CRIMINAL PROCEDURE

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I. THRESHOLD OF THE 4th AMENDMENT: RIGHT TO BE SECURE AGAINST SEARCHES

A. 4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, 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.

- **i. 4th Amdt. protects:**
  - **a)** Persons
  - **b)** Houses (e.g., motel rooms, invited guests)
  - **c)** Papers
  - **d)** Effects

B. Two-Fold Requirement for "Search":

- **i.** The person has exhibited an **actual, subjective expectation of privacy**; AND
  - **a)** Whether the individual has shown that he seeks to preserve something as private
- **ii.** The expectation be one that society is prepared to recognize as **"reasonable"**
  - **a)** Whether it is justifiable under the circumstances

C. *Katz v. United States*: Is electronically eavesdropping on a conversation occurring within a closed glass phone booth without physically penetrating it an "unreasonable" search protected against by the 4th Amdt.?

HELD: Yes, the Govt.'s activities in electronically listening to and recording D's words violated the privacy upon which he justifiably relied while using the phone booth and thus constituted a "search and seizure" within the meaning of the 4th Amdt.

- **i.** "Constitutionally protected" area is not necessarily the correct solution because *the Constitution protects people, not places*
- **ii.** <u>No longer need penetration</u>: The reach of the 4th Amdt. cannot turn upon the presence or absence of a physical intrusion into any given enclosure
  - **a)** Property interests no longer control the right of the Govt. to search or seize
  - **b)** 4th Amdt. also applies to recording statements even without technical trespass
- **iii.** <u>Twofold Test for 4th Amdt. Protection (Harlan)</u>:
  - **a)** (1) The person has exhibited an actual, subjective expectation of privacy; AND
  - **b)** (2) The expectation be one that society is prepared to recognize as "reasonable."
- **iv. Extension of *Katz*:** *Katz* has been extended to prohibit *wiretapping* without a warrant

D. False-Friend Rule

- **i. *United States v. White*:** Does the 4th Amdt. bar testimony of govt. agents who related certain conversations that occurred between D and an informant, which agents overheard by monitoring a radio transmitter carried by the informant and concealed on his person?

  HELD: No.
  - **a)** Simultaneously transmitting/recording the conversation does *not* violate 4th Amdt. rights because it's no different than a CI writing down the conversation immediately afterward
  - **b)** No constitutional protection once D has chosen to confide in a person, regardless of whether they turn out be an informant
  - **c)** Recording actually benefits D in that it makes the testimony more accurate
- **ii. False-Friend Rule:** If person *A* says something to person *B*, *B* can "chose" to turn that info over to the police
  - **a)** *A* has "given" *B* the statement, and now *B* can do whatever he wants with it
  - **b)** No constitutionally protected expectation that *B* will not reveal the info to police
  - **c)** "Rat testimony" is NEVER a 4th Amdt. problem

E. Inside/Outside Doctrine

i. ***Smith v. Maryland*:** Was the installation of a pen register on D's phone line, which recorded only the numbers dialed on the phone and not the contents of the conversations, without a warrant a "search" against which D was protected by the 4th Amdt.?
HELD: No, D had no actual expectation of privacy in the phone numbers he dialed, and even if he did, his expectation was not "legitimate."
   a) No legitimate expectation of privacy: General public does not have an actual expectation that numbers they dial on their phone lines will be kept secret
      - People know that numbers they dial may be recorded by the phone company because they show up on long-distance bills
      - People know that pen registers may be used to identify people making annoying or obscene calls
   b) Immaterial that D dialed the numbers in his *home* because the site of the call only goes to show that D intended to keep the *contents* of the calls private, not the numbers
   c) Voluntarily conveyed the numbers to the phone company
   d) Justice Marshall Dissent: By its terms, the constitutional prohibition against unreasonable searches and seizures assigns to the judiciary some *prescriptive* responsibility

ii. *Smith* stands for the **Inside/Outside Doctrine**
   a) *Inside* information = content = protected
      - Contents of call
      - Contents of letter
      - Contents of email (*Warshak*)?
   b) *Outside* information = meaningful info about conversation, but not content = not protected
      - Numbers dialed
      - Envelope information
      - Location of phone (GPS data) – not yet decided by SCOTUS

F. Overflights

i. ***California v. Ciraolo*:** Did police violate D's 4th Amdt. protection against warrantless searches when they flew over D's house at 1000 feet and observed marijuana plants growing in his yard only because police could not see them from the ground due to D's 2 fences erected there?
HELD: NO, the 4th Amdt. does not require that police traveling in the public airways at 1000 feet need obtain a warrant in order to observe what is *visible to the naked eye*.
   a) Subjective expectation of privacy exhibited: By erecting the 2 fences, D manifested his actual, subjective expectation of privacy for his backyard
   b) Within curtilage: Close nexus of yard to home means that it was encompassed within the curtilage
   c) But not barred from police observation: What a person *knowingly exposes to the public*, even in his own home or office, is not a subject of 4th Amdt. protection
      - Any member of the flying public could look down from public airspace and see the plants growing
      - Not a reasonable expectation of privacy that society is prepared to honor

ii. **Rule:** Overflights do NOT violate one's 4th Amdt. rights; no warrant needed (but see limits on technology)
   a) Practical concern: Police would constantly have to shield themselves from observing what's on the ground when in the sky
   b) Police can stand in a public place and observe details of private property

G. Searches of Effects

i. ***Bond v. United States*:** Is it a 4th Amdt. unreasonable search when a border patrol agent squeezes hard a passenger's soft-sided carry-on bag that is located in the overhead bin above the passenger's seat and feels a brick-like object inside the bag?
HELD: Yes.
   a) Bag = "effect": Bag protected by the 4th Amdt. even though it was not on D's person
   b) Physical invasion = intrusion: Tactile observation is physically invasive inspection that is simply more intrusive than purely visible inspection like in *Ciraolo*
   c) 4th Amdt. search analysis:

- Opaque bag = subjective expectation of privacy
- Reasonable because he did not expect other passengers to feel the bag in an exploratory manner

d) Justice Breyer Dissent:
- One's privacy expectation must be against everyone, not just govt. agents
- One cannot reasonably expect privacy of objects that *he knowingly exposes to the public*

e) Test: What is the general level of tactile manipulation a person can expect from putting his bag in a public space (e.g., overhead bin)?

H. High-Tech "Searches"

i. ***Kyllo v. United States*****:** Is the use of a thermal imager to detect the heat output of a house in order to determine if high-intensity lights are being used to grow marijuana an unconstitutional search if such details are not available otherwise without physical intrusion into the home?
HELD: Yes, the surveillance is a "search" and is presumptively unreasonable without a warrant when the govt. uses a ***device that is not in general public use*** to explore details of the home that would previously have been unknowable without physical intrusion.

a) *Silverman*: At the very core of the 4th Amdt. stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusions

b) Was a search: Obtaining info through sense-enhancing technology that is *not in general public use* that could not otherwise be obtained without physical intrusion is a search because there is a minimum expectation of privacy that exists inside the home
- More than just naked-eye visual observation as in *Ciraolo*
- Off-the-wall surveillance was not allowed in *Katz*

c) Bright-Line Test: The 4th Amdt. draws a firm, bright line at the entrance to the home in determining when a warrant is required for a search

d) But, a sensitive-handed agent on the street feeling the outside of the walls would NOT be a search

I. Email = Reasonable Expectation of Privacy?

i. ***United States v. Warshak*****:** Does an individual have a reasonable expectation of privacy for the contents of his emails such that the Govt. must obtain a warrant to search and seize them?
Yes.

a) Subjective expectation of privacy: Satisfied because of the private nature of communications

b) Reasonable: Given the fundamental similarities between phone calls/mail and email, it would be unreasonable to afford emails lesser 4th Amdt. protection
- Phone calls and mail have waned in importance and email has replaced them

II. PROBABLE CAUSE REQUIREMENT

A. Probable Cause to Arrest: Exists where the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that *an offense has been or is being committed by the person to be arrested*

i. Requires a certain likelihood that:

a) (1) The particular individual

b) (2) Has committed or is committing a particular offense

B. Probable Cause to Search: Exists where the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that *an item subject to seizure will be found in the place to be searched*

i. Requires a certain likelihood that:

a) (1) Something that is subject to seizure by the govt., i.e., contraband or fruits, instrumentalities, or evidence of a crime

b) (2) Is presently
- Must have *current* information
- Subject to challenge if too *stale*

c) (3) In the specific place to be searched

C. Anonymous Tips (Hearsay from informants can be the basis of PC)

i. ***Draper v. United States*:** Officers had PC to arrest Draper when they received a tip from a known informant that Draper would be bringing heroin back from his trip, and all of the informant's information matched Draper's description.

ii. ***Spinelli v. United States*:** Was there PC for a warrant when the affidavit contained an informant's tip that did not provide information to support its reliability nor did it provide the underlying circumstances which led to the conclusion in the tip?
HELD: No, the tip was not a sufficient basis for a finding of PC.
   a) *Aguilar*: Hearsay information from a CI can establish PC:
      - (1) Application must set forth some "underlying circumstances" necessary to enable the magistrate independently to judge the validity of the informant's conclusion
      - (2) Must support that the CI is "credible" or that the info is "reliable"

iii. ***Illinois v. Gates*:** Is an anonymous tip via a letter that does not include info about where the tipster acquired the info nor about his credibility still a sufficient basis for determining that there is PC to search D's house?
HELD: Yes, but only because the *Aguilar-Spinelli* test is out (in theory)
   a) Abandon rigid *Aguilar-Spinelli* test: The 2 elements of the test are highly relevant in determining the value of the tip, but they are not separate and independent
   b) Totality of the Circumstances Analysis: The issuing magistrate must make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis for knowledge" of persons supplying hearsay info, there is a ***fair probability*** that contraband or evidence of a crime will be found in a particular place
      - PC deals with probabilities and is not technical
      - Rigid rules are not suited for tips because warrants are issued on a nontechnical, common-sense judgment of PC
      - Even if there is some doubt about an informant's motives, his explicit and detailed description of alleged wrongdoing along with a statement that the event was observed first-hand entitles the tip to greater weight

D. Motive Immaterial with Probable Cause

i. ***Whren v. United States*:** Is the temporary detention of a motorist who police have PC to believe has committed a civil traffic violation inconsistent with the 4th Amdt.'s protection against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws?
HELD: No, PC justifies a search or seizure.
   a) Motive immaterial: Some ulterior motive of the officers cannot invalidate police conduct so long as there was a justifiable basis for PC to believe that a violation of law had occurred
      - Does NOT matter that arrest was a *pretext* to search
   b) Reasonableness of 4th Amdt. not concerned with intent
   c) Hypothecating about the reasonable officer would essentially subjectify the test

III. WARRRANT REQUIREMENT

A. 4th Amdt. Warrant Requirements:

i. PC supported by oath or affirmation

ii. Particularly describe the place to be searched and the person or things to be seized

B. Searches of Persons, Houses, Papers, & Effects

i. ***Johnson v. United States*:** Did a police officer violate D's 4th Amdt. rights by searching her hotel room without a warrant after the officer smelled a strong odor of burning opium and then knocked at the door and D let him in?
HELD: Yes.
   a) *Taylor v. United States*: Odors alone do NOT authorize a warrantless search
   b) No question that there was PC to obtain a warrant
   c) But the 4th Amdt. requires that the usual inferences which reasonable men draw from evidence be drawn by a *neutral and detached magistrate* instead of being judged by the officer engaged in the

often competitive enterprise of ferreting out crime

ii. ***Katz*:** Warrantless searches are *per se* unreasonable

C. Seizures of Persons

i. ***United States v. Watson*:** Did an officer violate D's 4th Amdt. rights when he made an arrest without a warrant in a public place after believing that D was in possession of stolen credit cards?
HELD: No, officers have the right to arrest in public without a warrant so long as they have PC.

a) Carroll v. United States: Usual rule is that a police officer may arrest without a warrant one believed by the officer upon probable cause to have been guilty of a felony

b) Arrest was valid because the officer had PC to believe that D had committed a felony

c) Never required a warrant to make an arrest for a felony so long as there's PC

- Officers may still seek warrants where practicable to do so

ii. **Arrest Location:**

a) Public place = don't need a warrant (*Watson*)

b) Private place = need a warrant (*Payton*)

iii. ***County of Riverside v. McLaughlin*:** PC determination made within 48 hours of arrest ordinarily will comply with promptness requirement

iv. ***Atwater v. City of Lago Vista*:** Does the 4th Amdt. prohibit a warrantless arrest for a minor criminal offense such as a misdemeanor seatbelt violation punishable only by a fine?
HELD: No, if an officer has PC to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the 4th Amdt., arrest the offender.

a) Warrantless arrests have been a part of Anglo-American jurisprudence for hundreds of years

b) No difference between fine-only and jailable offenses

- Impossible sometimes for an officer to know the penalty scheme in the field

c) No question that officer had PC to arrest

v. ***Virginia v. Moore*:** Did a police officer violate the 4th Amdt. when he arrested D based on PC to believe that D had broken the law, but state law prohibited arrest for this particular misdemeanor?
HELD: No, warrantless arrest for *any* crimes committed in the presence of an arresting officer are reasonable under the 4th Amdt., and state law requirements in addition do not alter the 4th Amdt.'s requirements.

a) When an officer has PC to believe that one has committed even a minor offense in his presence, the balance of public and private interests is not in doubt, and the arrest is reasonable

b) States can impose greater protections, but that does not affect the 4th Amdt.

D. Issuance, Content, & Execution of Warrants

i. ***United States v. Grubbs*:** Is an anticipatory search warrant invalid because the property owner was not given the affidavit that contained the condition precedent to the warrant taking effect along with the copy of the warrant?
HELD: No, property owners needn't receive the warrant at all.

a) Anticipatory search warrant: A warrant based upon an affidavit showing PC that at some *future time* (but not presently) certain evidence will be located at a specific place

- Usually subject to a condition precedent called a "triggering condition" other than the passage of time

b) All warrants are in a sense anticipatory

c) Particularity requirement only requires particularity in the places to be searched or the things to be seized – nothing more

d) Triggering condition needn't be in warrant because the warrant doesn't have to set forth the magistrate's basis for finding PC

ii. **Problem:** Anticipatory warrant with location "to be identified by Trooper Sullivan prior to execution of the warrant"

a) Location is NOT specific enough – otherwise it's a general warrant

b) Magistrate has to know *exact* location *before* the search begins

iii. **Problem:** Scope of warrant: "the persons and vehicles of any other subjects at the residence after the

signing of the search warrant"

a) Not particular enough – need to know exactly which cars/people

b) No PC to believe that every person/vehicle at the residence has drugs in them

iv. ***Groh v. Ramirez*: *EXAM*** *Search* warrant issued by magistrate was properly based on PC but the warrant *did not cross-reference* the supporting affidavit containing description of contraband to be seized

v. ***Maryland v. Garrison*:** A reasonable mistake about the place to be searched will not invalidate a warrant

a) Need to allow some latitude in executing warrants

vi. Neutral & Detached Magistrate: Not within the text of the 4th Amdt. but required nonetheless

a) Must *not* receive quid pro quo compensation for issuing warrants

b) Must be capable of determining whether PC exists (clerks probably OK)

vii. Knock & Announce Rule

a) ***Wilson v. Arkansas*:** Does an officer have to knock and announce his presence before kicking in a door to a house for which he has a valid search or arrest warrant?
HELD: Maybe – K&A is a factor in the reasonableness requirement.

- In some circumstances an officer's unannounced entry into a home might be unreasonable under the 4th Amdt.
- Exceptions:
  - Under circumstances presenting a threat of physical violence
  - Where officers are apprehending an escaped prisoner
  - Where officers have reason to believe that evidence would be likely destroyed if advance notice is given
- NO suppression remedy for K&A violations

b) ***Richards v. Wisconsin*:** Categorical exception to the K&A rule for felony drug investigations is too broad

c) ***United States v. Ramirez*:** Excessive or unnecessary destruction of property in the course of a search may violate the 4th Amdt. even though the entry itself is lawful and the fruits of the search are not subject to suppression (claim for damages)

d) ***United States v. Banks*:** Kicking down a door after waiting 15 to 20 seconds after knocking is not unreasonable

viii. ***Wilson v. Layne*:** It is a violation of the 4th Amdt. for police to bring members of the media or other 3rd parties into a home during the execution of a warrant when the presence of the 3rd parties is not needed

IV. REASONABLE SEARCHES WITHOUT WARRANTS

A. Searches Incident to Arrest

i. Of Immediate Area

a) ***Chimel v. California*:** Did a search of D's entire house including closed desk drawers following his valid arrest amount to an unreasonable search under the 4th Amdt.?
HELD: Yes, the search was unreasonable because it far exceeded D's person and immediate area.

- When an arrest is made, it is reasonable for the arresting officer to search the person arrested for ***weapons*** and ***evidence*** and the area "within his immediate control," i.e., the area into which an arrestee might reach in order to grab a weapon or evidentiary items
- **Wingspan Rule:** Reasonable search incident to arrest must be within the area into which a person might reach

ii. Of Person

a) ***United States v. Robinson*:** Was a search of a crumpled up cigarette pack in D's pocket following D's lawful arrest justifiable as a search incident to arrest?
HELD: Yes, in the case of lawful custodial arrest, a full search of the person is not only an exception to the warrant requirement, but it is also a reasonable search under it.

- Searches incident to arrest are justified by needing to protect officers against concealed weapons and to preserve evidence on an arrestee's person for trial

- Immaterial that the officer has no PC to believe that D has drugs on his person
- Doesn't extend to body cavities, however
- Purses are generally included

iii. Of Vehicle

a) ***New York v. Belton*****:** May a police officer search the passenger compartment of a vehicle and containers inside it without a warrant as incident to a valid arrest of its occupants?
HELD: Yes, when a police officer has made a lawful custodial arrest of the occupant of a vehicle, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that vehicle.
- Bright-Line Test: Officers may search the entire passenger compartment including closed containers because they are necessarily within the reach of the occupants
- However, after *Gant, Belton* is limited to its facts, i.e., where the arrestees are not handcuffed and could conceivably reach into the vehicle

b) ***Arizona v. Gant*****:** May a police officer properly search the passenger compartment of a vehicle and its contents as a warrantless search incident to arrest if the arrestees are secured and cannot possibly reach any of the contents of the vehicle?
HELD: No, the police are authorized to search a vehicle incident to a recent occupant's arrest *only* when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.
- Exception: When it is reasonable to believe that evidence *relevant to the crime of arrest* might be found in the vehicle, a search incident to arrest of the vehicle is justified
  - Not just mere traffic violations, however

iv. ***Payton v. New York*****:** May a police officer enter a private residence without a warrant and with force if necessary in order to make a routine felony arrest, even if allowed by state law?
HELD: No.

a) Absent exigent circumstances, a warrantless entry into a home to search for weapons or contraband is unconstitutional even when a felony has been committed and there is PC to believe that incriminating evidence will be found therein
- PC determination must be made by neutral and detached magistrate

b) Need a warrant to arrest in the home (without exigent circumstances)

c) *Watson* only allows warrantless arrests in *public* places (e.g., right outside one's door)

B. Exigent Circumstances – Have a good answer to: Why didn't you get a warrant?

i. Hot Pursuit

a) ***Warden, Maryland Penitentiary v. Hayden*****:** Is a comprehensive search of a residence without a warrant a violation of the 4th Amdt. if an armed robbery had just occurred and police received a tip that the alleged robber had just entered the house in question?
HELD: No, the exigencies of the situation made the warrantless search for the robber and weapons imperative.
- The 4th Amdt. does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others
- Thorough search was necessary to find any weapons or evidence

b) ***Welsh v. Wisconsin*****:** Unreasonable warrantless search of D's home when the underlying offense was extremely minor

c) ***Brigham City, Utah v. Stuart*****:** The need to protect persons who are seriously injured or threatened with such injury inside a house justifies a warrantless entry

ii. ***Vale v. Louisiana*****:** May police officers search a house as incident to arrest if D was arrested outside the house on the front steps for allegedly selling narcotics?
HELD: No.

a) For a search incident to arrest of a home to be valid, the arrest must occur *inside* the home, not outside

b) An arrest on the street can't provide its own exigent circumstance to justify a warrantless search of the arrestee's house

iii. ***Illinois v. McArthur*****:** Warrantless seizure of the premises (i.e., not allowing D back into the trailer until the warrant was issued) was not per se unreasonable because the restraint was tailored to the need

a) Since the officer didn't enter, the intrusion upon the privacy interest was relatively minor and outweighed by the law enforcement interest at stake

b) Doorway is a public place

iv. ***Steagald v. United States*****:** Police have a valid arrest warrant for D, but he's not in his own home. Arrest warrant will allow officers to forcibly enter D's own home but NOT someone else's home.

a) Police forcibly enter the 3rd party's home without a warrant and find contraband = evidence is suppressed

v. ***Pearson*****:** Undercover agent identifying himself to create exigent circumstances is not valid

C. Vehicle & Container Searches

i. Vehicle Searches Based on PC

a) ***Chambers v. Maroney*****:** Is a warrantless seizure of a vehicle unreasonable under the 4th Amdt. if officers had PC to believe that the fruits & instrumentalities of crime would be found inside?
HELD: No, there is no constitutional difference between a warrantless search of the vehicle and a warrantless seizure (both are valid under the 4th Amdt. with PC).

- Cars are moveable, so if a search is to be done, it must be done immediately or risk losing the F&I of crime
  - Need PC to believe that the F&I of crime will be found inside, however
- Reason for exception: If the police had to get a search warrant, they'd have to seize the car so that it wouldn't be lost. However, that seizure without a warrant would be a violation of the 4th Amdt. = catch-22
  - (1) Mobility of automobiles
  - (2) Lessened expectation of privacy due to pervasive regulation
- **Vehicle Searches:** PC = Search
  - May search entire vehicle, including trunk
- **Rare Exception:** Police see a person put a paper bag in the trunk that they have PC to believe contains drugs, but they know the rest of the car is clean.
  - Thus, PC to search bag ONLY
  - CANNOT search the rest of the car – just the container

b) ***State v. Wallace*****:** Positive dog sniff alerting to a car gives PC to search the car but does NOT give PC to search the passengers in the vehicle. The officer *can* have the dog sniff the passengers, however, and that won't be a search.

c) ***California v. Carney*****:** Is a warrantless search of a fully-mobile motor home reasonable under the vehicle exception to the 4th Amdt. warrant requirement if the officers have PC to believe that the F&I of crime will be found inside?
HELD: Yes.

- Motor homes are mobile and readily moveable, so the *Carroll* exception applies
- Immaterial that the motor home may be used as a residence
- **Factors if Not Mobile: *EXAM***
  - Location (on private property not readily accessible to public road)
  - Mobility (up on blocks, tires flat/missing)
  - License plate
  - Connected to utilities
- **Attacking Exception:** To attack vehicle exception, need to attack either prong: mobility or lessened expectation of privacy

d) ***Wyoming v. Houghton*****:** Where there's PC to search a vehicle, the automobile exception permits the warrantless search of a *passenger's* personal belongings, even if he's not suspected of criminal

activity
- Exception: Can't search personal belongings if they're directly connected with the individual

e) ***California v. Acevedo*****:** Does the 4th Amdt. require the police to obtain a warrant to open a paper bag in a moveable vehicle simply because they lack PC to search the entire car?
HELD: No, the police may search an automobile and the containers within it where they have PC to believe contraband or evidence is contained.
- If there's PC to believe that the vehicle contains contraband, the police may search the entire vehicle + any closed containers therein
  - HOWEVER, if there's only PC to search containers, police CANNOT search the whole car

f) Problem: Police had PC to believe that a car contained heroin so they seized it. However, the search became *unreasonable* because they searched the car 10 times without a warrant.
- You only get 1 shot

ii. Container Searches

a) ***United States v. Chadwick*****:** Is a warrantless search of a footlocker that the police have PC to believe contains the F&I of crime valid under the 4th Amdt. if it has been seized by police and under their exclusive control?
HELD: No, the footlocker is protected by the 4th Amdt. Warrant Clause, so it may only be searched with a warrant or under exigent circumstances.
- Expectation of privacy manifested by locking the footlocker
- Just because it's mobile doesn't mean it falls under vehicle exception because luggage is intended as a repository of personal effects
- Not incident to arrest because the search was remote in time and place from the arrest
  - No danger that the arrestee might gain access to it
- **Hypo:** If police had arrested the individuals on the sidewalk before the footlocker was loaded into the car, the police would need a warrant to search it
  - Unless it was abandoned, then police cannot search without a warrant

b) ***Hawkins v. State*****:** (Not SCOTUS) Is a cell phone similar enough to a "container" such that an officer may reasonably search it without a warrant as a contemporaneous incident to a lawful arrest?
Yes.
- Cell phone is roughly analogous to a "container" in that it can be opened during a search incident to arrest
- Officer had every reason to believe that evidence of the crime of arrest in the form of text messages would be found in the vehicle and in the "container," i.e., the cell phone

D. Inventory Searches

i. ***South Dakota v. Opperman*****:** Was a standard inventory search of the contents of a car that was impounded for multiple parking violations unreasonable under the 4th Amdt. if officers found marijuana in the glove box?
HELD: No, in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not "unreasonable" under the 4th Amdt.

a) Reasons for inventorying contents:
- Protection of owner's property while in police custody
- Protection of police against claims or disputes over lost or stolen property
- Protection of the police from potential danger

b) Police were engaged in a *caretaking search* of a lawfully impounded vehicle, so it was reasonable

c) No suggestion that it was a pretext for concealing an investigatory police motive

d) Question: Was the inventory search done pursuant to the justification in *Opperman*, i.e., caretaking?
- If yes, then valid
- If no, then not valid

ii. ***Illinois v. Lafayette*****:** Was it unreasonable under the 4th Amdt. for an officer to search the contents of D's

shoulder bag upon arresting him and before incarcerating him if the officer found contraband inside?
HELD: No, it is not unreasonable for police, as part of the routine procedure incident to incarcerating an arrestee, to search any container or article in his possession in accordance with established inventory procedures.

a) What would be impracticable or unreasonable on the street as far as searching can more readily and privately be performed at the police station
- Don't need a warrant or PC

b) Reasonableness doesn't depend on there being less intrusive alternatives

iii. ***Colorado v. Bertine*****:** Was it unreasonable under the 4th Amdt. for an officer to open a backpack and the containers inside that was inside a van the officer was lawfully impounding pursuant to an arrest?
HELD: No, reasonable police regulations relating to inventory procedures administered in good faith satisfy the 4th Amdt. even though in hindsight courts might be able to devise equally reasonable rules.

a) Same govt. interests as *Opperman* and *Lafayette*

b) Valid exercise of *discretion* – doesn't matter what could have been done instead

iv. ***Florida v. Wells*****:** An inventory search of a locked suitcase found in the trunk of an impounded vehicle *did* violate the 4th Amdt. because highway patrol had no policy with respect to the opening of closed containers encountered during an inventory search.

a) Police dept. must have an inventory policy or else it's NOT an inventory search (*Wells*)

b) Pretext can be shown only if outside the scope defined by the policy
- Inventory searches can't be used as a ruse for general rummaging (*Whren*)

c) EXAM: No written policy. Maybe ask sheriff to testify about policies

E. Consent Searches

i. Showing Required

a) ***Schneckloth v. Bustamonte*****:** Must an individual be advised of his right to refuse consent to a search requested by police in order to be reasonable under the 4th Amdt.?
HELD: No, the prosecution must only show that the consent was in fact voluntarily given and not the result of duress or coercion, express or implied.
- It would be too burdensome to have to prove knowledge of the right to refuse consent
- Knowing and intelligent waivers are required to preserve fair trials, but 4th Amdt. protections are entirely different
- Holding: When a subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the 4th Amdt. requires that the consent was in fact ***voluntarily given*** and not the result of ***duress*** or ***coercion***, express or implied.
  - Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of the right to refuse is a factor, the prosecution needn't demonstrate knowledge of this right.

b) ***United States v. Watson*****:** The prosecution doesn't have to prove knowledge of the right to refuse consent even when an individual is in custody

c) ***Ohio v. Robinette*****:** 4th Amdt. doesn't require that a person who was lawfully seized be advised that he is free to go before consent to search will be recognized as voluntary

d) ***Florida v. Jimeno*****:** Scope of consent search is governed by a standard of objective reasonableness
- What would a reasonable person have understood by the exchange between the officer and the suspect?

ii. 3rd Party Consent

a) ***United States v. Matlock*****:** Was the government's showing of 3rd party consent to search the premises constitutionally sufficient to render the evidence found therein admissible at trial?
HELD: Yes.
- Prosecution may justify a warrantless search by proof of voluntary consent obtained from a 3rd party who possessed "common authority" over or other sufficient relationship to the premises and effects sought to be inspected
  - Sufficiency of consent rests on *mutual use* of the property by persons generally having *joint*

access or control for most purposes so that it is reasonable to recognize that any of the co-inhabitants has the right to permit inspection in his own right

b) ***Georgia v. Randolph*****:** May police conduct a search consented to by a 3rd party if another cotenant is present and objects to the search?
HELD: No, a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.
- There is NO common understanding that one cotenant generally has a right or authority to prevail over the express wishes of another
- The consent of one does not counter the force of the objecting individual's claim to security from governmental intrusions
- Refusal has no bearing on *exigent circumstances*, however (e.g., DV)

c) ***Illinois v. Rodriguez*****:** Does an officer's mistaken but objectively reasonable belief that a person has "common authority" to consent to a search of a residence render the search unreasonable if the person in fact does not live there but had a key?
HELD: No.
- 4th Amdt. guarantees an individual that no search will be unreasonable, not that the judgment of govt. officials will always be correct
  - If an official's determination later turns out to be incorrect, that is just one of the inconveniences that one must suffer for living in a safe society
  - Some room allowed for mistakes
- Determination of consent must be judged by an ***objective standard***

F. "Plain View" Doctrine

i. ***Horton v. California*****:** Is the warrantless seizure of evidence of crime in plain view prohibited by the 4th Amdt. if the discovery was not inadvertent?
HELD: No, even though inadvertence is characteristic of most legitimate "plain view" seizures, it is not a necessary condition.

a) Plain View Doctrine: Justifies the warrantless *seizure* of evidence in plain view, but NOT a search because something in plain view is not searched
- Warrantless *searches* are still per se unreasonable (*Katz*)

b) Additional requirements for plain view doctrine:
- The incriminating character must be "immediately apparent"
- Officer must be lawfully located in the place from which the object can be plainly seen and must have a lawful right of access to the object itself

c) No requirement of inadvertence because evenhanded law enforcement is best achieved through objective standards of conduct rather then depending on the officers' states of mind

d) "Particularity" concerns are eschewed by the issuance of the warrant that ipso facto must be particular

ii. ***Arizona v. Hicks*****:** May police conduct a "search" greater than a cursory examination of an item found in plain view during a lawful search of the premises in order to find out more information about the item?
HELD: No, not unless police have probable cause to search the item.

a) Recording the serial number off of a radio was a "search" because the officer was not able to see the serial number without turning the radio over

b) Need probable cause in order to search an item found in plain view
- PVD is a matter of convenience for the officers but it does not obviate the underlying PC requirement

iii. Plain View Computer Searches

a) ***United States v. Comprehensive Drug Testing*****:** May the govt. lawfully seize electronic information that is comingled with information for which it does not have a warrant to seize if the govt. did not follow the warrant's requirements in segregating the data?

No.

- Govt. violated the express terms of the warrant itself and therefore the evidence must be suppressed
- Problem: Search warrant authorizes a search and seizure of one particular file, but in order to find that file, an agent has to review every single file
  - Thus, everything comes into "plain view"
  - But what's the "lawful position" here?:
    - At the computer OR
    - Searching the file authorized by the warrant only
  - Solution: Have 3rd party search every file and only turn over what's responsive to the warrant
- Kozinski guidance: (*Was* majority opinion, but moved to concurrence in revised opinion in 2010)
  (1) No plain view in computer searches
  (2) Segregate/redact
  (3) Warrants must disclose risks and other venues (where else trying to get data)
  (4) Narrowly targeted search protocol/no browsing by case agent
  (5) Destroy/return data and storage devices
- State of the Law?: Uncertain – so describe the situation

V. BALANCING APPROACH TO 4TH AMENDMENT REASONABLENESS

A. Stops, Frisks, & the Right to Be Secure in One's Person, Houses, & Effects

i. Constitutional Doctrine

a) ***Terry v. Ohio*****:** Is it always unreasonable for a police officer to seize a person and subject him to a limited search for weapons unless there is PC for an arrest?
HELD: No, where a police officer observes unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity is afoot and that the persons with whom he is dealing may be armed and presently dangerous, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons to discover weapons.

- Seizure: When an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen
- Balancing approach: Police conduct under certain circumstances is not conducive to the warrant requirement because swift actions and on-the-spot observations are necessary
  - Balance the need to search/seize against the intrusion of the constitutionally protected interests of the private citizens
- Stop and frisk = search & seizure
- Police undoubtedly have a legitimate interest in crime prevention and detection that justify them in approaching someone and making inquiries
- There is an immediate interest of the police in taking steps to assure himself that the person with whom he's dealing is not armed
  - When an officer is justified in believing that the individual is armed and presently dangerous, it is only reasonable that he be able to take the necessary measures to neutralize any threat
  - Police must be able to point to specific and articulable facts which, taken together with rational inferences drawn from them, reasonably warrant the intrusion
- Standard: REASONABLE SUSPICION – a reasonably prudent person would perceive danger in the situation
- Justification is *solely* officer safety, so it may be a search for weapons *only*

b) ***Dunaway v. New York*****:** Did the police violate the 4th Amdt.'s prohibition against unreasonable seizures when they requested that D accompany them to the station in a police car for interrogation and would have used force if necessary to restrain him but he was not under a technical "arrest?"
HELD: Yes, the detention of D was indistinguishable from a traditional arrest.

- No question that D was involuntarily taken to the station and thus was "seized"
- Case doesn't fall within the narrow scope of *Terry*

- The detention was indistinguishable from an arrest in many ways
- Bright-line rule is that if it's a *Terry* stop, can't bring a person to the police station
  - Stop must be brief
  - Can handcuff someone and fingerprint on the scene, however
- *Terry* stop can be done of anyone that the officers have reasonable suspicion to be involved in a crime
  - Physical patdown only comes when the officers believe that the person is armed and dangerous
- Holding on to someone beyond the brief time reasonably necessary to conduct the investigation is an unreasonable seizure

ii. Seizures of Persons

a) ***United States v. Mendenhall*****:** Was an airline passenger "seized" under the 4th Amdt. when 2 DEA agents confronted her upon deplaning and asked her for her ticket and ID and then asked if she would accompany them to an office for further questioning?
HELD: No.
- No objective reason for D to believe that she was not free to end the conversation and proceed on her way
- Totality of the circumstances shows that D voluntarily consented to accompanying the agents to the office
- Test: Whether a *reasonable person* under the circumstances would feel free to terminate the encounter and go about his business
  - Almost immaterial whether the *particular person* felt so able

b) ***Florida v. Royer*****:** D was "seized" when agents asked him to go to the office while retaining his ticket and ID
- "Arrest" is governed by an *objective* standard, so the A/O's subjective intention and the mindset of the suspect are immaterial

c) ***Michigan v. Chesternut*****:** Not seized when a marked police car followed a man running on the side of the road (no sirens used or commands to stop)

d) ***Florida v. Bostick*****:** Is a categorical per se rule that an impermissible "seizure" results when the police mount a drug sweep on a bus during a scheduled stop and question boarded passengers without articulable suspicion for doing so and thereby obtain consent to search the passengers' bags consistent with the 4th Amdt.?
HELD: No.
- *No seizure* results when the police ask questions of an individual, ask to examine the individual's ID, and request consent to search his luggage so long as the officers don't convey a message that compliance is required
- Standard: Standard is whether a reasonable person would *feel free to decline the officers' requests or otherwise terminate the encounter*
  - "Reasonable person" = reasonable *innocent* person
  - Basically the officers need to point a gun at someone to vitiate consent
  - Immaterial that a person cannot leave the bus
- Basically all bus sweeps will be upheld, but it's a fact-specific inquiry

e) ***California v. Hodari D.*****:** Was a fleeing suspect "seized" when a police officer was right behind him chasing him but had not yet had physical contact with the suspect?
HELD: No, an arrest requires either physical force or submission to the assertion of authority.
- Physical force is needed (or submission to assertion of authority)
- *Mendenhall* test (not feeling free to terminate the encounter) is only a *necessary*, not a sufficient, condition of a seizure effected through a show of authority

f) ***United States v. Pratt*****:** (8th Cir.) When probable cause to arrest exists, the standard for determining whether an arrest has occurred is the same as that for determining whether a seizure has occurred.

- Seizure under *Hodari D.* + PC = ARREST

g) *Brendlin v. California*: Unanimous Supreme Court held that a passenger in a car was "seized" when the car was stopped by the police in order to verify a permit
- Any reasonable passenger would understand that he was not free to depart without police permission

iii. Showing Need for "Stop & Frisk"

a) *Illinois v. Wardlow*: May a police officer perform a *Terry* stop when he sees an individual flee from the scene when the police drive by a high-crime area?
HELD: Yes.
- High-crime area + Flight = Reasonable suspicion
- Flight is not "going about one's business"

b) *Alabama v. White*: Did an officer have reasonable suspicion sufficient to justify a *Terry* stop when the police received an anonymous tip that D would be carrying cocaine and not all of the information in the tip checked out?
HELD: Yes.
- The anonymous tip alone didn't provide reasonable suspicion
- Subsequent corroboration of some info in the tip did provide the officers with reasonable suspicion, however
- Anonymous tip + Official corroboration = Reasonable suspicion (but not always)

c) *Florida v. J.L.*: Did officers have reasonable suspicion to believe that D would be carrying a gun when they received an anonymous tip that a young, black male in a plaid shirt at a certain bus stop was carrying a gun?
HELD: No, an anonymous tip lacking indicia of reliability of the kind contemplated in *White* does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.
- No moderate indicia of reliability like in *White*
- Reasonable suspicion requires that a tip be *reliable in its assertion of illegality*, not just in its tendency to identify a determinate person
  - No per se exception for firearms (maybe bombs?)
- Anonymous tip (without more) ≠ Reasonable suspicion

iv. Permissible Scope of Stops, Frisks, & Sweeps

a) *Hayes v. Florida*: May the police take a suspect to the police station for the purpose of fingerprinting the individual if they do not have PC to make an arrest but they do have reasonable suspicion?
HELD: No.
- A line is crossed when the police without PC or a warrant forcibly remove a person from his home or other place and transport him to the police station where he is detained, although briefly, for investigative purposes
- Brief detention in the field for fingerprinting would be OK, however

b) *United States v. Sharpe*: Was it unreasonable for officers to detain a truck for 20 minutes that they suspected was carrying marijuana while the officers tried to pull over another vehicle?
HELD: No.
- No bright-line test for brevity – have to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes
- In assessing length, it is appropriate to examine whether the police *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 D

c) *United States v. Montoya de Hernandez*: A 16-hour detention of a suspected drug smuggler in order to wait for her bowel movement was not unreasonable
- Can't detect alimentary smuggling in the usual brief time allowed for a *Terry* stop

d) *Hiibel v. 6th Judicial District Court of Nevada*: A state law requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with the 4th Amdt.

e) ***United States v. Place*:** Is a 90-minute detention of a traveler's luggage in order to subject the bag to a dog sniff an unreasonable seizure under the 4th Amdt. if it was part of a *Terry* stop?
HELD: Yes.
- A brief seizure of personal property during a *Terry* stop would be so minimally intrusive that it would be justified upon reasonable suspicion
- Canine sniff is not a search (*sui generis*)
- The 90-minute seizure of the luggage *did* exceed the permissible limits of a *Terry* stop of the bags
  - Same limitation that applies to an investigative detention of persons also applies to personal effects
- Can't prolong the *Terry* stop for longer than is reasonably necessary to effectuate the investigation

f) ***Michigan v. Long*:** May a police officer search the passenger compartment of a vehicle for weapons if he reasonably believes that the driver is potentially dangerous?
HELD: Yes, the balancing required by *Terry* clearly weighs in favor of allowing the police to conduct an area search of the passenger compartment to uncover weapons as long as they possess reasonable suspicion.
- *Terry* is not limited to searches of the person only
- A search of a passenger compartment of an automobile, limited to the areas in which a weapon might be hidden, is permissible when the officers possess reasonable suspicion that the suspect is dangerous -- "patdown" of the car
  - If contraband is found during such a search, it needn't be suppressed
- Standard: If an officer has reasonable suspicion that crime is afoot and a reasonable suspicion that the vehicle contains weapons, he can "patdown" the car (can't search locked glove compartment)

g) ***Minnesota v. Dickerson*:** Does the 4th Amdt. permit the seizure of contraband detected through a police officer's sense of touch during a protective patdown if the incriminating character of the contraband is *not* immediately apparent?
HELD: No.
- Plain view doctrine justifies a seizure of contraband found during a *Terry* stop
- If an officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity ***immediately apparent***, the warrantless seizure of it is justified (stems from PVD)

h) ***Maryland v. Buie*:** Is a protective sweep of a house to ensure that there are no persons hidden that could harm officers while effecting an arrest reasonable under the 4th Amdt.?
HELD: Yes, when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene, the police may conduct a "protective sweep."
- Arresting officers are permitted to take reasonable steps to ensure their safety during and after making the arrest
- Need reasonable suspicion to believe that there's an individual hiding there
- May only be a cursory inspection (but PVD does apply)

B. Special Balancing Contexts

i. School Searches

a) ***New Jersey v. T.L.O.*:** Was it unreasonable for a school's vice principal to search the contents of a student's purse twice because he reasonably believed that she was smoking in the lavatory against school rules?
HELD: No.
- 4th Amdt. protections *do* extend to students at school, and school officials carrying out searches are agents of the state at that point
  - Not *in loco parentis*

- NO warrant requirement because it would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed by schools
- Standard: A search of a student by a school official will be justified at its inception when there are *reasonable grounds* for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school
  - Permissible *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
- Analysis:
  - (1) Need a school rule/the law
  - (2) Need some reasonable suspicion to suspect that rule has been violated
  - (3) Balance interests:
    - Intrusiveness of search *with*
    - Seriousness of offense

b) ***Safford Unified School Dist. v. Redding*****:** Seriousness of offense has to be *danger* or have a belief that the individual is hiding contraband in underwear in order to make a student disrobe

ii. Checkpoints

a) ***Michigan Dept. of State Police v. Sitz*****:** Is a highway sobriety checkpoint consistent with the 4th Amdt.'s prohibition on unreasonable seizures?
HELD: Yes.

- Stopping motorists at checkpoints *is a seizure* that invokes the 4th Amdt.
- Govt. interest: Drunk driving is a serious problem
  - Legitimate public emergency
- Private interest: Intrusion bearing on motorists stopped is slight as they are only detained briefly and any concern or fear would be slight
- Balancing: Seizures at checkpoints are *reasonable*
- Analysis:
  - Public safety vs. ordinary law enforcement
  - Impact on public (fear of law-abiding public/inconvenience)
  - Degree of intrusion vs. severity/nature of interest
    - Discretion
    - Marked
    - Briefness/delay
  - Primary purpose (pretext relevant here because no PC/warrant)
- Suspicionless roving stops are NOT permissible

b) ***United States v. Martinez-Fuerte*****:** Highway checkpoints for illegal aliens reasonably near the border are reasonable under the 4th Amdt.

c) ***City of Indianapolis v. Edmond*****:** Is a drug-detection checkpoint on a road violative of the 4th Amdt.?
HELD: Yes.

- Stopping motorists is a *seizure*, but the dog sniffs are not searches (*Place*)
- Since the primary purpose of the checkpoint was ***general crime control***, it violates the 4th Amdt. absent individualized suspicion
- Validity: Purpose of the checkpoint must relate to important interests of policing the borders or ensuring roadway safety

d) ***Illinois v. Lidster*****:** Is a highway checkpoint for information gathering about a crime that had occurred a week earlier unreasonable under the 4th Amdt.?
HELD: No.

- Information-seeking stops don't require individualized suspicion, as police can always approach someone and ask them questions
- *Edmond*-type rule is not needed to prevent the proliferation of these stops as limited resources

and community hostility will control them

- Low degree of intrusiveness:
  - No discretion
  - Marked checkpoint
  - Brief stops
  - No unusual delay
- If the information checkpoint had K9 dogs, that would show the impermissible pretext of general crime control

iii. Drug Testing

a) ***Skinner v. Railway Labor Executives' Association*****:** Is it an unreasonable search of a railroad employee to automatically require him to undergo blood, urine, or breath tests immediately following certain incidents on a railroad in order to determine if he has consumed intoxicants despite lacking individualized suspicion?
HELD: No.

- Testing is a "search," and compelled intrusions into the body do invoke the 4th Amdt.
- No warrant requirement because obtaining a warrant is likely to frustrate the govt.'s interest in protecting against railway calamities
  - Any delay might result in destruction of evidence by the body
- No individualized suspicion needed because the testing procedures only impose slightly upon the employees' expectations of privacy while the govt. interest is compelling
- Justification:
  - Public safety interest of protecting against railway calamities
  - No impact on general public
  - Slight degree of intrusion because employees' freedoms already limited at work

b) ***Ntl. Treasury Employees Union v. Von Raab*****:** Urinalysis of border patrol employees without individualized suspicion was reasonable given the interest in safeguarding the borders and the nature of carrying a gun

c) ***Vernonia School Dist. v. Acton*****:** Suspicionless drug testing of high school and grade school students who wished to participate in interscholastic activities was reasonable because the intrusion in collecting the samples was slight while the govt. interest in deterring drug use was "important enough" to justify the search

d) ***Board of Education of Independent School Dist. v. Earls*****:** Suspicionless urinalysis of middle and high school students wishing to participate in *any* extracurricular activities was reasonable

- Not just testing all students as that would be impermissible
- There's still some choice to not be tested, i.e., don't participate

e) ***Chandler v. Miller*****:** Is a state statute that requires all candidates for certain public offices to submit a certification of drug testing an unreasonable search without individualized suspicion?
HELD: Yes.

- Drug testing is a *search*
- Govt. interest is weak because there's no indication that Georgia has had a problem with public officials using drugs
  - Public officials are constantly in the limelight under intense scrutiny
  - No "concrete danger" to depart from 4th Amdt.'s main rule
- *Von Raab* dealt with customs officials working closely with large amounts of drugs and deadly weapons, which is quite different than here

f) ***Ferguson v. City of Charleston*****:** Drug testing of pregnant women on public assistance was a necessary precondition to being able to give birth in a public hospital. Asserted purpose was protecting the mother and child

- Unconstitutional because ultimate policy was indistinguishable from general crime control

iv. Border Searches

a) ***United States v. Flores-Montano*****:** Is disassembly of a vehicle's gas tank in order to search it for secreted contraband unreasonable if the border patrol agents didn't have reasonable suspicion that it contained contraband?
HELD: No.

- Complex balancing tests to determine what is a "routine" search of a vehicle have no place in border searches of vehicles
- US, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity
- Searches done at the border are *reasonable* just by the fact that they occur at the border
- Search of gas tank OK because it's no more an invasion of privacy than a search of the passenger compartment
  - Expectations of privacy are less at the border

b) Non-Routine Border Searches:

- Body cavity searches (need PC and probably a warrant)
- Strip searches
- Involuntary X-rays
- In theory, some other kind of search that is equal in "intrusiveness" to the above

c) ***United States v. Seljan*****:** Random, suspicionless searches at the border by opening packages mailed *from* the US to foreign countries. Border context *can* be used as an excuse for general rummaging.

- Inspection of packages was not overly intrusive

C. Higher Than Usual Standards of Reasonableness

i. Deadly Force

a) ***Tennessee v. Garner*****:** Is it reasonable for an officer to use deadly force to stop a fleeing felon under all circumstances?
HELD: No.

- Use of deadly force is not a sufficiently productive means of accomplishing law enforcement goals to justify the killing of nonviolent suspects
- Standard: Where an officer has PC to believe that the suspect poses a threat of *serious physical harm* to himself or to others, it is constitutionally reasonable to prevent escape by using deadly force
  - Not just allowed in *all* circumstances

b) ***Scott v. Harris*****:** Officer's actions of hitting D's car in order to push him off the road in order to end a high speed pursuit were reasonable

ii. Compelled Operations

a) ***Schmerber v. California*****:** Was it unreasonable for the police to force a blood sample to be taken at a hospital in order to determine D's blood alcohol content following being arrested for DUI?
HELD: No.

- Blood test is a search and seizure protected by the 4th Amdt.
- Officers need a clear indication that in fact desired evidence will be found by conducting the test
- Search reasonable because D had just been arrested for DUI, and the test was administered in a hospital by a doctor

b) ***Winston v. Lee*****:** It is an unreasonable search for a state to require D to undergo an operation to remove a bullet from his chest to be used against him if the state has substantial evidence to use against him at trial already?
HELD: Yes.

- To determine reasonableness of compelled surgical intrusion, need to balance strong personal interest against the state's interest
- Here the search was unreasonable because the state already had substantial evidence to use against him

- Higher standard: The 4th Amdt.'s command that search be "reasonable" requires that when the state seeks to intrude upon an area in which society recognizes a significantly heightened interest, a ***more substantial justification is required*** to make the search "reasonable"
- *NO* compelled surgery to remove evidence

VI. CONFESSIONS

A. Interrogation Outline

i. Voluntary?

a) If no, then:
- Involuntariness due to police misconduct?
  - If yes, suppress.
  - If no, continue.

b) If yes, then:

ii. In custody?

a) If no, then admit.

b) If yes, then;

iii. Interrogated

a) If no, then admit.

b) If yes, then:

iv. Adequately warned?

a) If no, then:
- Public safety exception?
  - If no, then suppress.
  - If yes, then admit.

b) If yes, then:

v. Waived? (Does not have to be express.)

a) If no, then suppress.

b) If yes, then admit.

vi. Invoked? (Does have to be express.)

a) If yes, then:

vii. Silence or counsel?

a) If silence, did police honor the invocation? (stop, lay off for 2 hrs, re-warn?)
- If yes, then admit.
- If no, then suppress.

b) If counsel, did police stop questioning until lawyer was present?
- If yes, then admit.
- If no, then did D re-initiate?
- (Or, was D released from custody and allowed to consult attorney, and did the police wait 2 weeks (Shatzer v. Maryland (2010))?).

B. Due Process of Law & Confessions

i. Overbear One's Will

a) ***Ashcraft v. Tennessee*****:** Is a confession obtained through constant questioning for over 36 hours without letting D sleep or leave the room valid against D?
No.
- Not voluntary: If D did make a confession, it wasn't voluntary
- Inherently coercive: Situation was so "inherently coercive" that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear
  - D's *will was overborne*
  - Constitution stands as a bar against the conviction of any individual in an American court by means of a coerced confession

- Due Process: It is and was always a violation of due process to involuntarily extract a confession out of someone
  - DPC motion (not necessarily a *Miranda* violation and vice versa)
- Involuntary statements: = the product of duress (use or threat of force)
  - Power imbalance between the suspect and police
  - Secrecy so courts don't know what goes on there

ii. Totality Test for Voluntariness

a) ***Spano v. New York*****:** Was a confession voluntarily obtained if D repeatedly asked to speak with his attorney but wasn't allowed and D refused to speak until his friend/new cop convinced him to talk? No.

- Balancing of interests: State's interest in prompt and efficient law enforcement with interest in preventing the rights of individuals from being abridged through unconstitutional methods of law enforcement
  - Police must obey the law while enforcing it
- Totality of the situation: D was overborne by official pressure, fatigue, and sympathy
  - Not native born
  - Junior high education
  - Off-hours interrogation
  - Mounting fatigue
  - 4 attempts by his "friend" to force a confession
- DPC does NOT prohibit police from *lying* while interrogating suspects
  - Police *can* lie about finding forensic evidence supposedly implicating the D

b) ***Arizona v. Fulminante*****:** After D was having a "rough time" in prison, a prison informant offered D protection from the other inmates if he told him about the murder of D's stepdaughter.

- Held, D's confession of the murder was coerced because D's will was overborne by the credible threat of physical violence if he did not confess

iii. Police Misconduct

a) ***Colorado v. Connelly*****:** Was a confession voluntarily given if D blurted it out to police officers who did not coerce him at all but it later turns out that D was suffering from psychosis?
HELD: Yes, coercive police activity is a necessary predicate to finding a confession not "voluntary" within the meaning of the DPC.

- No due process claim: Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal D of due process of law
  - Need an element of police overreaching
- State of mind not dispositive: While mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry
- Exclusionary rule inappropriate: The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of it, but that is inapplicable where police conduct is not at issue
- *Connelly*: Will must be overborne by *police* misconduct – it has to be something the police did and it has to be police misconduct
  - (1) By something police did, and
    - Not something D did himself or a 3rd party did
  - (2) Police misconduct/overreaching
    - Could still be caused by the police, but if there's no misconduct, it's not a violation of the DPC
    - Exclusionary rule not appropriate when there's no police misconduct

C. Privilege against Self-Incrimination & Confessions

i. Constitutional Basis

a) ***Miranda v. Arizona*:** Must a suspect be informed of his constitutional rights against self-incrimination and assistance of counsel and give a voluntary and intelligent waiver of those rights as a necessary precondition to police questioning and the giving of a confession?
Yes.

- Need for limitation: Unless a proper limitation upon custodial interrogation is achieved, there can be no assurance that black police practices of this nature will be eradicated in the foreseeable future
  - Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the D can truly be the product of his free choice
- 5th Amdt. applies: All the principles embodied in the privilege against self-incrimination apply to informal compulsion exerted by law enforcement officers during in-custody questioning
  - 5th Amdt. privilege applies in all settings where the freedom of the suspect is curtailed in any significant way
  - Does NOT apply to general on-the-scene questioning
- Required admonition of rights:
  - (1) Suspect must be informed in clear and unequivocal language that he has the *right to remain silent*
    - Absolute prerequisite to overcoming the inherent pressures of the interrogation atmosphere
    - Warning will show that one's interrogators are prepared to recognize his privilege should he choose to exercise it
  - (2) Anything said can and will be used against the individual in court
    - It is only through awareness of these *consequences* that there can be any assurance of real understanding and intelligent exercise of the privilege
  - (3) Individual has a right to consult with counsel and have him present during any questioning if the individual so desires
    - Assistance of counsel can mitigate the dangers of untrustworthiness
    - Presence of a lawyer can guarantee that the accused gives a fully accurate statement to the police
  - (4) If the individual is indigent, a lawyer will be appointed to represent him
    - Without this additional warning, the admonition of right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one
    - Financial ability of the individual has no relationship to the scope of the rights involved here
- Prophylactic: Procedural measures put into place to protect suspects' rights
  - Rights are a prerequisite to the *admissibility* of statements
  - So violation of *Miranda* does NOT necessarily mean that 5th Amdt. rights were violated
  - Statements taken in violation of *Miranda* cannot be used in the State's case-in-chief (but everything might be suppressed if due to physical coercion)
    - But *derivative* evidence can be used (*United States v. Patane*)
    - Statement *can* be used for impeachment (*Harris v. New York*)

b) ***New York v. Quarles*:** Was an officer justified in questioning a D immediately upon detention about the whereabouts of a gun that the officer believed was missing without advising D of his *Miranda* rights in the name of public safety?
HELD: Yes, the needs for answers in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the 5th Amdt.'s privilege against self-incrimination.

- "Public Safety" exception: There is a public safety exception to the requirement that *Miranda* rights be given before questioning
  - Does NOT depend on the officer's subjective state of mind
  - Exception is sui generis – general danger to public safety = exigent circumstances here
  - Classic Q: "Where is the victim?"
- Black-Letter Law: No *Miranda* warnings are necessary as a condition of admissibility for voluntary statements made during custodial interrogation in circumstances where a reasonable police officer might believe the question necessary to protect the safety of the public (including the suspect and the officer).

c) *Dickerson v. United States*: Was *Miranda* a constitutional decision such that a statute enacted by Congress essentially overruling it is invalid?
Yes.

- *Miranda* is a constitutional rule: Congress may not legislatively supersede decisions interpreting and applying the Constitution
  - Began being applied to the states and continued that way
  - Court granted cert. to give concrete constitutional guidelines for law enforcements agencies and courts to follow
  - *Stare decisis* weighs in favor of leaving *Miranda* alone

d) *Chavez v. Martinez*: Violation of one's 5th Amdt. rights can only occur if the evidence obtained is used at trial against a D

- Thus, violation of *Miranda* is not by itself grounds for a § 1983 suit

ii. Custody

a) *Thompson v. Keohane*: Custody = when a reasonable person under the circumstances would *not* have felt at liberty to terminate the interrogation and leave

b) *Berkemer v. McCarty*: Was a D taken into "custody" and thus his statements barred from evidence per *Miranda* if he was detained at a traffic stop and subjected to standard questioning and a balancing test?
No.

- *Miranda v. Arizona*: By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way
- Traffic stop ≠ custody: While a traffic stop does significantly curtail the freedom of action of the driver and passengers in a detained vehicle, a traffic stop is different from actual custody
  - Presumptively temporary and brief, unlike station house interrogation
  - Mostly public to some degree
  - Atmosphere is substantially less police-dominated
  - More like *Terry* stops, which are not subject to *Miranda*
- Black-Letter Law: There is no *Miranda* requirement for questions asked during traffic stops or *Terry* stops because, while they are "seizures" for 4th Amdt. purposes, they are not "custodial" for 5th Amdt. purposes.

iii. Interrogation

a) *Rhode Island v. Innis*: Was an individual "interrogated" under *Miranda* if the 2 officers in the police car said that it would be unfortunate for a little handicapped girl to die by finding a sawed-off shotgun hidden by the individual?
No.

- "Interrogation" under *Miranda*: *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent
  - Express questioning, and
  - Words and actions that the police *should have known* are reasonably likely to elicit an incriminating response

- D not "interrogated": D was not interrogated within the meaning of *Miranda* because it cannot be said that the officers should have known that their conversation was reasonably likely to elicit an incriminating response from D
  - No indication that D was peculiarly susceptible to an appeal to his conscience
  - Not unusually disoriented or upset
  - Nothing more than few offhand remarks
- Black-Letter Law: "Interrogation," for purposes of the "custodial interrogation" test, means any act, verbal or non-verbal by the police that they should know is reasonably likely to elicit an incriminating response from the suspect. It's *not* a subjective test on either side.
  - On the cops' side, it's based on what a reasonable cop would think under the circumstances
  - On the suspect's side, it's based on the facts that a reasonable officer would be aware of

b) *Illinois v. Perkins*: Does an undercover law enforcement officer have to give *Miranda* warnings to an incarcerated suspect before asking him questions that may elicit an incriminating response?
No.

- Rule: Conversations between suspects and undercover agents do *not* implicate the concerns underlying *Miranda*
  - No police domination or compulsion because the individual does not know that he is speaking with an officer
  - *Miranda* forbids coercion, not strategic deception by taking advantage of the suspect's misplaced trust

iv. Waiver

a) *North Carolina v. Butler*: Must officers obtain an express waiver from a D of his *Miranda* rights as a necessary condition to the admissibility of a subsequent statement?
No.

- Question is not one of form but rather whether D in fact knowingly and voluntarily waived his *Miranda* rights
  - Mere silence is not enough, however
- In some cases, waiver can be *inferred* from the actions and words of the person interrogated

b) *Colorado v. Spring*: Must a suspect be informed of all of the possible subjects of the interrogation as a necessary precondition to his waiver of his *Miranda* rights being voluntary and knowing?
HELD: No, a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his 5th Amdt. privilege.

- No doubt that the waiver D signed was voluntary
- Court has never held that mere silence by law enforcement officials as to the subject-mater of an interrogation is "trickery" sufficient to invalidate a suspect's waiver
- Valid waiver does not require that an individual be informed of all info "useful" in making his decision or that might affect his decision

c) *Moran v. Burbine*: Waiver must be "knowing, intelligent, & voluntary," i.e., the product of free & deliberate choice rather than intimidation, coercion, or deception

- D's waiver was valid, as the interactions between the police and an attorney have no impact on the validity of D's waiver
- Police are not required to supply a suspect with a flow of info to help him calibrate his self-interest in deciding whether to speak or stand by his rights

d) *Colorado v. Connelly*: While mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry

- So a drunk, high, in pain, or insane suspect can validly waive *Miranda* rights

v. Invocation & Protections

	Right to Remain Silent	Right to Assistance of Counsel
Waiver	*North Carolina v. Butler* Doesn't have to be express – waiver can be inferred from the actions and words of the person interrogated (*Berghuis*)	*North Carolina v. Butler* Doesn't have to be express – waiver can be inferred from the actions and words of the person interrogated
Ambiguous "Invocation"	*Berghuis v. Thompkins* Right to remain silent must be unambiguously and unequivocally invoked	*Davis v. United States* Request for assistance of counsel must be unambiguously and unequivocally invoked
Express Invocation	*Michigan v. Mosley* Must be "scrupulously honored," i.e., stop, wait 2 hours, re-Mirandize, re-question about a separate crime – Crime-specific	*Edwards v. Arizona* Not subject to further questioning until a lawyer has been made available or the suspect himself re-initiates the conversation – NOT crime-specific (*AZ v. Roberson*)

a) Right to Remain Silent

- ***Michigan v. Mosley*:** Do police have to cease questioning forever after a suspect invokes his right to remain silent on certain subjects during questioning?
  No.
  - <u>*Miranda*</u>: 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*.
  - No per se rule – police don't have to refrain from questioning forever, but they also many not resume after a momentary respite
  - <u>Standard</u>: Admissibility of statement depends on whether D's right to cut off questioning was **"scrupulously honored"**
    - Invocation is crime-specific – police can still ask a suspect about crimes other than the ones for which he has invoked
  - <u>*Mosley* Rule</u>:
    - (1) Police must stop upon invocation of right to remain silent
    - (2) Wait about 2 hours
    - (3) Can only resume questioning about another crime
    - ((4) Re-Mirandize)
- ***Berghuis v. Thompkins*:** Are police required to obtain an express waiver of the right to remain silent as a necessary precondition to the admissibility of uncoerced statements if the suspect was given his *Miranda* rights and understands them?
  HELD: No, a suspect who has received and understands his *Miranda* rights and has not invoked these rights waives the right to remain silent by making an uncoerced statement to the police.
  - <u>Invocation</u>: Right to remain silent must be unambiguously and unequivocally invoked just like the *Davis* rule for right to assistance of counsel
    - No express waiver needed per *Butler*
  - <u>Implied waiver of right to remain silent</u>:
    Miranda warnings + D understands them + uncoerced statement = Implied Waiver
    - Law can presume that an individual who, fully understanding his rights and acting in a manner inconsistent with those rights, has made a deliberate choice to relinquish their protections

b) Right to Assistance of Counsel

- ***Davis v. United States*:** Must the police cease questioning of a suspect if he makes an objectively ambiguous mention of consulting with counsel?
  No.
  - Suspect's request for assistance of counsel must be unambiguously invoked

        - Ambiguity cuts in favor of police re. *invocation*
    - Must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney
- ***Edwards v. Arizona*:** May the prosecution use a statement D made after he invoked his right to assistance of counsel if the police didn't provide him with counsel and started a second round of questioning?
  No.
    - Rule: If a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself re-initiates the conversation
        - No more custodial interrogation
            - *Innis* rule (reasonably likely to elicit an incriminating response)
        - That was initiated by the police
            - Casual conversation will not be taken as initiating conversation
            - Exception: Nothing stops the police from listening to one who voluntarily volunteered statements
- ***Minnick v. Mississippi*:** Is it necessary for police to refrain from questioning a D if he has invoked his right to counsel and did in fact consult with counsel but counsel was not present in the interrogation room?
  Yes.
    - *Edwards* requirement that counsel be "made available" refers to more than an opportunity to consult with an attorney outside the interrogation room
    - Rule: When counsel is requested, interrogation must cease, and officials may not re-initiate interrogation *without counsel present*, whether or not the accused has consulted with his attorney
    - Exception: An individual may still initiate a conversation by himself
- ***Arizona v. Roberson*:** A suspect who asserts his right to counsel after being given his *Miranda* rights as to one offense may *not* be questioned about a separate offense by a different officer unless the suspect initiates further exchanges with the police
    - Invocation of right to counsel is *not* crime-specific (cf. right to remain silent)
- ***Florida v. Powell*:** Do *Miranda* rights that tell a suspect that he has the right to assistance of counsel *before* questioning but also tell him that he can invoke his rights at any time satisfy *Miranda*?
  Yes.
    - Totality of the circumstances: In combination, the 2 warnings reasonably conveyed Powell's right to have an atty present prior to and during questioning
        - "Before" term conveyed that Powell could consult his atty before answering each question
- ***Maryland v. Shatzer*:** When a suspect who has invoked his right to counsel has been released from his pretrial custody and has returned to his normal life for 2 weeks before the attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced
    - *Edwards* invocation only lasts 2 weeks if D is released from custody

VII. SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL

A. 6th Amdt. Right to Assistance of Counsel at Trial

i. ***Betts v. Brady*:** Does the 14th Amdt. DPC require that states appoint counsel to represent indigent Ds in all criminal cases?
No.

a) Great majority of States do not require their courts to appoint counsel to represent all Ds as a

fundamental right essential to a fair trial

ii. ***Gideon v. Wainwright*:** Should *Betts v. Brady* be overruled as being inconsistent with the fundamental right of fairness at trial?
Yes.
   a) Court in *Betts* was wrong in concluding that the 6th Amdt.'s guarantee of counsel is not one of the fundamental rights essential to a fair trial
   b) Both precedents and reason require one to recognize that in an adversary system, one cannot be assured a fair trial unless counsel is provided for him
   c) Lawyers in criminal courts are necessities, not luxuries

iii. **Waiver of Right to Counsel at Trial**
   a) ***Carnley v. Cochran*:** For a waiver of the right to counsel at trial to be valid, the record must show that the accused was offered counsel but *intelligently and understandably* rejected the offer
   b) ***Faretta v. California*:** D should be made aware of the dangers and disadvantages of self-representation so that the record will establish that he knows what he is doing and his choice is made with his eyes open

iv. ***Strickland v. Washington*:** Effective assistance of counsel:
   a) (1) Attorney's performance be deficient when measured against an objective standard of reasonableness; AND
   b) (2) D was prejudiced in that there was a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

v. ***Scott v. Illinois*:** Is the *Argersinger* "actual imprisonment" rule that no person may be incarcerated for any offense unless he was represented by counsel still valid?
Yes.
   a) Basic premise of *Argersinger* that actual imprisonment vs. just fines or the mere threat of imprisonment is the dividing line for the constitutional right to appointment of counsel
   b) 6th and 14th Amdts. require only that no indigent criminal D be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense
   c) Rule: D is entitled to assistance of counsel if *actually* sentenced to imprisonment
      - So no constitutional problem if D is denied counsel but is not sentenced to imprisonment

vi. **Jury Trial Right vs. Right to Counsel**
   a) Jury Trial: Charged with a crime punishable by at least 6 months in jail
      - Thus, could constitutionally have a jury trial with NO right to counsel (not sentenced to jail even though punishment could carry jail time)
   b) Counsel: *Actually* punished to a term of imprisonment – not just mere threat of imprisonment
      - When waiving right, judge has to tell D what sentences are possible, etc.
      - Possible to have a right to counsel but NO right to a jury trial (sentenced to jail but max. possible sentence is less than 6 months ex ante)

B. Confessions & the 6th Right to Assistance of Counsel

i. ***Massiah v. United States*:** May law enforcement agents use incriminating statements obtained surreptitiously from a D in the absence of D's counsel who has already been indicted in evidence against D?
No.
   a) Violated 6th Amdt.: D was denied the basic protections of the 6th Amdt. guarantee of assistance of counsel when his incriminating words were used against him at trial, which agents ***deliberately elicited*** after D had been indicted and in the absence of D's counsel
      - Pretrial period is just as crucial as the trial itself for constitutional protections
   b) "Deliberate elicitation": Term of art in the 6th Amdt. context for violating D's 6th Amdt. rights by eliciting an incriminating statement post-indictment (similar to *Innis* "interrogation" definition for *Miranda*)
   c) 6th Amdt. Confession Analysis: PWCD
      - (1) Post-attachment?

- (2) Waived in *Miranda* setting (*Montejo*)?
- (3) Counsel present?
- (4) Deliberate elicitation?

d) *Kansas v. Ventris*: Statements obtained in violation of *Massiah can* be used for impeachment

ii. False-Friend/Undercover Agent Redux:

a) 4th Amdt.: Not a "search" problem per *United States v. White* false-friend rule

b) 5th Amdt.: Not a problem of the use of force/threat of force (i.e., not an involuntary confession) per *Colorado v. Connelly*

c) *Miranda*: Not a problem of custodial interrogation per *Illinois v. Perkins*

d) 6th Amdt.: *Is* a problem per *Massiah v. United States* after D indicted

- Don't mess with lawyers' prerogatives

iii. *Brewer v. Williams*: Was it a violation of D's right to assistance of counsel when officers made statements in a car with him reasonably likely to elicit incriminating responses from D in the absence of D's attorney?

Yes.

a) Attachment of right: Right to assistance of counsel attaches on the state level post-complaint (after arrest that explains PC and charge arrest was based upon)

- (Fed. system = post-indictment)

b) Violation of 6th Amdt.: D's 6th Amdt. right to counsel was violated

- Arraignment = initiation of adversarial proceedings
- Christian burial speech = deliberate elicitation

iv. *Texas v. Cobb*: 6th Amdt. right to assistance of counsel is *offense-specific*

a) If D was charged with one offense and is represented by counsel, the police can still question him in the absence of counsel about a separate offense for which adversarial proceedings have not yet been initiated

v. *Montejo v. Louisiana*: A D may validly waive his right to counsel for police interrogation, even if police initiate the interrogation after the D's assertion of his right to counsel at an arraignment or similar proceeding

a) 6th Amdt. can be validly waived, post-attachment, by a represented D without the knowledge of the D's lawyer

b) *Edwards*, not the fact of attachment or of representation, is the source of any prohibition on contact

c) Post-indictment, valid request for *Miranda* waiver from a *counseled* suspect?: Most likely now a valid *Miranda* waiver even though D is represented by counsel per *Montejo*, but see *Patterson* possible exception (retained counsel + atty present + police lied to atty?)

- In *Patterson*, D retained counsel himself = invocation of 6th Amdt. right to assistance of counsel
  - So if D retains counsel (*not* appointed counsel), the atty is present at the station, and the police lie to him, that *might* be enough to invalidate a subsequent waiver
- But in *Montejo*, D was *appointed* counsel, which means that he hadn't actually invoked his 6th Amdt. right
  - Appointment of counsel doesn't negate ability to ask for waiver
  - D needs to invoke his right to counsel in a *Miranda* context in order to have a subsequent waiver be invalidated

vi. Deliberate Elicitation & Jailhouse Informants

a) ***United States v. Henry*:** Was it a violation of D's 6th Amdt. right to counsel when the govt. paid a fellow inmate to listen to D and report to the govt. if D made any incriminating statements while imprisoned after he was indicted and D's attorney was not present?

Yes.

- Deliberate elicitation: Informant deliberately used his position to secure incriminating info from D when counsel was not present
  - Informant was not a passive listener

- Not like the 4th & 5th Amdts. where there's no issue so long as D was unaware that the other person was an informant

b) ***Maine v. Moulton*:** Case not distinguishable from *Massiah* even though D himself initiated the meeting and the informant wore a wire to it
- *Knowing exploitation* by the State of an opportunity to obtain incriminating statements is also a breach of D's right to counsel

c) ***Kuhlmann v. Wilson*:** Did police "deliberately elicit" incriminating statements from D in violation of D's 6th Amdt. right to counsel when police placed an informant in D's cell who merely listened to D? No.
- No "deliberate elicitation" because informant only listened to D's spontaneous and unsolicited statements
  - D must show that the police and their informant took some action beyond merely passively listening

C. 6th Amdt. Right to Assistance of Counsel & Identifications

i. Lineups:

a) Post-attachment?
- NO – no 6th Amdt. right
- YES – proceed:

b) What type of lineup was it?
- Live lineup/confrontation = right to have counsel present – *Wade*
  - Was counsel present?
- Photo lineup = NO right to counsel present – *Ash*

ii. ***United States v. Wade*:** Does a post-indictment lineup conducted for identification purposes out of the presence of D's counsel violate the 6th Amdt. right to assistance of counsel?

Yes.

a) No 5th Amdt. problem: Neither the lineup nor anything that D was required to do during the lineup violated D's privilege against self-incrimination
- Compelling the accused to exhibit his person for observation by a prosecution witness prior to trial is *not* compelled self-incrimination
- Voice, likeness, etc. are not protected by the 5th Amdt.

b) No right at prep. stage: Denial of the right to have counsel present during the analysis of fingerprints, blood sample, clothing, etc. does not violate D's 6th Amdt. rights because there is *little risk that the counsel's absence might derogate from his right to a fair trial*

c) Post-indictment lineup = critical stage: No doubt that for D the post-indictment lineup was a critical stage of the prosecution at which he was entitled to the presence of counsel
- Significant concerns about improper suggestion upon identifying witnesses
- Inability to reconstruct at trial any unfairness that occurred during the lineup
- Not necessarily about the dangers of police misconduct, but rather about the dangers of eyewitness identifications in general
- "*Wade* a minute, counsel needs to be at a post-indictment lineup!"

iii. ***Kirby v. Illinois*:** Was it a violation of D's 6th Amdt. right to counsel when the police set up a witness identification of D in the police station following D's arrest but before D was arraigned?

No.

a) 6th Amdt. right to counsel only attaches at the onset of adversarial proceedings against D, which hadn't begun yet here

iv. ***United States v. Ash*:** Was it a violation of D's 6th Amdt. right to counsel when police used a photographic lineup outside the presence of D's counsel to see if the witnesses could identify D?

No.

a) *Wade* exception: *Wade* Court recognized that there were times when the subsequent trial could cure a one-sided confrontation between prosecuting authorities and an uncounseled D

- If accurate reconstruction of the event is possible, the opportunity to cure defects at trial causes the confrontation to cease to be "critical"

b) No counsel at photo displays: 6th Amdt. does not grant the right to counsel at photographic displays conducted by the govt. for the purpose of allowing a witness to attempt to ID the offender

- Accused himself is not present, so there's no risk that he'll fall victim to unfamiliarity with the law
- No right to counsel during prosecution's trial preparation interviews with Ws
- Prosecutor's ethical responsibility is the primary safeguard here
- 6th Amdt. right to counsel *only* for live lineups & physical confrontations

D. Due Process Clause & Identifications

i. Due Process Violation in Lineup?

a) ID unnecessarily suggestive & conducive to irreparable mistaken ID? -- *Stovall*

- E.g., single suspect shown, other indicia of police belief in guilt, police comment, clothing, background, facial hair, showing booking placard
- Exception: Unnecessarily suggestive lineup OK if witness is literally about to die

b) If so, is in-court ID testimony admissible? -- *Manson*

- ODACT

ii. *Stovall v. Denno*: Did police violate D's due process rights by displaying him singly in a hospital room a day after the victim had major surgery and the victim made a positive ID?
No.

a) Due Process in Lineups: DPC forbids a lineup that is *unnecessarily suggestive and conducive to irreparable mistaken identification*

b) No DPC violation here: A claimed due process violation in the conduct of a confrontation depends on the *totality of the circumstances* surrounding it, and the record here reveals that showing D to V in the hospital was imperative

- V was the only person who could exonerate D
- Under the circumstances, a station lineup would be out of the question

c) Single-Person Lineup: ONLY permissible when the witness is literally about to die

iii. *Foster v. California*: D was shown to V in each of 2 lineups. In the 1st lineup, D was 5-6 inches taller than all the other men and was wearing a leather jacket that was how the perp was dressed. In the 2nd lineup, D was the only person who was the same as before.

a) HELD, the suggestive elements in the ID procedure made it all but inevitable that the witness would identify D whether or not he was in fact the man

b) = Violation of D's due process rights (only SCOTUS case to so hold thus far)

iv. Admissibility of ID Testimony

a) ***Manson v. Brathwaite*:** Did police violate D's due process rights when the undercover officer who viewed D in dim light was given a single photo to view and ID'ed D as the alleged perp based on a vague and general description of D?
No.

- Adopt totality test: *Reliability* is the linchpin in determining the admissibility of ID testimony, and the totality of the circumstances approach should be adopted
  - *Manson* suppressions are extraordinarily rare
- Factors to consider in determining reliability:
  - Opportunity to view the criminal at the time of the crime
  - Degree of attention
  - Accuracy description of the criminal
  - Certainty demonstrated at the confrontation
  - Time between the crime and the confrontation
- No prob. of 1 photo: Failure to view a photo array is not of one constitutional dimension to be enforced with a rigorous and unbending exclusionary rule; defect goes to weight, not to

substance

VIII. EXCLUSIONARY RULE

A. Sources of and Rationales for the Exclusionary Rules

i. ***Weeks v. United States*****:** Should the trial judge have excluded evidence obtained from a search of D's home conducted in violation of the 4th Amdt.?
Yes.

a) Exclusionary Rule: If letters and private documents could be seized by the govt. and used in evidence against an accused, the protection of the 4th Amdt. would be of no value and might as well be written out of the Constitution = 1st statement of the Exclusionary Rule

- Evidence here was obtained in direct violation of D's constitutional rights = prejudicial error committed
- *Weeks* applies to *federal* govt. only (*Mapp* extends this to the states)

ii. ***Mapp v. Ohio*****:** May evidence obtained from an unconstitutional search and seizure be admitted against a criminal D in state court?
No.

a) Exclusionary Rule: All evidence obtained by searches and seizures in violation of the Constitution is inadmissible in state court

- Since the 4th Amdt. has been deemed enforceable against the States through the 14th Amdt. DPC, so is the Exclusionary Rule
- Rule ensures that no man will be convicted on unconstitutional evidence
- Makes good sense too, as nothing can destroy a govt. faster than its own disregard for its laws

b) "Fruits" Doctrine: If the initial conduct violated the 4th Amdt., then all "fruits" of the search/seizure will be excluded from evidence unless sufficiently purged of the taint

iii. ***United States v. Calandra*****:** Exclusionary Rule's primary purpose is to *deter* future unlawful conduct and thereby effectuate the guarantee of the 4th Amdt. against unreasonable searches and seizures

a) *Not* designed to redress the injury to the privacy of the search victim

iv. Exclusionary Rule for *Miranda* Violations

a) ***Michigan v. Tucker*****:** Statements obtained in violation of *Miranda* have to be excluded *but not* the witness testimony that was obtained as a result of those illegal statements

- *Miranda* requirements are only prophylactic and are not themselves required by the Constitution
- Derivative evidence will NOT be excluded with *Miranda* violations

B. Scope and Exceptions to the Exclusionary Rules

i. "Standing" Limitation

a) ***Alderman v. United States*****:** Suppression of the product of a 4th Amdt. violation can be successfully urged *only* by those whose rights are aggrieved solely by the introduction of the damaging evidence

- 4th Amdt. rights are *personal rights* and cannot be asserted vicariously

b) ***Rakas v. Illinois*****:** May passengers in an automobile that was the subject of an unconstitutional search assert the exclusionary rule to exclude the evidence obtained from that search against them?
No.

- No valid suppression claim: Ds had neither a property interest nor a possessory interest in the car, nor an interest in the property seized
  - The fact that they were "legitimately on the premises" is insufficient to determine that their 4th Amdt. rights were violated
  - Property interests are *not dispositive*, however; they can be overcome by the totality of the factors (e.g., who was the driver, who's on the title, sleeping in the car, caring for the car, spare key, etc.)
- Abandon "standing": Better analysis in "standing" cases is to focus on the extent of a particular D's rights under the 4th Amdt., rather than relying on any separate but intertwined concept of "standing"

- Question is whether the challenged search or seizure violated a D's 4th Amdt. rights who seeks to exclude the evidence obtained during it
- **Illegality in Traffic Stops:**
  - Illegal *Stop*: All passengers have a suppression claim (*Brendlin*)
    - Need to ask if the initial illegality is the proximate cause of the discovery of the evidence
  - Illegal *Search*: Affects ONLY those with possessory interests, NOT passengers (*Rakas*)

c) ***Minnesota v. Olson*****:** In general, an overnight guest *has a legitimate expectation of privacy* in the host's home despite not having a legal interest in the premises
- Question of intent of the owner and intent of the guest to stay the night (toothbrush, clothes there, spent the night before, spend nights at other people's homes frequently, etc.)
- Don't *actually* have to spend the night, just have the requisite *intent* to stay the night
- Act of sleeping puts someone in a particularly vulnerable position

d) ***Simmons v. United States*****:** A D's admission of ownership of contraband at a suppression hearing in order to establish "standing" cannot be used as substantive proof of guilt against him at trial
- No longer need "automatic standing" rule when one is charged with possession of contraband
- "What happens in Vegas stays in Vegas" Rule

e) ***United States v. Payner*****:** Banker's customers still did *not* have "standing" to bring a 4th Amdt. claim for suppression despite the bad faith of the IRS agents in violating the banker's 4th Amdt. rights

f) ***Minnesota v. Carter*****:** Does a temporary houseguest who is not staying overnight have a legitimate expectation of privacy such that he can object to an allegedly unreasonable search of the house?
No.
- *Olson* doesn't apply: While an overnight guest may claim a legitimate expectation of privacy, one who is merely present with the consent of the house owner may not
  - Expectations of privacy are diminished when premises are used just for commercial transactions

ii. "Independent Source" Doctrine

a) ***Silverthorne Lumber Co. v. United States*****:** May the Govt. use the knowledge it gained from reading illegally seized documents as evidence against Ds at trial?
No.
- May not use evidence: Essence of the 4th Amdt. provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall be used before the Court but that it shall not be used at all
  - Allowing knowledge gained from documents to be used would reduce the 4th Amdt. to a mere form of words
- Independent Source: If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the Govt.'s own wrong cannot be used by it in the way proposed

b) ***Murray v. United States*****:** Must evidence obtained through a legal search be suppressed if an illegal search was conducted prior to the legal one but the knowledge gained from the illegal search was not used to obtain the warrant?
No, probably not.
- Exclusionary Rule: Prohibits introduction into evidence of tangible materials seized during an unlawful search and of testimony concerning knowledge acquired during an unlawful search
  - Derivative Evidence: The Exclusionary Rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint
  - Independent Source Doctrine: Allows into evidence all information acquired in a fashion untainted by the illegal evidence-gathering activity
    - Facts X and Y are obtained from an illegal search, but fact Z is from an independent

source. Fact Z is admissible.

iii. "Inevitable Discovery" Doctrine

a) ***Nix v. Williams*****:** Should the Inevitable Discovery Doctrine apply to allow admission of evidence that would have been discovered if search teams continued as they would have if D had not led the police to the victim's body?
Yes.

- Inevitable Discovery Doctrine: If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, then the evidence should be admitted into evidence
  - Excluding such evidence would put the police in a *worse* position than they would have been in, which is contrary to the interests of society
- No absence of bad faith requirement: There is no requirement that the prosecution must prove the absence of bad faith
  - Such a req't would place courts in the position of withholding from juries relevant and undoubted truth that would have been available absent unlawful police conduct
- *Nix v. Williams* MODERNLY: Inevitable Discovery Doctrine here doesn't matter because derivative evidence isn't suppressed under *Miranda* violations (*Patane*), just the statement from the case-in-chief

iv. "Attenuation" Doctrine

a) ***Wong Sun v. United States*****:** Did release from custody and a 2-week period sufficiently attenuate the taint of the unlawful police conduct in order for the later, voluntary statements to be admissible?
Yes.

- Statement = "fruit": Verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion
- Statement tainted: It is unreasonable to infer that Toy's response was *sufficiently an act of free will to purge the primary taint of the unlawful invasion*
  - No independent source and connection with the unlawful activity is not so attenuated as to dissipate the taint
- Wong's statement: Because Wong Sun had been released on his own recognizance and went to Agent Wong voluntarily, the connection between the arrest and the statement had become so attenuated as to dissipate the taint
- Attenuation Doctrine: (Purging the Taint) Whether, granting establishment of the primary illegality, the evidence sought to be admitted has come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint

b) ***Brown v. Illinois*****:** Did *Miranda* warnings sufficiently attenuate the taint of an illegal arrest in order for statements resulting from it to be admissible into evidence?
No.

- *Miranda* warnings insufficient: If *Miranda* warnings by themselves were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the 4th Amdt. violation, the effect of the Exclusionary Rule would be substantially diluted
  - *Miranda* warnings have never been held to be a means of remedying and deterring 4th Amdt. violations
- "Sufficiently an Act of Free Will" Test:
  - Temporal proximity between the arrest and the confession
  - Presence of intervening circumstances (e.g., release from custody)
  - Purpose and flagrancy of the police misconduct

c) ***United States v. Ceccolini*****:** A live witness's testimony is *always attenuated* from the initial 4th Amdt. violation that resulted in the discovery of that witness

- Intervening act of free will attenuates the taint of the 4th Amdt. violation

d) ***Hudson v. Michigan*:** Does a violation of the *Wilson* knock-and-announce rule when police were conducting a legal, warranted search of D's home subject the evidence found pursuant to the search to the Exclusionary Rule?
HELD: No, an impermissible *manner* of entry does not necessarily trigger the Exclusionary Rule.
- Not but-for cause: The constitutional violation of an illegal *manner* of entry was not the but-for cause of obtaining the evidence because the police would have still obtained the evidence but-for the illegal entry
- Exclusionary Rule inapplicable: Since the interests that *were* violated have nothing to do with the seizure of the evidence, the Exclusionary Rule is inapplicable
  - 4th Amdt. protects PHPE against unreasonable govt. intrusion
  - K&A rule only gives one an opportunity to collect himself before police entry
- Social costs too high: Imposing the massive remedy of the Exclusionary Rule for K&A violations would generate a constant flood of alleged failures to observe the rule and claims that there was no justification for a no-knock entry

e) ***Oregon v. Elstad*:** Does an initial failure to administer *Miranda* warnings before questioning a suspect "taint" a subsequent voluntary, warned confession that was given after *Miranda* warnings were given and waived?
HELD: No, a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.
- No excludable "fruits": It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.
  - Admissibility of any subsequent statement should turn on solely whether it was knowingly and voluntarily made
  - Since there was *no actual infringement of D's constitutional rights* in the first instance, subsequent voluntary statement is not excludable as the fruit of the poisonous tree
- Subsequent statement voluntary: A careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible
- No "cat out of the bag" theory: Psychological impact of the voluntary disclosure of a guilty secret does not qualify as state compulsion and does not compromise the voluntariness of a subsequent informed waiver

f) ***Missouri v. Seibert*:** Did midstream *Miranda* warnings serve to sufficiently dissipate the taint of previous, unwarned police questioning if the 2 sessions of questioning were essentially continuous and referred to each other?
No.
- Warnings ineffective: It is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the *warnings will be ineffective* in preparing the suspect for successive interrogation, close in time and similar in content
- Factors: Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture?
  – Basically midstream warnings won't work (essentially overrules *Elstad*)
  - Completeness & detail of questions & answers in 1st round
  - Overlapping content
  - Timing & setting
  - Continuity of police personnel
  - Degree to which interrogator's questions treated rounds as continuous

- Kennedy Concurrence: (the law) Exclusion appropriate only when the police employ a 2-step interrogation technique *deliberately calculated* to undermine *Miranda*

g) ***United States v. Patane*****:** Does the failure to give a suspect *Miranda* warnings require suppression of the physical fruits of the suspect's unwarned but voluntary statements?
No.

- No suppression: Self-Incrimination Clause is not implicated by the admission into evidence of the *physical fruit* of a voluntary statement, and thus there is no justification in extending the *Miranda* rule into this context
  - Derivative evidence *is* admissible
- No constitutional violation: Mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights
  - Exclusion of the unwarned statements is a complete and sufficient remedy for any perceived *Miranda* violation

v. "Good Faith" Exception

a) ***United States v. Leon*****:** Should the 4th Amdt. Exclusionary Rule be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective because there was no PC?
Yes.

- Good-Faith Exception: Evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers *reasonably relying* on a warrant issued by a neutral and detached magistrate leads to the conclusion that such evidence should be admissible in the prosecution's case-in-chief
  - Reliance upon the warrant will normally establish that the officer has acted in good faith
  - Reliance must be objectively reasonable
- Exclusion inappropriate: No basis for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate, as they have no stake in the outcome
  - Exclusionary Rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates
- When exception *won't* apply:
  - Lies in affidavit
  - Absolutely no PC (e.g., uncorroborated anonymous tip (*Florida v. JL*))
  - No particularity (facially deficient)
    - *Groh v. Ramirez*: Space for description on warrant was left completely blank
      - HELD, no good-faith exception because warrant was so facially deficient that no reasonable officer could rely upon it

b) ***Massachusetts v. Sheppard*****:** Did officers reasonably rely on a search warrant issued by a judge that was defective because it included an authorization to search for materials for which the officers had no PC and it didn't incorporate the supporting affidavit?
Yes.

- Reasonable belief: No dispute that the officers believed that the warrant was valid, and there was an objectively reasonable basis for the officers' mistaken belief
  - Reasonable police officer could conclude that the warrant authorized a search for those items contained therein
  - Officers are not required to disbelieve a judge

c) ***Illinois v. Krull*****:** Evidence obtained as a result of a constitutionally unreasonable search was admissible because the officers reasonably relied on a state statute authorizing such search

- No police error to deter

d) ***Arizona v. Evans*****:** Evidence found as the result of an unreasonable arrest was admissible if the officer acted in objectively reasonable reliance on an erroneous computer record incorrectly indicating an

outstanding arrest warrant and if court employees were responsible for the error

e) ***Herring v. United States*****:** Should the exclusionary rule apply to evidence found during a search incident to arrest if the arrest is subsequently invalidated due to a revoked warrant on which the officers reasonably relied in arresting D?
No.

- No exclusionary rule: The conduct at issue here was not so objectively culpable as to require exclusion, as it was merely negligent and not reckless or deliberate
  - Any marginal deterrence is insufficient to trigger exclusion
  - Police conduct must be sufficiently deliberate in order to trigger the exclusionary rule
- BUT: Leaves open the door to excluding evidence resulting from "systemic negligence"

vi. "Impeachment" Limitation

a) ***Harris v. New York*****:** Can the prosecution use a statement obtained in violation of *Miranda* to impeach the D's testimony at trial?
Yes.

- Impeachment allowed: The impeachment process undoubtedly provided valuable aid to the jury in assessing D's credibility, and the *benefits of this process should not be lost* because of the speculative possibility that impermissible police conduct will be encouraged thereby
  - Sufficient deterrence flows from the evidence in question being inadmissible in the case-in-chief
  - D not entitled to perjure himself, and the prosecution did no more than utilize the traditional truth-testing device

b) ***United States v. Havens*****:** Can the physical evidence, otherwise inadmissible because of a 4th Amdt. violation, be used to impeach a D at trial during cross-examination?
Yes.

- Not limited to direct: A D's statements made in response to proper cross-examination reasonably suggested by the D's direct examination are subject to impeachment by the prosecution, albeit by evidence illegally obtained and not admissible in the prosecution's case-in-chief
  - A flat rule permitting only statements on direct examination to be impeached misapprehends the underlying rationale of cases like *Harris*
  - Deterrence function is sufficiently served by not using illegally obtained evidence in the case-in-chief

c) ***Kansas v. Ventris*****:** Statements obtained in violation of *Massiah* can be used for impeachment

d) ***James v. Illinois*****:** Should the impeachment exception to the Exclusionary Rule be expanded such that this evidence can be used to impeach all defense witnesses and not just Ds?
No.

- No expansion: Expansion of the impeachment exception would not promote the truth-seeking function to the same extent as did creation of the original exception, yet it would significantly undermine the deterrent effect of the general exclusionary rule
  - Threat of perjury alone is sufficient to deter defense Ws from intentionally lying on D's behalf
  - Expansion might chill some Ds from presenting their best defense by not calling certain Ws
  - Would significantly weaken deterrence effect of Exclusionary Rule b/c police would stack the deck in favor of the prosecution w/ illegally obtained evidence

e) ***Mincey v. Arizona*****:** Use of an *involuntary* statement against a criminal D at trial is a denial of due process of law and thus *cannot* be used for impeachment

