single confirmatory photographs, which are outside the scope of this memorandum.

Over the past year, a team of Department experts—including prosecutors, law enforcement personnel, and social scientists—have worked together to study the research and identify best practices. Their work culminated in the attached document, which outlines procedures for the administration of photo arrays. These procedures are not a step-by-step description of how to conduct photo arrays, but rather set out principles and describe examples of how to perform them.

The heads of the Department’s law enforcement components should review these procedures and, to the extent necessary, update their own internal policies to ensure that they are consistent with the procedures described in this document. In addition, all Department prosecutors should review these procedures and take them into consideration when deciding whether to charge a case involving an eyewitness identification. Although nothing in this memorandum implies that an identification not done in accordance with these procedures is unreliable or inadmissible in court, it is important that prosecutors identify potential issues in the administration of a photo array early in an investigation and take any such issues into account when evaluating the overall strength of the evidence in their case.

These procedures are designed to promote sound professional practices and consistency across the Department’s law enforcement efforts. As stated in several sections, the principles may be adjusted in light of specific circumstances—including, but not limited to, exigent circumstances, limitations on personnel or other resources, concerns for a witness’s fears and safety, and sensitivity to victims—and each identification must be evaluated on its own merits.

Thank you for your attention to this issue and for everything you do at this Department to ensure the administration of justice.

**U.S. DEPARTMENT OF JUSTICE**  
**EYEWITNESS IDENTIFICATION**  
**PROCEDURES FOR CONDUCTING PHOTO ARRAYS<sup>1</sup>**

**Location of the Photo Array**

- 1.1 Unless impracticable, the witness should view the photo array out of earshot and view of others and in a location that avoids exposing the witness to information or evidence that could influence the witness's identification, including information about the case, the progress of the investigation, or the suspect.
- 1.2 Neither the suspect nor any photographs of the suspect (including wanted posters) should be visible in any area where the witness will be present.

**Photograph of the Suspect**

- 2.1 When selecting a photograph of the suspect for the photo array, the administrator should include only one suspect in each photo array regardless of the total number of photographs and regardless of whether multiple suspects fit the same description.
- 2.2 Unless impracticable, the administrator should select a photograph of the suspect that resembles the witness's description of the perpetrator or the perpetrator's appearance at the time of the incident.
- 2.3 The administrator should avoid using a photo that is several years old or has different characteristics (for example, hair style, or facial hair) than those described, unless a current photograph cannot be taken or procured.

**Selection of Filler Photographs**

- 3.1 A photo array should include at least five filler, or non-suspect, photographs.
- 3.2 Fillers should generally fit the witness's description of the perpetrator, including such characteristics as gender, race, skin color, facial hair, age, and distinctive physical features. They should be sufficiently similar so

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<sup>1</sup> This document is not intended to create, does not create, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nothing in these procedures implies that an identification not done in accordance with them is unreliable or inadmissible in court.

that a suspect's photograph does not stand out, but not so similar that a person who knew the suspect would find it difficult to distinguish him or her. When viewed as a whole, the array should not point to or suggest the suspect to the witness.

- 3.3 Where the suspect has a unique feature, such as a scar, tattoo, or mole, or distinctive clothing that would make him or her stand out in a photo array, filler photographs should include that unique feature either by selecting fillers who have such a feature themselves or by altering the photographs of fillers to the extent necessary to achieve a consistent appearance. If the suspect's distinctive feature cannot be readily duplicated on the filler photographers, then the suspect's feature can be blacked out and a similar black mark can be placed on the filler photographs. The administrator should document any alterations to either the fillers or the suspect's photograph as well as the reason(s) for doing so.
- 3.4 Photographs should be of similar size, background, format, and color. Photographs should be numbered or labeled in a manner that does not disclose any person's identity or the source of the photograph. No other writing or information should be visible.
- 3.5 Nothing should appear on the photos that suggests a person's name, his or her inclusion in a previous array, or any information about previous arrests or identifications.
- 3.6 If there are multiple perpetrators or multiple suspects, the administrator should inform the witness in advance that more than one array will be shown.
- 3.7 Fillers should not be reused in arrays for different suspects shown to the same witness.

#### **Method of Presenting Photographs**

- 4.1 Administrators may employ either sequential or simultaneous procedures. Under a sequential procedure, the witness looks at one photograph at a time in a finite number of photographs until he or she has seen all in the array (with each photo being taken back before the next one is shown). In a simultaneous procedure, the witness observes all of the photos in the array at once.



### **Administrator's Knowledge of the Suspect**

- 5.1 The administrator must ensure that he or she does not suggest to the witness -even unintentionally -which photograph contains the image of the suspect. Oftentimes, the best and simplest way to achieve this is by selecting an administrator who is not involved in the investigation and does not know what the suspect looks like.
- 5.2 There are times when such "blind" administration may be impracticable, for example, when all of the officers in an investigating office already know who the suspect is, or when a victim-witness refuses to participate in a photo array unless it is administered by the investigating officer. In such cases, the administrator should adopt "blinded" procedures, so that he or she cannot see the order or arrangement of the photographs viewed by the witness or which photograph(s) the witness is viewing at any particular moment.
- 5.3 "Blinded" administration can be accomplished by:
  - 5.3.1 *If simultaneous administration:* Randomizing the order of photographs and shielding the administrator from the photographs (for example, by displaying the images on a computer screen between the witness and the administrator, so that the witness can see it but the administrator cannot).
  - 5.3.2 *If sequential administration:* Putting each photograph in its own physical folder, shuffling the order of the folders, and standing where the administrator cannot see which photographs the witness is viewing.
- 5.4 There may be exceptional circumstances in which it is not practicable to conduct either a blind or blinded photo array. In those instances, the administrator should document the reasons for the non-blind(ed) procedure and be prepared to explain the reasons for conducting such an alternative procedure.

### **Instructions to Witness**

- 6.1 The administrator should read instructions to the witness and then permit the witness to read them and ask any questions. The witness and administrator should sign and date the instructions.
- 6.2 The administrator should not interrupt the witness so long as she or he is

looking at the array. However, when it becomes apparent that the witness is finished and no longer looking at the array, the administrator should end the procedure.

6.3 Instructions should use language similar to that below:

6.3.1 "In a moment, you will be shown a group of photographs. The group of photographs may or may not contain a photograph of the person who committed the crime of which you are the victim [*or witness*]."

6.3.2 "Sometimes a person may look different in a photograph than in real life because of different hair styles, facial hair, glasses, a hat, or other changes in appearance. Keep in mind that how a photograph was taken or developed may make a person's complexion look lighter or darker than in real life."

6.3.3 "Please let me know if you recognize the person who committed the crime [*or the actions you witnessed*]. If you do recognize someone, please tell me how confident you are of your identification."

6.3.4 "You may not recognize anyone. That is okay. Just say so. Whether or not you select someone, we will continue to investigate the case."

6.3.5 "Do not assume that I know who committed this crime."

6.3.6 "Pay no attention to any marking or numbers on the photographs or any differences in the type or style of the photographs. They are not relevant to identifying anyone in the photographs. "

6.3.7 "Please do not discuss this procedure or any photograph that you may pick with any other witness in this case."

6.3.8 "Please let me know if you do not understand these instructions or if you have any questions."

6.3.9 *If sequential administration:* "You are going to look at the photographs one at a time. You may make a decision at any time. If you select a photograph before you get to the end, our protocol requires that you look at the rest of the photographs anyway. If, after seeing all the photographs, you want to see one or more photographs again, you should look at the entire array again."

### **Multiple Witnesses**

- 7.1 If multiple witnesses are to be presented with photo arrays, each witness should be instructed and view the photo array separately.
- 7.2 A witness should not be able to hear or observe other witnesses during an identification procedure.
- 7.3 A witness who has seen the array should not return to the same area when other witnesses are waiting to see the array.
- 7.4 For each suspect, the administrator should use the same photo array for multiple witnesses. However, the order of appearance in the photo array should be changed if possible.

### **Administrator Feedback**

- 8.1 The administrator must avoid any words, sounds, expressions, actions or behaviors that suggest who the suspect is. Before, during, or after conducting the photo array, the administrator should not:
  - 8.1.1 Volunteer information about the suspect or the case;
  - 8.1.2 Indicate that the administrator knows who the suspect is;
  - 8.1.3 Indicate to the witness that he or she has picked the "right" or "wrong" photograph; or
  - 8.1.4 Tell the witness that any other witness has made an identification.
- 8.2 If the witness makes an identification, the administrator should ask the witness to state in his or her own words how confident he or she is in the identification (known as a "statement of confidence").
- 8.3 If the witness is vague in his or her answer, such as, "I think it's #4," the administrator should say: "You said [I think it's #4]. What do you mean by that?"

## **Documentation<sup>2</sup>**

- 9.1 The witness's identification of a photo, if any, and the corresponding statement of confidence should be clearly documented by:
  - 9.1.1 Video- or audio-recording the photo array;<sup>3</sup> or
  - 9.1.2 The administrator immediately writing down as close to verbatim as possible the witness's identification and statement of confidence, as well as any relevant gestures or non-verbal reactions. The witness should confirm the accuracy of the statement.
- 9.2 The witness should indicate his or her identification in writing.
  - 9.2.1 If simultaneous administration: The witness should circle the photograph chosen and then sign and date the photograph.
  - 9.2.2 If sequential administration: The witness should sign and date the front or back of the photograph chosen.
  - 9.2.3 If a witness fails to make an identification, the administrator should record so in writing.
- 9.3 The administrator should document the following elements of the identification procedure:
  - 9.3.1 The approximate amount of time it took the witness to make an identification;
  - 9.3.2 The presentation method and order of the photographs displayed;
  - 9.3.3 The names of all persons present during administration; and
  - 9.3.4 Any other facts or circumstances that would help contextualize or explain the witness' selection.

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<sup>2</sup> This section assumes the use of printed photographs. If the photo array is presented on a computer screen, the administrator should ensure that the same information described in this section is captured and saved electronically.

<sup>3</sup> Electronic recording serves several important purposes: it preserves the identification process for later review in court, it protects officers against unfounded claims of misconduct, and it allows fact finders to directly evaluate a witness's verbal and nonverbal reactions and any aspects of the array procedure that would help to contextualize or explain the witness' selection.

- 9.4 In addition to documenting information about an identification, the administrator should preserve as evidence:
- 9.4.1 The written copy of the instructions signed and dated by the witness and the administrator; and
  - 9.4.2 All photographs shown to the witness, including any identified, signed, and dated by the witness.

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## PROCEDURES FOR CONDUCTING PHOTO ARRAYS

### APPENDIX

For decades, law enforcement agencies at the federal, state, and local levels have used varying practices for the identification of suspects by eyewitnesses to crimes, while researchers have studied the science of human perception underlying eyewitness identification. In recognition of advancements in scientific knowledge and changes in practice, the National Academies of Science (NAS) convened a committee of experts to evaluate eyewitness identification procedures and, in 2014, published a report summarizing its findings entitled, *Identifying the Culprit: Assessing Eyewitness Identification*.<sup>1</sup> Although acknowledging that more research is still needed, the committee concluded that "a range of [identification] practices has been validated by scientific methods and research and represents a starting place for efforts to improve eyewitness identification procedures."<sup>2</sup>

This appendix provides a brief explanation of both the research and practical experience behind several of the procedures outlined earlier in this memorandum. This summary is not meant to be exhaustive, in part because research continues to advance on eyewitness identification procedures, including photo arrays. Furthermore, the described procedures are only exemplary and do not create an enforceable right in any civil or criminal matter. The intent of this summary is to provide law enforcement agents and prosecutors an understanding of the reasons behind several of the procedures that either are not widely known or were not addressed in a prior publication on eyewitness identification from the

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<sup>1</sup> National Academies of Science, *Identifying the Culprit: Assessing Eyewitness Identification* (2014), available at: <https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification>

<sup>2</sup> *Id.* at xiv.

National Institute of Justice.<sup>3</sup>

### **Sequential vs. Simultaneous Identification Methods**

Historically, many law enforcement agencies employed simultaneous identification procedures, in which an eyewitness views all of the photos in an array at once. In the late 1980s, psychological research began to suggest that sequential methods, in which witnesses are shown one photo at a time, would be better at preventing erroneous identifications without reducing the rate of correct identifications.<sup>4</sup> As a result, several police agencies, including those in North Carolina<sup>5</sup> and Massachusetts,<sup>6</sup> turned to the sequential method for photo arrays. More recently, however, some research has raised questions about the superiority of sequential methods. Those studies tested techniques in the field<sup>7</sup> as well as in the laboratory<sup>8</sup> and employed different statistical tests to evaluate the accuracy of an eyewitness' identification. This research reached different conclusions, suggesting that simultaneous procedures may result in more true identifications and fewer false ones.<sup>9</sup> Until additional research is conducted, however, it is not possible to say conclusively whether one identification method is better than the other. Indeed, the NAS recommended "that caution and care be used when considering changes to" sequential or simultaneous procedures" until such time as there is clear evidence for the advantages of doing so."<sup>10</sup> For this reason, this

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<sup>3</sup> National Institute of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999).

<sup>4</sup> Roderick Lindsay & Gary Wells, "Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation," 70 *Journal of Applied Psychology* 556 (1985); Nancy Steblay, Jennifer Dysart, Solomon Fulero & R.C.L. Lindsay, "Eyewitness Accuracy rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytical Comparison," 25 *Law and Human Behavior* 459 (2001).

<sup>5</sup> N.C. Gen. Stat. § ISA-284.52 (2007).

<sup>6</sup> See Massachusetts Supreme Judicial Court Study Group on Eyewitness Identification, *Report and Recommendations to the Justices* (2013).

<sup>7</sup> Karen Amendola & John Wixted, "The Role of Site Variance in the American Judicature Society Field Study Comparing Simultaneous and Sequential Lineups." *Journal of Quantitative Criminology* (2015), doi: 10.1007/s 10940-015-9273-6.

<sup>8</sup> David Dobolyi & Chad Dodson, "Eyewitness Confidence in Simultaneous and Sequential Lineups: A Criterion Shift Account for Sequential Mistaken Identification Overconfidence," 19 *Journal of Experimental Psychology: Applied* 345 (2013).

<sup>9</sup> John Wixted, Laura Mickes, John Dunn, Steven Clark & William Wells, "Estimating the Reliability of Eyewitness Identifications from Police Lineups," 113 *Proceedings of the National Academy of Sciences*, 304 (January 12, 2016); John Wixted, Laura Mickes, Steven Clark, Scott Gronlund & Henry Roediger, "Initial Eyewitness Confidence Reliably Predicts Eyewitness Identification Accuracy," 70 *American Psychologist* 515 (September 2015).

<sup>10</sup> National Academies of Science, *supra* note 1, at 118. See also International Association of Chiefs of Police, *Model Policy* (2016).

document does not take a position on which procedure should be used.

### **Investigator Influence and Blind vs. Blinded Procedures**

An investigator's statements when administering an identification procedure can influence a witness' selection of a suspect in a photo array as well as his or her confidence in the choice.<sup>11</sup> Influence can occur, for example, when the investigator suggests in advance that the perpetrator is in the array ("We found the guy with your credit cards" or "We arrested someone we want you to identify"), when the investigator confirms or disconfirms the witness's pick ("Good work! You picked the right guy"), or when the administrator communicates such messages through nonverbal gestures.<sup>12</sup> In either case, witnesses may be more inclined to select a photograph from the array or to be more confident in their selection than they otherwise would be. "Suggestiveness during an identification procedure can result in suppression of both out-of-court and in-court identifications and thereby seriously impair the prosecution's ability to prove its case beyond a reasonable doubt."<sup>13</sup>

There are several recommended approaches to avoid inappropriate investigator influence or an allegation of inappropriate investigator influence. First, as the procedures in this document outline, administrators of photo arrays must consciously "avoid any words, sounds, expressions, actions or behaviors that suggest who the suspect is." Second, feedback is virtually impossible when the administrator does not know who the suspect is or which photograph is that of the suspect. As the NAS explains, "if administrators are not involved with the construction of the lineup and are unaware of the placement of the potential suspect in the sequence, then they cannot influence the witness."<sup>14</sup>

Although the NAS recommends blind procedures, it acknowledges that such procedures may not be feasible in some circumstances because of "financial

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<sup>11</sup> Amy Bradfield Douglass & Nancy Steblay, "Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect," 20 *Applied Cognitive Psychology* 859 (2006); Carla Maclean, C.A. Elizabeth Brimacombe, Meredith Allison & Helena Kadlec, "Post-Identification Feedback Effects: Investigators and Evaluators," 25 *Applied Cognitive Psychology* 739 (2011); Gary Wells & Amy Bradfield, "Good, You Identified the Suspect: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience," 83 *Journal of Applied Psychology* 360 (1993); Nancy Steblay, Gary Wells, & Amy Bradfield Douglass, "The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications," 20 *Psychology, Public Policy & Law* 1 (2014).

<sup>12</sup> National Academies of Science, *supra* note 1.

<sup>13</sup> *Id.* at 107.

<sup>14</sup> *Id.* at 106.

costs and human resource demands."<sup>15</sup> In these situations, investigators should at least use "blinded" procedures in which the administrator cannot see the order or arrangement of the photographs viewed by the witness or which photograph(s) the witness is viewing at any particular moment. However, even in these circumstances the NAS believes that law enforcement should consider "new technologies" such as "computer-based presentation technology" to prevent inadvertent suggestiveness.<sup>16</sup> If neither blind nor blinded procedures are practicable under certain circumstances, administrators should document the steps they took to avoid any influence before or after the array was shown and a confidence statement was taken.

### Confidence Statements

When the Supreme Court decided *Manson v. Brathwaite*,<sup>17</sup> establishing criteria to evaluate the reliability of eyewitness identification, it premised admissibility in part on the witness's self-reported confidence at the time of the initial identification procedure. After decades of research investigating and even questioning the science behind the Court's holding,<sup>18</sup> new research finds that a witness's confidence at the time of an initial identification is a reliable indicator of accuracy.<sup>19</sup> For this reason, the NAS has recommended "that law enforcement document the witness' level of confidence verbatim at the time when she or he first identifies a suspect . . . ."<sup>20</sup> Further, to prevent any undue suggestion and to ensure that investigators and fact-finders fully understand the level of the witness' confidence, the NAS recommends that the "witness' self-report . . . should be given in the witness' own words."<sup>21</sup>

### Recording the Photo Array

A witness's identification and assessment of certainty cannot be easily challenged if law enforcement agencies electronically record the identification

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Manson v. Brathwaite*, 432 U.S. 98 (1977).

<sup>18</sup> *See, e.g.*, Gary Wells, Elizabeth Olson & Steve Charman, "The Confidence of Eyewitnesses in their Identifications from Lineups," 5 *Current Directions in Psychological Sciences*, 151 (2002); Steven Penrod & Brian Cutler, "Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation," 1 *Psychology, Public Policy & Law* 817 (1995); National Academies of Science, *supra* note 1.

<sup>19</sup> John Wixted & Gary Wells, "The Relationship between Eyewitness Confidence and Identification Accuracy: A New Synthesis," *Psychological Science in the Public Interest* (in press); Wixted, et al., *supra* note 9.

<sup>20</sup> National Academies of Science, *supra* note 1, at 108.

<sup>21</sup> *Id.*



procedure and the witness's response. Electronic recording preserves the identification process for later review in court and also protects officers against unfounded claims of misconduct. Video-recording is helpful because it allows fact finders to directly evaluate a witness's verbal and nonverbal reactions and any aspects of the array procedure that would help to contextualize or explain the witness' selection. As of 2013, approximately one-fifth of state and local law enforcement agencies had instituted video-recording of photo arrays.<sup>22</sup> The NAS recommended "that the video recording of eyewitness identification procedures become standard practice,"<sup>23</sup> and the practice continues to expand as legislation<sup>24</sup> and model policies<sup>25</sup> urge its implementation. If video is impracticable, however, an audiotape may be useful because it allows judges and jurors to hear exactly what was said by both the administrator and the witness rather than relying exclusively on an oral or written report about the procedure.

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<sup>22</sup> Police Executive Research Foundation, *A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies* (2013).

<sup>23</sup> National Academies of Science, *supra* note 1, at 108.

<sup>24</sup> Ill. Comp. Stat. 725 § 5/107A-2 (2015); N.C. Gen. Stat. §15-284.52 (2007).

<sup>25</sup> See International Association of Chiefs of Police, *Model Policy: Eyewitness Identification* (2010); Municipal Police Training Council of New York, *Identification Procedures: Photo Arrays and Line-ups Model Policy* (2015); Attorney General of Wisconsin, *Model Policy and Procedure for Eyewitness Identification* (2010).

## **NOTES**

## P. DHS - Human Trafficking Indicators

# HUMAN TRAFFICKING INDICATORS

- 1** Is the victim in possession of identification and travel documents; if not, who has control of the documents?
- 2** Was the victim coached on what to say to law enforcement and immigration officials?
- 3** Was the victim recruited for one purpose and forced to engage in some other job?
- 4** Is the victim's salary being garnished to pay off a smuggling fee? (Paying off a smuggling fee alone is not considered trafficking.)
- 5** Was the victim forced to perform sexual acts?
- 6** Does the victim have freedom of movement?
- 7** Has the victim or family been threatened with harm if the victim attempts to escape?
- 8** Has the victim been threatened with deportation or law enforcement action?
- 9** Has the victim been harmed or deprived of food, water, sleep, medical care or other life necessities?
- 10** Can the victim freely contact friends or family?
- 11** Is the victim a juvenile engaged in commercial sex?
- 12** Is the victim allowed to socialize or attend religious services?

Trafficking is exploitation-based  
Smuggling is transportation-based

### HUMAN TRAFFICKING DEFINED:

- Sex trafficking in which a commercial sex act is induced by force, fraud or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- The recruitment, harboring, transportation, provision or obtaining of a person for labor or services through the use of force, fraud or coercion for the purpose of subjecting to involuntary servitude, peonage, debt bondage or slavery.

### HUMAN SMUGGLING DEFINED:

The importation of people into the United States involving deliberate evasion of immigration laws. This offense includes bringing illegal aliens into the United States as well as the unlawful transportation and harboring of aliens already in the United States.

Report Suspicious Activity: **1-866-DHS-2-ICE** (1-866-347-2423) • [www.ice.gov](http://www.ice.gov)



## NOTES

## **Q. Limited English Proficiency Resource**

Limited English Proficiency (LEP)  
LEP.gov - A Federal Interagency Website

### **LEP.gov Mission Statement**

LEP.gov promotes a positive and cooperative understanding of the importance of language access to federally conducted and federally assisted programs. This site acts as a clearinghouse, providing and linking to information, tools, and technical assistance regarding limited English proficiency and language services for federal agencies, recipients of federal funds, users of federal programs and federally assisted programs, and other stakeholders.

### **Featured Resources**

1. State Courts
2. Foreign Language Services Ordering Guide
3. Translation and Interpretation and Procurement Services (TIPS) Sheets
4. Training Video: Communicating Effectively with LEP Members of the Public
5. Title VI Protection for LEP Individuals

#### **LEP Resources and Information**

Frequently Asked Questions  
Executive Order 13166  
Resources by Subject  
Recipients of Federal Assistance  
Interpretation and Translation  
LEP and Title VI Videos  
Demographic Data  
LEP Mapping Tools

#### **LEP Compliance**

Federal Agency LEP Plans  
LEP Guidance for Recipients  
LEP Guidance for DOJ Recipients  
File a Complaint

## NOTES

## R. Table of Cases

|  |          |
|--|----------|
| A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1723 (1964).....                                  | 276      |
| Abel v. United States, 362 U.S. 217, 80 S. Ct. 683 (1960) .....  | 31, 235  |
| Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1921 (1972) .....   | 82       |
| Agnello v. United States, 269 U.S. 20, 46 S. Ct. 4 (1925).....   | 171      |
| Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509 (1964).....   | 95       |
| Alabama v. White, 496 U.S. 325, 110 S. Ct. 2412 (1990) .....   | 86       |
| Alderman v. United States, 394 U.S. 165; 89 S. Ct. 961 (1969) .....  | 249      |
| Almeida-Sanchez v. United States, 413 U.S. 266, 93 S. Ct. 2535 (1973).....   | 72       |
| Andresen v. Maryland, 427 U.S. 463, 96 S. Ct. 2737 (1976).....   | 103, 299 |
| Arizona v. Evans, 514 U.S. 1, 115 S. Ct. 1185 (1995).....  | 253      |
| Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246 (1991) .....  | 312      |
| Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710 (2009) .....  | 181      |
| Arizona v. Hicks, 480 U.S. 321, 107 S. Ct. 1149 (1987) .....   | 132      |
| Arizona v. Johnson, 555 U.S. 323, 129 S. Ct. 781 (2009).....   | 165      |
| Arizona v. Mauro, 481 U.S. 520, 107 S. Ct. 1931 (1987) .....   | 325      |
| Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093 (1988).....   | 351      |
| Arkansas v. Sullivan, 532 U.S. 769, 121 S. Ct. 1876 (2001).....  | 269      |
| Atwater v. City of Lago Vista, 532 U.S. 318, 121 S. Ct. 1536 (2001) .....  | 44       |
| Bailey v. United States, 568 U.S. ___, 133 S. Ct. 1031 (2013).....   | 118      |
| Banks v. Dretke, 540 U.S. 668, 124 S. Ct. 1256 (2004).....   | 429      |
| Beckwith v. United States, 425 U.S. 341, 96 S. Ct. 1612 (1976).....  | 329      |
| Beecher v. Alabama, 408 U.S. 234, 92 S. Ct. 2282 (1972) .....  | 313      |
| Bellis v. United States, 417 U.S. 85, 94 S. Ct. 2179 (1974) .....  | 308      |
| Berghuis v. Thompkins, 560 U.S. 370, 130 S. Ct. 2250 (2010).....   | 344      |
| Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138 (1984) .....  | 326      |
| Birchfield v. North Dakota, 579 U.S. ___, 136 S. Ct. 2160 (2016) .....   | 187      |
| Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,<br>403 U.S. 388; 91 S. Ct. 1999 (1971)..... | 417      |
| Board of Education v. Earls, 536 U.S. 822, 122 S. Ct. 822 (2002) .....   | 230      |
| Bobby v. Dixon, 565 U.S. 23, 132 S. Ct. 26 (2011).....   | 368      |
| Bond v. United States, 529 U.S. 334, 120 S. Ct. 1462 (2000) .....  | 24       |
| Brady v. Maryland, 373 U.S. 83; 83 S. Ct. 1194 (1963).....   | 428      |
| Braswell v. United States, 487 U.S. 99, 108 S. Ct. 2284 (1988).....  | 304      |
| Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400 (2007).....   | 39       |
| Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232 (1977).....   | 386      |
| Brigham City v. Stuart, 547 U.S. 398, 126 S. Ct. 1943 (2006).....  | 161      |
| Brogan v. United States, 522 U.S. 398, 118 S. Ct. 805 (1998) .....   | 280      |
| Brower v. Inyo County, 489 U.S. 593, 109 S. Ct. 1378 (1989) .....  | 38       |
| Brown et. al. v. Mississippi, 297 U.S. 278, 56 S. Ct. 461 (1936) .....   | 298      |
| Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254 (1975) .....   | 284      |
| Brown v. Texas, 443 U.S. 47, 99 S. Ct. 2637 (1979).....  | 83       |
| Bullcoming v. New Mexico, 564 U.S. 647, 131 S. Ct. 2705 (2011).....  | 399      |
| Bumper v. North Carolina, 391 U.S. 543, 89 S. Ct. 1788 (1968).....   | 199      |
| Byars v. United States, 273 U.S. 28, 47 S. Ct. 248 (1927) .....  | 92       |

|  |     |
|--|-----|
| California v. Acevedo, 500 U.S. 565, 111 S. Ct. 1982 (1991) .....                      | 143 |
| California v. Beheler, 463 U.S. 1121; 103 S. Ct. 3517 (1983) .....                     | 336 |
| California v. Carney, 471 U.S. 386, 105 S. Ct. 2066 (1985) .....                       | 142 |
| California v. Ciraolo, 476 U.S. 207, 106 S. Ct. 1809 (1986) .....                      | 6   |
| California v. Greenwood, 486 U.S. 35, 108 S. Ct. 1625 (1988).....                      | 30  |
| California v. Hodari, 499 U.S. 621, 111 S. Ct. 1547 (1991) .....                       | 37  |
| California v. Prysock, 453 U.S. 355, 101 S. Ct. 2806 (1981).....                       | 362 |
| Camara v. Municipal Court, 387 U.S. 523, 87 S. Ct. 1727 (1967).....                    | 210 |
| Cardwell v. Lewis, 417 U.S. 583, 94 S. Ct. 2464 (1974).....                            | 13  |
| Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280 (1925) .....                     | 135 |
| Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975 (1970).....                           | 136 |
| Chandler v. Miller, 520 U.S. 305, 117 S. Ct. 305 (1997).....                           | 231 |
| Chapman v. United States, 365 U.S. 610, 81 S. Ct. 776 (1961) .....                     | 196 |
| Chavez v. Martinez, 538 U.S. 760, 123 S. Ct. 1994 (2002) .....                         | 371 |
| Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034 (1969) .....                        | 170 |
| City & Cnty. of San Francisco v. Sheehan, 575 U.S. ___, 135 S. Ct. 1765<br>(2015)..... | 411 |
| City of Indianapolis v. Edmond, 531 U.S. 32, 121 S. Ct. 447 (2000) .....               | 220 |
| City of Los Angeles v. Patel, 576 U.S. ___, 135 S. Ct. 2443 (2015).....                | 216 |
| City of Ontario v. Quon, 560 U.S. 746, 130 S. Ct. 2619 (2010).....                     | 20  |
| Colorado v. Bertine, 479 U.S. 367, 107 S. Ct. 738 (1987).....                          | 205 |
| Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515 (1986).....                         | 311 |
| Colorado v. Spring, 479 U.S. 564, 107 S. Ct. 851 (1987).....                           | 360 |
| Connecticut v. Barrett, 479 U.S. 523, 107 S. Ct. 828 (1987) .....                      | 361 |
| Connelly v. Georgia, 429 U.S. 245, 97 S. Ct. 546 (1977) .....                          | 101 |
| Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022 (1971).....                    | 5   |
| Cooper v. California, 386 U.S. 58, 87 S. Ct. 788 (1967).....                           | 206 |
| Corley v. United States, 556 U.S. 303; 129 S. Ct. 1558 (2009) .....                    | 278 |
| Couch v. United States, 409 U.S. 322, 93 S. Ct. 611 (1973) .....                       | 305 |
| County Of Sacramento v. Lewis, 523 U.S. 833; 118 S. Ct. 1708 (1998)....                | 418 |
| Cupp v. Murphy, 412 U.S. 291, 93 S. Ct. 2000 (1973) .....                              | 147 |
| Dalia v. United States, 441 U.S. 238, 99 S. Ct. 1682 (1979) .....                      | 128 |
| Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394 (1969) .....                        | 57  |
| Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350 (1994).....                      | 355 |
| Davis v. United States, 564 U.S. 229, 131 S. Ct. 2419 (2011).....                      | 255 |
| Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391 (1979) .....                          | 59  |
| Devenpeck v. Alford, 543 U.S. 146, 125 S. Ct. 588 (2004) .....                         | 268 |
| Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326 (2000).....                   | 322 |
| Doe v. United States, 487 U.S. 201, 108 S. Ct. 2341 (1988) .....                       | 305 |
| Donovan v. Dewey, 452 U.S. 594, 101 S. Ct. 2534 (1981) .....                           | 212 |
| Dow Chemical Co. v. United States, 476 U.S. 227, 106 S. Ct. 1819 (1986) ...            | 7   |
| Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240 (1976).....                                | 348 |
| Draper v. United States, 358 U.S. 307, 79 S. Ct. 329 (1959) .....                      | 77  |
| Duckworth v. Eagan, 492 U.S. 195, 109 S. Ct. 2875(1989) .....                          | 363 |
| Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248 (1979).....                          | 282 |
| Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880 (1981).....                          | 350 |
| Elkins v. United States, 364 U.S. 206, 80 S. Ct. 1437 (1960) .....                     | 237 |
| Fellers v. United States, 540 U.S. 519, 124 S. Ct. 1019 (2004) .....                   | 392 |
| Ferguson v. City of Charleston, 532 U.S. 67, 121 S. Ct. 1281 (2000) .....              | 227 |



|  |     |
|--|-----|
| Fernandez v. California, 571 U.S. ___, 134 S. Ct. 1126 (2014) .....                    | 194 |
| Fisher v. United States, 425 U.S. 391, 96 S. Ct. 1569 (1976) .....                     | 306 |
| Fletcher v. Weir, 455 U.S. 603, 102 S. Ct. 1309 (1982) .....                           | 346 |
| Flippo v. West Virginia, 528 U.S. 11, 120 S. Ct. 7 (1999).....                         | 160 |
| Florence v. County of Burlington, 566 U.S. 318, 132 S. Ct. 1510 (2012)...              | 177 |
| Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382 (1991).....                          | 40  |
| Florida v. Harris, 568 U.S. ___, 133 S. Ct. 1050 (2013) .....                          | 81  |
| Florida v. J. L., 529 U.S. 266, 120 S. Ct. 1375 (2000) .....                           | 87  |
| Florida v. Jardines, 569 U.S. ___, 133 S. Ct. 1409 (2013).....                         | 202 |
| Florida v. Jimeno, 500 U.S. 297, 111 S. Ct. 1801 (1991).....                           | 201 |
| Florida v. Myers, 466 U.S. 380, 104 S. Ct. 1852 (1984).....                            | 139 |
| Florida v. Powell, 559 U.S. 50, 130 S. Ct. 1195 (2010) .....                           | 323 |
| Florida v. Riley, 488 U.S. 445, 109 S. Ct. 693 (1989) .....                            | 8   |
| Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319 (1983) .....                           | 58  |
| Florida v. Wells, 495 U.S. 1, 110 S. Ct. 1632 (1990).....                              | 208 |
| Florida v. White, 526 U.S. 559, 119 S. Ct. 1555 (1999).....                            | 271 |
| Foster v. California, 394 U.S. 440, 89 S. Ct. 1127 (1969) .....                        | 288 |
| Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978).....                           | 129 |
| Frazier v. Cupp, 394 U.S. 731, 89 S. Ct. 1420 (1969).....                              | 192 |
| G. M. Leasing Corp. v. United States, 429 U.S. 338, 97 S. Ct. 619 (1977).              | 270 |
| Gardner v. Broderick, 392 U.S. 273, 88 S. Ct. 1913 (1968) .....                        | 374 |
| Garrity v. New Jersey, 385 U.S. 493, 87 S. Ct. 616 (1967) .....                        | 375 |
| Georgia v. Randolph, 547 U.S. 103, 126 S. Ct. 1515 (2006) .....                        | 193 |
| Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854 (1975).....                              | 274 |
| Giglio v. United States, 405 U.S. 150; 92 S. Ct. 763 (1972) .....                      | 430 |
| Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951 (1967) .....                       | 393 |
| Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S. Ct. 153 (1931)<br>.....    | 169 |
| Gooding v. United States, 416 U.S. 430, 94 S. Ct. 1780 (1974) .....                    | 127 |
| Gouled v. United States, 255 U.S. 298, 41 S. Ct. 261 (1921) .....                      | 6   |
| Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865 (1989).....                            | 403 |
| Groh v. Ramirez, 540 U.S. 551, 124 S. Ct. 1284 (2004) .....                            | 105 |
| Hanlon v. Berger, 526 U.S. 808, 119 S. Ct. 1706 (1999) .....                           | 130 |
| Hardy v. Cross, 565 U.S. 65, 132 S. Ct. 490 (2011) .....                               | 401 |
| Harris v. New York, 401 U.S. 222, 91 S. Ct. 643 (1971) .....                           | 380 |
| Harris v. United States, 390 U.S. 234, 88 S. Ct. 992 (1968) .....                      | 204 |
| Hayes v. Florida, 470 U.S. 811, 105 S. Ct. 1643 (1985).....                            | 68  |
| Haynes v. Washington, 373 U.S. 503, 83 S. Ct. 1336 (1963) .....                        | 314 |
| Heien v. North Carolina, 574 U.S. ___, 135 S. Ct. 530 (2014) .....                     | 61  |
| Henry v. United States, 361 U.S. 98, 80 S. Ct. 168 (1959).....                         | 76  |
| Herring v. United States, 555 U.S. 135, 129 S. Ct. 695 (2009) .....                    | 254 |
| Hester v. United States, 265 U.S. 57, 44 S. Ct. 445 (1924).....                        | 27  |
| Hiibel v. Sixth Judicial District Court, 542 U.S. 177, 124 S. Ct. 1494 (2004)<br>..... | 273 |
| Hoffa v. United States, 385 U.S. 293, 87 S. Ct. 408 (1966).....                        | 15  |
| Horton v. California, 496 U.S. 128, 110 S. Ct. 2301 (1990) .....                       | 131 |
| Howes v. Fields, 565 U.S. 499, 132 S. Ct. 1181 (2012).....                             | 333 |
| Hudson v. Michigan, 547 U.S. 1096, 126 S. Ct. 2159 (2006).....                         | 112 |
| Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194 (1984).....                            | 21  |

|   |     |
|---|-----|
| Illinois v. Andreas, 463 U.S. 765, 103 S. Ct. 3319 (1983).....              | 10  |
| Illinois v. Caballes, 543 U.S. 405, 125 S. Ct. 834 (2005) .....             | 64  |
| Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983).....                | 97  |
| Illinois v. Krull, 480 U.S. 340, 107 S. Ct. 1160 (1987).....                | 256 |
| Illinois v. Lafayette, 462 U.S. 640, 103 S. Ct. 2605 (1983).....            | 207 |
| Illinois v. Lidster, 540 U.S. 419, 124 S. Ct. 885 (2004).....               | 221 |
| Illinois v. McArthur, 531 U.S. 326, 121 S. Ct. 946 (2001).....              | 122 |
| Illinois v. Perkins, 496 U.S. 292, 110 S. Ct. 2394 (1990).....              | 324 |
| Illinois v. Rodriguez, 497 U.S. 177, 110 S. Ct. 2793 (1990) .....           | 198 |
| Illinois v. Wardlow, 528 U.S. 119, 120 S. Ct. 673 (2000) .....              | 90  |
| J. D. B. v. North Carolina, 564 U.S. ___, 131 S. Ct. 2394 (2011).....       | 339 |
| James v. Illinois, 493 U.S. 307, 100 S. Ct. 648 (1990) .....                | 259 |
| Jenkins v. Anderson, 447 U.S. 231, 100 S. Ct. 2124 (1980) .....             | 345 |
| Kalkines v. United States, 473 F.2d 1391 (1973) .....                       | 376 |
| Kastigar et. al. v. United States, 406 U.S. 441, 92 S. Ct. 1653 (1972)..... | 318 |
| Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967) .....             | 2   |
| Kaupp v. Texas, 538 U.S. 626, 123 S. Ct. 1843 (2003).....                   | 287 |
| Kentucky v. King, 563 U.S. 452, 131 S. Ct. 1849 (2011) .....                | 146 |
| Kinglsey v. Hendrickson, 576 U.S. ___, 135 S. Ct. 2466 (2015).....          | 414 |
| Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877 (1972) .....                | 383 |
| Kirk v. Louisiana, 536 U.S. 635, 122 S. Ct. 2458 (2002) .....               | 47  |
| Knowles v. Iowa, 525 U.S. 113, 119 S. Ct. 484 (1998).....                   | 186 |
| Kolender v. Lawson, 461 U.S. 352, 103 S. Ct. 1855 (1983).....               | 272 |
| Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616 (1986) .....              | 391 |
| Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038 (2001) .....           | 14  |
| LaChance v. Erickson, 522 U.S. 262, 118 S. Ct. 753(1998) .....              | 378 |
| Lefkowitz v. Turley, 414 U.S. 70, 94 S. Ct. 316 (1973) .....                | 377 |
| Lego v. Twomey, 404 U.S. 477, 92 S. Ct. 619 (1972) .....                    | 315 |
| Lewis v. United States, 385 U.S. 206, 87 S. Ct. 424 (1966) .....            | 200 |
| Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S. Ct. 2319 (1979).....     | 102 |
| Los Angeles County v. Rettele, 550 U.S. 609, 127 S. Ct. 1989 (2007) .....   | 119 |
| Lynumn v. Illinois, 372 U.S. 528, 83 S. Ct. 917 (1963) .....                | 310 |
| Maine v. Moulton, 474 U.S. 159, 106 S. Ct. 477 (1985).....                  | 396 |
| Malley v. Briggs, 475 U.S. 335; 106 S. Ct. 1092 (1986) .....                | 420 |
| Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489 (1964).....                     | 278 |
| Mancusi v. DeForte, 392 U.S. 364, 88 S. Ct. 2120 (1968) .....               | 250 |
| Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243 (1977).....               | 294 |
| Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961).....                      | 238 |
| Marshall v. Barlow's Inc., 436 U.S. 307, 98 S. Ct. 1816 (1978).....         | 211 |
| Maryland v. Buie, 494 U.S. 325, 110 S. Ct. 1093 (1990) .....                | 53  |
| Maryland v. Dyson, 527 U.S.465, 119 S. Ct. 2013 (1999).....                 | 141 |
| Maryland v. Garrison, 480 U.S. 79, 107 S. Ct. 1013 (1987).....              | 108 |
| Maryland v. King, 569 U.S. ___, 133 S. Ct. 1958 (2013) .....                | 178 |
| Maryland v. Macon, 472 U.S. 463, 105 S. Ct. 2778 (1985) .....               | 22  |
| Maryland v. Pringle, 540 U.S. 366, 124 S. Ct. 795 (2003).....               | 80  |
| Maryland v. Shatzer, 559 U.S. 98, 130 S. Ct. 1213 (2010) .....              | 353 |
| Maryland v. Wilson, 519 U.S. 408, 117 S. Ct. 882 (1997).....                | 66  |
| Massachusetts v. Sheppard, 468 U.S. 981, 104 S. Ct. 3424 (1984) .....       | 252 |
| Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964) .....         | 394 |

|  |         |
|--|---------|
| Mathis v. United States, 391 U.S. 1, 88 S. Ct. 1503 (1968) .....                                       | 332     |
| McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204 (1991).....   | 357     |
| Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527 (2011) ...                               | 398     |
| Messerschmidt v. Millender, 565 U.S. 535, 132 S. Ct. 1235 (2012) .....                                 | 106     |
| Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143 (2011) .....   | 400     |
| Michigan v. Chesternut, 486 U.S. 567, 108 S. Ct. 1975 (1988).....                                      | 38      |
| Michigan v. Clifford, 464 U.S. 287, 104 S. Ct. 641 (1984) .....  | 156     |
| Michigan v. Fisher, 558 U.S. 45, 130 S. Ct. 546 (2009).....  | 162     |
| Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469 (1983) .....  | 166     |
| Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321 (1975).....   | 349     |
| Michigan v. Sitz, 496 U.S. 444, 110 S. Ct. 2481 (1990).....  | 218     |
| Michigan v. Summers, 452 U.S. 693, 101 S. Ct. 2587 (1981) .....  | 116     |
| Michigan v. Thomas, 458 U.S. 259, 102 S. Ct. 3079 (1982).....  | 138     |
| Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357 (1974).....   | 369     |
| Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942 (1978).....  | 155     |
| Millbrook v. United States, 569 U.S. ___, 133 S. Ct. 1441 (2013).....                                  | 426     |
| Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408 (1978) .....   | 158     |
| Minnesota v. Carter, 525 U.S. 83, 119 S. Ct. 469 (1998).....   | 17      |
| Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130 (1993) .....                                     | 167     |
| Minnesota v. Olson, 495 U.S. 91, 110 S. Ct. 1684 (1990).....   | 16      |
| Minnick v. Mississippi, 498 U.S. 146, 111 S. Ct. 486 (1990) .....                                      | 352     |
| Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966) .....  | 321     |
| Missouri v. McNeely, 569 U.S. ___, 133 S. Ct. 1552 (2013).....   | 150     |
| Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601 (2004).....   | 367     |
| Mitchell v. United States, 526 U.S. 314, 119 S. Ct. 1307 (1999).....                                   | 280     |
| Montejo v. Louisiana, 556 U.S. 778, 129 S. Ct. 2079 (2009).....  | 383     |
| Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135 (1986) .....   | 372     |
| Muehler v. Mena, 544 U.S. 93, 125 S. Ct. 1465 (2005).....  | 117     |
| Mullenix v. Luna, 577 U.S. ___, 136 S. Ct. 305 (2015).....   | 413     |
| Murphy et. al. v. Waterfront Commission of New York Harbor, 378 U.S. 52,<br>84 S. Ct. 1594 (1964)..... | 317     |
| Murray v. United States, 487 U.S. 533, 108 S. Ct. 2529 (1988).....                                     | 261     |
| Nardone et al. v. United States, 308 U.S. 338, 60 S. Ct. 266 (1939).....                               | 240     |
| NASA v. FLRA, 527 U.S. 229, 119 S. Ct. 1979 (1999).....  | 379     |
| National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S. Ct.<br>1384 (1989) .....           | 226     |
| Navarette v. California, 572 U.S. ___, 134 S. Ct. 1683 (2014) .....                                    | 88      |
| Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375 (1972) .....  | 291     |
| New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733 (1985) .....  | 4       |
| New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860 (1981) .....   | 182     |
| New York v. Burger, 482 U.S. 691, 107 S. Ct. 2636 (1987).....  | 214     |
| New York v. Class, 475 U.S. 106, 106 S. Ct. 960 (1986).....  | 23      |
| New York v. Harris, 495 U.S. 14, 110 S. Ct. 1640 (1990).....   | 46, 283 |
| New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626 (1984) .....  | 381     |
| Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501 (1984) .....  | 262     |
| North Carolina v. Butler, 441 U.S. 369, 99 S. Ct. 1755 (1979) .....                                    | 364     |
| O'Connor v. Ortega, 480 U.S. 709, 107 S. Ct. 1492 (1987) .....   | 18      |
| Ohio v. Reiner, 532 U.S. 17, 121 S. Ct. 1252 (2001) .....  | 320     |
| Ohio v. Robinette, 519 U.S. 33, 117 S. Ct. 417 (1996).....   | 191     |

|   |          |
|---|----------|
| Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735 (1984) .....   | 28       |
| Olmstead v. United States, 277 U.S. 438, 48 S. Ct. 564 (1928) .....   | 1        |
| Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830 (1983) .....   | 359      |
| Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285 (1985).....   | 365      |
| Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711 (1977) .....   | 328      |
| Ornelas v. United States, 517 U.S. 690, 116 S. Ct. 1657 (1996) .....  | 75       |
| Orozco v. Texas, 394 U.S. 324, 89 S. Ct. 1095 (1969) .....  | 331      |
| Patterson v. Illinois, 487 U.S. 285, 108 S. Ct. 2389 (1988).....  | 388      |
| Payton v New York, 445 U.S. 573, 100 S. Ct. 1371 (1980).....  | 45       |
| Pembaur v. Cincinnati, 475 U.S. 469, 106 S. Ct. 1292 (1986).....  | 49       |
| Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357, 118 S.<br>Ct. 2014 (1998) .....          | 266      |
| Pennsylvania v. Bruder, 488 U.S. 9, S. Ct. 205 (1988) .....   | 327      |
| Pennsylvania v. Labron, 518 U.S. 938, 116 S. Ct. 2485 (1996).....   | 140      |
| Pennsylvania v. Mimms, 434 U.S. 106, 98 S. Ct. 330 (1977) .....   | 65       |
| Pennsylvania v. Muniz, 496 U.S. 582, 110 S. Ct. 2638 (1990).....  | 341      |
| Perry v. New Hampshire, 565 U.S. 228, 132 S. Ct. 716 (2012) .....   | 292      |
| Peters v. New York, 392 U.S. 40, 88 S. Ct. 1889 (1968).....   | 79       |
| Plumhoff v. Rickard, 572 U.S. ___, 134 S. Ct. 2012 (2014) .....   | 409      |
| Preston v. United States, 376 U.S. 364, 84 S. Ct. 881 (1964) .....  | 184      |
| Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 421 (1978).....  | 244      |
| Rawlings v. Kentucky, 448 U.S. 98, 100 S. Ct. 2556 (1980) .....   | 243      |
| Reichle v. Howards, 566 U.S. ___, 132 S. Ct. 2088 (2012) .....  | 423      |
| Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682 (1980).....  | 340      |
| Richards v. Wisconsin, 520 U.S. 385, 117 S. Ct. 1416 (1997) .....   | 113      |
| Riley v. California (consolidated with United States v. Wurie) 573 U.S. ___,<br>134 S. Ct. 2473 (2014)..... | 179      |
| Riverside v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661 (1991).....   | 432      |
| Rodriguez v. United States, 575 U.S. ___, 135 S. Ct. 1609 (2015) .....                                      | 62       |
| Rogers v. Richmond, 365 U.S. 534, 81 S. Ct. 735 (1961).....   | 309      |
| Rothgery v. Gillespie County, 554 U.S. 191, 128 S. Ct. 2578 (2008) .....                                    | 384      |
| Ryburn v. Huff, 565 U.S. 469, 132 S. Ct. 987 (2012) .....   | 163      |
| Sabbath v. United States, 391 U.S. 585, 88 S. Ct. 1755 (1968) .....   | 110      |
| Salinas v. Texas, 570 U.S. ___, 133 S. Ct. 2174 (2013).....   | 343      |
| Samson v. California, 547 U.S. 843, 126 S. Ct. 2193 (2006).....   | 223      |
| Sanchez-Llamas v. Oregon, 548 U.S. 331, 126 S. Ct. 2669 (2006).....   | 433      |
| Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151 (2001) .....   | 421      |
| Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826 (1966) .....  | 149, 295 |
| Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041 (1973) .....  | 190      |
| Scott v. Harris, 550 U.S. 372, 127 S. Ct. 1769 (2007) .....   | 407      |
| See v. City of Seattle, 387 U.S. 541, 87 S. Ct. 1737 (1967) .....   | 209      |
| Segura v. United States, 468 U.S. 796, 104 S. Ct. 3380 (1984) .....   | 124      |
| Sgro v. United States, 287 U.S. 206, 53 S. Ct. 138 (1932) .....   | 126      |
| Shipley v. California, 395 U.S. 818, 89 S. Ct. 2053 (1969) .....  | 172      |
| Sibron v. New York, 392 U.S. 40, 88 S. Ct. 1889 (1968).....   | 78       |
| Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S. Ct. 182 (1920)<br>.....                       | 239      |
| Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967 (1968).....   | 293      |

|   |        |
|---|--------|
| Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 109 S. Ct. 1402 (1989)..... | 224    |
| Smith v. Cain, 565 U.S. 73, 132 S. Ct. 627 (2012) .....                                     | 431    |
| Smith v. Illinois, 469 U.S. 91, 105 S. Ct. 490 (1984) .....                                 | 356    |
| Smith v. Maryland, 442 U.S. 735, 99 S. Ct. 2577 (1979).....                                 | 36     |
| Smith v. United States, 568 U.S. ___, 133 S. Ct. 714 (2013).....                            | 435    |
| Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207 (2011).....                                 | 434    |
| Soldal v. Cook County, 506 U.S. 56, 113 S. Ct. 538 (1992) .....                             | 43     |
| South Dakota v. Opperman, 428 U.S. 364, 96 S. Ct. 3092 (1976) .....                         | 203    |
| Spano v. New York, 360 U.S. 315, 79 S. Ct. 1202 (1959).....                                 | 316    |
| Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584 (1969) .....                         | 96     |
| Stanford v. Texas, 379 U.S. 476, 85 S. Ct. 506 (1965).....                                  | 104    |
| Stansbury v. California, 511 U.S. 318, 114 S. Ct. 1526 (1994).....                          | 335    |
| Steagald v. United States, 451 U.S. 204, 101 S. Ct. 1642 (1981).....                        | 48     |
| Steele v. United States, 267 U.S. 498, 45 S. Ct. 414 (1925).....                            | 109    |
| Stoner v. California, 376 U.S. 483, 84 S. Ct. 889 (1964) .....                              | 197    |
| Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967 (1967) .....                                 | 289    |
| Taylor v. Alabama, 457 U.S. 687, 102 S. Ct. 2664 (1982).....                                | 286    |
| Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694 (1985).....                                | 405    |
| Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968) .....                                      | 55     |
| Texas v. Brown, 460 U.S. 730, 103 S. Ct. 1535 (1983).....                                   | 133    |
| Texas v. Cobb, 532 U.S. 162, 121 S. Ct. 1335 (2001).....                                    | 397    |
| Thompson v. Keohane, 516 U.S. 99, 116 S. Ct. 457 (1995) .....                               | 337    |
| Thompson v. Louisiana, 469 U.S. 17, 105 S. Ct. 409 (1984).....                              | 159    |
| Thornton v. United States, 541 U.S. 615, 124 S. Ct. 2137 (2004).....                        | 185    |
| Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745 (1963) .....                                  | 314    |
| Trupiano v. United States, 334 U.S. 699, 68 S. Ct. 1229 (1948) .....                        | 243    |
| United States v. Arvizu, 534 U.S. 266; 122 S. Ct. 744 (2002) .....                          | 90     |
| United States v. Balsys, 524 U.S. 666, 118 S. Ct. 2218 (1999) .....                         | 303    |
| United States v. Banks, 540 U.S. 31, 124 S.Ct. 521 (2003) .....                             | 114    |
| United States v. Biswell, 406 U.S. 311, 92 S. Ct. 1593 (1972) .....                         | 216    |
| United States v. Brignoni-Ponce, 422 U.S. 873, 95 S. Ct. 2574 (1975).....                   | 74     |
| United States v. Calandra, 414 U.S. 338, 94 S. Ct. 613 (1974).....                          | 265    |
| United States v. Ceccolini, 435 U.S. 268, 98 S. Ct. 1054 (1978) .....                       | 240    |
| United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476 (1977).....                           | 9, 168 |
| United States v. Crews, 445 U.S. 463, 100 S. Ct. 1244 (1980).....                           | 241    |
| United States v. Dionisio, 410 U.S. 1, 93 S. Ct. 764 (1973) .....                           | 296    |
| United States v. Doe, 465 U.S. 605, 104 S. Ct. 1237 (1984) .....                            | 300    |
| United States v. Drayton, 536 U.S. 194, 122 S. Ct. 2105 (2002).....                         | 41     |
| United States v. Dunn, 480 U.S. 294, 107 S. Ct. 1134 (1987) .....                           | 28     |
| United States v. Edwards, 415 U.S. 800, 94 S. Ct. 1234 (1974).....                          | 175    |
| United States v. Flores-Montano, 541 U.S. 149, 124 S. Ct. 1582 (2004) ...                   | 234    |
| United States v. Gouveia, 467 U.S. 180, 104 S. Ct. 2292 (1984).....                         | 385    |
| United States v. Grubbs, 547 U.S. 90, 126 S. Ct. 1494 (2006) .....                          | 100    |
| United States v. Hale, 422 U.S. 171, 95 S. Ct. 2133 (1975) .....                            | 347    |
| United States v. Harris, 403 U.S. 573, 91 S. Ct. 2075 (1971) .....                          | 98     |
| United States v. Havens, 446 U.S. 620, 100 S. Ct. 1912 (1980).....                          | 258    |
| United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183 (1980).....                           | 390    |
| United States v. Hensley, 469 U.S. 221, 105 S. Ct. 675 (1985).....                          | 67     |

|   |     |
|---|-----|
| United States v. Hubbell, 530 U.S. 27, 120 S. Ct. 2037 (2000) .....                 | 301 |
| United States v. Jacobsen, 466 U.S. 109, 104 S. Ct. 1652 (1984).....                | 33  |
| United States v. Johns, 469 U.S. 478, 105 S. Ct. 881 (1985).....                    | 140 |
| United States v. Jones, 565 U.S. 400, 132 S. Ct. 945 (2012) .....                   | 3   |
| United States v. Karo, 468 U.S. 705, 104 S. Ct. 3296 (1984).....                    | 11  |
| United States v. Knights, 534 U.S. 112, 122 S.Ct. 587 (2001) .....                  | 222 |
| United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984).....                    | 251 |
| United States v. Mara, 410 U.S. 19, 93 S. Ct. 774 (1973).....                       | 297 |
| United States v. Martinez-Fuerte, 428 U.S. 543, 96 S. Ct. 3074 (1976).....          | 73  |
| United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988 (1974).....                   | 195 |
| United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870 (1980) .....             | 189 |
| United States v. Miller, 425 U.S. 435, 96 S. Ct. 1619 (1976) .....                  | 35  |
| United States v. Montoya de Hernandez, 473 U.S. 531, 105 S. Ct. 3304<br>(1985)..... | 69  |
| United States v. Padilla, 508 U.S. 77, 113 S. Ct. 1936 (1993).....                  | 248 |
| United States v. Patane, 542 U.S. 630, 124 S. Ct. 2620 (2004).....                  | 370 |
| United States v. Payner, 447 U.S. 727, 100 S. Ct. 2439 (1980).....                  | 247 |
| United States v. Place, 462 U.S. 696, 103 S. Ct. 2637 (1983) .....                  | 25  |
| United States v. Ramirez, 523 U.S. 65, 118 S. Ct. 992 (1998) .....                  | 113 |
| United States v. Ramsey, 431 U.S. 606, 97 S. Ct. 1972 (1977) .....                  | 233 |
| United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467 (1973).....                  | 174 |
| United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157 (1982).....                    | 137 |
| United States v. Salvucci, Jr., 448 U.S. 83, 100 S. Ct. 2547 (1980) .....           | 246 |
| United States v. Santana, 427 U.S. 38, 96 S. Ct. 2406 (1976) .....                  | 154 |
| United States v. Sharpe, 470 U.S. 675, 105 S. Ct. 1568 (1985) .....                 | 60  |
| United States v. Sokolow, 490 U.S. 1, 109 S. Ct. 1581 (1989) .....                  | 85  |
| United States v. Van Leeuwen, 397 U.S. 249, 90 S. Ct. 1029 (1970).....              | 123 |
| United States v. Ventresca, 380 U.S. 102, 85 S. Ct. 741 (1965).....                 | 94  |
| United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056 (1990)..           | 31  |
| United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926 (1967).....                     | 394 |
| United States v. Watson, 423 U.S. 411, 96 S. Ct. 820 (1976) .....                   | 51  |
| Utah v. Strieff, 579 U.S. ___, 136 S. Ct. 2056 (2016) .....                         | 263 |
| Vale v. Louisiana, 399 U.S. 30, 90 S. Ct. 1969 (1970).....                          | 173 |
| Vernonia School District v. Acton, 515 U.S. 646, 115 S. Ct. 2386 (1995)..           | 229 |
| Virginia v. Moore, 553 U.S. 164; 128 S. Ct. 1598 (2008) .....                       | 176 |
| Walder v. United States, 347 U.S. 62, 74 S. Ct. 354 (1954) .....                    | 257 |
| Walter v. United States, 447 U.S. 649, 100 S. Ct. 2395 (1980) .....                 | 34  |
| Warden v. Hayden, 387 U.S. 294, 87 S. Ct. 1642 (1967) .....                         | 151 |
| Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341 (1914) .....                    | 236 |
| Welsh v. Wisconsin, 466 U.S. 740, 104 S. Ct. 2091 (1984).....                       | 152 |
| Whiteley v. Warden, 401 U.S. 560, 91 S. Ct. 1031 (1971).....                        | 50  |
| Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769 (1996) .....                  | 267 |
| Wilson v. Arkansas, 514 U.S. 927, 115 S. Ct. 1914 (1995) .....                      | 111 |
| Wilson v. Layne, 526 U.S. 603, 119 S. Ct. 1692 (1999) .....                         | 129 |
| Winston v. Lee, 470 U.S. 753, 105 S. Ct. 1611 (1985).....                           | 93  |
| Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407 (1963) .....                 | 245 |
| Wood v. Moss, 572 U.S. ___, 134 S. Ct. 2056 (2014) .....                            | 424 |
| Wyman v. James, 400 U.S. 309, 91 S. Ct. 381 (1971) .....                            | 232 |
| Wyoming v. Houghton, 526 U.S. 295, 119 S. Ct. 1297 (1999).....                      | 145 |

Yarborough v. Alvarado, 541 U.S. 652, 124 S. Ct. 2140 (2004) .....338  
Ybarra v. Illinois, 444 U.S. 85, 100 S. Ct. 338 (1979).....121  
Zurcher v. Stanford Daily, 436 U.S. 547, 98 S. Ct. 1970 (1978) .....275







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