Criminal Procedure – Bolitho (Spring 2020)

The 4th Amendment (1791) → "The right of the people to be secure in their persons, houses, papers, and effects, against ***unreasonable searches and seizures***, shall not be violated, ***and*** no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Steps in Criminal Procedure Process (RED is what class focuses on)

1. **Crime**
2. **Police Investigation**
3. **Arrest/Booking**
4. **Filing Complaint**
5. **First/Initial Appearance**
6. **Preliminary Hearing/Filing of Indictment/Information**
7. **Arraignment**
8. **Pretrial Motions (Motion to Suppress)**
9. **Trial or Guilty Plea**
10. **Sentencing (if Guilty)**
11. **Appeals**
12. **Post-Conviction Remedies (*Habeas Corpus* Procedures)**

Eras of 4th Amendment Supreme Court Jurisprudence

1. **Warren Court (1953-1969) → D wins; Government loses (Privacy > Safety)**
2. **Berger Court (1969-86) → D loses; Government wins (Privacy < Safety)**
3. **Rehnquist Court (1986-2005) → Wild Card – goes either way**
4. **Roberts Court (2005-Present) → When technology is involved, D wins**
   a. **Phase 1 (2005-2016) → Scalia**
   b. **Phase 2 (2016-Present) → Death of Scalia + Kavanaugh/Gorsuch**

The Birth of the Exclusionary Rule

Overview: nowhere in the text of the 4th Amendment do the Founders prescribe a remedy for violations of the 4th Amendment, i.e., there was a constitutional right against unreasonable search and seizures or S&S without warrants, but no remedy for a violation or incentive to not violate the right

Common Law Remedy (Pre-1904): only remedy was a **civil action** against the individual agent, i.e., if an agent entered premises without a warrant or permission, they were automatically deemed **trespassers** and could offer no defense

Adams v. New York **(1904)** → Governmental misconduct (i.e., unconstitutional S&S) is a collateral matter in a criminal prosecution of one whom has been arrested by illegally obtained evidence – the individual is still guilty of the crime regardless of how the proof/evidence was obtained

- Court does not stop to inquire ***HOW*** the evidence was obtained, so long as the evidence proves guilt
- Remedy? → Replevin action for "criminal" to get the property back AND/OR civil trespass tort

Weeks v. United States **(1914)** → established the ***Exclusionary Rule***

- Since a remedy is not explicitly prescribed by the Constitution for a 4th Amendment violation, the Supreme Court ***MADE UP/IMPLIED*** the Exclusionary Rule remedy
- **Exclusionary Rule:** evidence obtained by the US and federal officials by an unconstitutional S&S is prohibited from being used in trial, i.e., the effect of the 4th Amendment is to put the US and federal officials under limits and restraints to forever secure the people against unreasonable search and seizures.
- **What happens with the evidence?** → it is returned back to the individual (like replevin) and **cannot** be used in court
  - **NOTE:** at this point the 4th Amendment ONLY applied to FEDERAL government, but did not apply to state and local government
  - **Silver Platter Doctrine:** b/c Exclusionary Rule ONLY applied to federal officials, local law enforcement could still obtain evidence unconstitutionally and deliver the evidence to federal officials "on a silver platter"

Wolf v. Colorado **(1949) →** Incorporated the 4th Amendment to the states, ***BUT*** did not incorporate the remedy, i.e., the Exclusionary Rule, to the states since it is not found in the Constitution; gave the right but not the remedy

Mapp v. Ohio **(1961) →** overturns *Wolf* applying the Exclusionary Rule to the states as well as the federal government, i.e., all evidence obtained by S&S in violation of the Constitution is **INADMISSIBLE** in a STATE court as well as federal courts
- Incorporated the remedy for unconstitutional S&S to the states

Possible 4th Amendment Violation Remedies
1. **Civil Liability –** e.g., trespass tort for $ damages
2. **Administrative Act** – punishment by the police department of the individual agent
3. **Criminal Liability**
4. **Exclusionary Rule –** exclude the evidence

2 Purposes of Exclusionary Rule
1. **Deterrence –** creates punishment for violation and incentive for police to not violate 4th Amendment rights
2. **Judicial Integrity** (as stated in *Mapp*) – "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Exclusionary Rule Today
- ER applies everywhere post-*Mapp*
- IF 4th Amendment violation, then file **motion to suppress (Rule 12)** – Waived if don't make motion Fed. R. Crim. Pro. 12(3)(C)
  - **NOTE:** Motion in limine does NOT work

4th Amendment Overview

Analysis

1.) **State Action Doctrine –** the Bill of Rights, i.e., the 4th Amendment guarantees, protect *only against* ***governmental***, ***NOT PRIVATE***, *conduct*
  - 4th A NOT violated if private party (e.g., landlord, phone company) searches
    - **UNLESS** private party searches by request of the Government, then Private Party becomes "deputized" by State and becomes a State Actor
  - 4th A implicated if police officer investigates, participates in, or requests a search

2.) ***"People"*, i.e., WHO? →** *US v. Verdugo-Urguidez* (1990) - "The people" refers to a particular class of persons comprising a national community or else with such significant connections to this country that they are deemed part of that community.
  - **Test: (1)** Sufficient connection with national community and **(2)** Individual accepted some societal obligations

  - If US authority is involved in investigation of criminal activity in a foreign nation, then 4th Amendment is loosely triggered and must go through procedures of that foreign nation (not US procedures if not in US)
    - **US Government Involved in Foreign Criminal Procedure Against US "Citizen" → 4th Amendment Protection**
    - **No US Government Involvement in Foreign Criminal Procedure Against US "Citizen" → NO 4th Amendment Protection**
    - **US Government Involved in Foreign Criminal Procedure of NON-US "Citizen" → NO 4th Amendment Protection**

3.) ***"Search"*?**
  - **What? →** "Secure . . . against unreasonable searches and seizures
  - **Where? →** "Persons, houses, papers, and effects (effects = wallet, phone, things on a person)

Defining "Search"

Question: What governmental conduct constitutes a search or seizure of a person, house, paper, or effect and, therefore, triggers Fourth Amendment protection?

2 Periods of "Search" Analysis

1. **Pre-*Katz* "Protected Places" Approach (Pre-1967)**
   - Property-focused inquiry
   - A search of a defendant will be deemed to occur if the government ***physically intrudes*** on the defendant's property
   - 4th Amendment only protects certain **places** (usually limited to private property owned by the subject of the search)
2. **Post-*Katz* "Reasonable Expectation of Privacy" Approach (Post-1967)**
   - **Rule:** "The 4th Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."
   - **Justice Harlan's "Reasonable Expectation of Privacy" 2-Prong Test**
     - **(1)** a person exhibited an ***actual (*****subjective)** ***expectation of privacy***; and
     - **(2)** the person's expectation is one that society is prepared to recognize as "**reasonable**" **(objective)**

Wiretaps, Informants, Hidden Microphones, etc.

Olmstead v. US **(1928) →** 1st telephone wiretap case to reach the Supreme Court

- **Held:** messages passing over telephone wires were **not** within the 4th Amendment's protection against unreasonable search and seizure
- Relied on ***physical trespass*** rationale (overturned by *Katz*) – 4th can only be violated by physical trespass on subject's property; since the tap had been placed on wires outside D's premises, no 4th Amendment violation could have occurred

Katz v. US **(1967) →** ***unauthorized electronic eavesdropping*** is an illegal search and seizure, even though it involves only intangible conversations, and even though no physical trespass onto the speaker's property occurs.

- Since the 4th Amendment protects people, not places, it did not matter whether the telephone booth was a "constitutionally protected area"
- Constitutional protection must be accorded to a person who justifiably relies upon the privacy of a particular place (e.g., home, office, car, telephone booth, etc.)
- **Harlan's Reliance Test →** an unauthorized wiretap violates the 4th Amendment if the subject places justifiable reliance on the privacy of the particular place regardless if the place is public or private

Pre-*Katz* View of "Bugged Agents" (w/ recording/transmitting device)

- **Occurs when government either uses an INFORMANT that suspect already knows OR uses an AGENT to induce the suspect to confide in the suspect**

On Lee v. US **(1952) →** (still applied the physical trespass test for 4th Amendment S&S violations) in the absence of a physical trespass there was no "search and seizure"

- **Facts:** an informant was "wired for sound" and a conversation between him and the defendant, occurring within the defendant's house, was transmitted by radio to a narcotics agent. The agent testified at court as to the substance of the conversation
- **Bottomline: NOT A SEARCH, therefore NO warrant required, therefore NOT a 4th Amendment violation**

Lopez v. US **(1962) →** the use of a tape-recorder by a secret agent was approved by the Court

- **Bottomline: NOT A SEARCH**

Pre-*Katz* Use of "Unbugged Agents" (w/o recording/transmitting device)

- **Unbugged Agent**: agents who testify at trial from recollection as to the incriminating statements made to them
- **Summary:** the use of unbugged agents involves no intrusion by the government but only "misplaced trust" by the suspect in the agent or informant

Lewis v. US **(1966) →** no 4th Amendment violation b/c the defendant "invited the undercover agent to his home for the specific purpose of executing a felonious sale of narcotics," as well as the agent did not "see, hear, or take anything that was not contemplated and in fact intended by petitioner as a necessary part of his illegal business."

- The Court held that the defendant **WAIVED** his 4th Amendment rights in his home since he had converted it to a "commercial center"

Hoffa v. US* (1966)** → one of Hoffa's Teamsters-turned-informant regularly overheard conversations concerning Hoffa's plan to bribe jurors. Since Hoffa's statements were *totally voluntary*, no 4th Amendment search or seizure occurred and Hoffa's ***misplaced trust was his own fault

<u>Post-*Katz* Use of Agents</u>

***US v. White* (1971)** → NO 4th Amendment right was involved because of the following reasoning:

- **NO Expectation of Privacy:** when a person ***misplaces his trust***, and makes incriminating statements to a bugged OR unbugged informer, he does not have any "justifiable expectation of privacy" which has been violated; there is no 4th Amendment protection for "wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."
- ***White* Erodes the *Katz* "Justifiable Reliance" Concept →** *White* necessarily assumes that a person cannot "justifiably" trust and talk to anyone, regardless of how close. A new test might be based on a "***possible risk of disclosure***."

<u>Summary</u>

1. ***White* (1971):** Not search.
2. ***On Lee* (1952):** Nearly identical facts of White. No trespass when criminal informant entered.
3. ***Lopez* (1963):** False friend "wired." No 4A violation for undercover to secretly record D using a hidden device. Reliable evidence. No unlawful physical invasion (trespass theory).
4. ***Hoffa* (1966)**: False Friend/Undercover Agent. NOT search. 4A provides no protection for "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Assumption of the risk. "It is the kind of risk we necessarily assume when we speak."

<u>Other cases refresher: NONE are searches. "Assume the risk"</u>

- **(1) Gov't eavesdrops on conversation between A and B**
  - ***Katz* -** phone booth wired
    - Held: Search without warrant. Inadmissible evidence.
- **(2) Gov't participates in the conversation itself (false friend or undercover agent)**
  - ***Hoffa*** - friend is actually gov't informant. NOT "search"
  - ***Lewis* -** gov't send secret agent who conceals his identity to make a purchase of narcotics
- **(3) False friend tapes conversation or is "wired"**
  - ***Lopez* -** agent carries electronic equipment to record Δ's words. No physical invasion.
  - ***On Lee* -** radio equipment simultaneously transmits conversations to recording equipment located elsewhere or other agents monitoring the transmitting frequency
    - Held: testimony admissible
  - ***White* -** friend turned gov't informant transmitting conversations
    - Held: testimony admissible

***Smith v. Maryland* (1979)** → an individual has no legitimate expectation of privacy in the numbers dialed on his telephone b/c he voluntarily conveys those numbers to the telephone company when he uses the telephone.

<u>3rd Party Disclosure Doctrine</u>

Rule → when an individual ***<u>voluntarily</u>*** transfers info to a 3rd party, the transferor enjoys no further 4th Amendment protection as to that information – government may DEMAND that the 3rd party turn the info over, even if the government not only lacks probable cause or a warrant, but doesn't even have reasonable grounds for suspecting that the info may be relevant to a criminal investigation

- ***US v. Miller* →** "The 4th Amendment does NOT prohibit the obtaining of info voluntarily revealed to a 3rd party and conveyed by him to government authorities, even if that info is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the 3rd party will not be betrayed."
  - Any info you voluntarily convey to a 3rd party; you no longer have reasonable expectation of privacy
  - *Miller* - don't need warrant to get everything from bank because you voluntarily gave info to bank

- ***US v. Miller* (1976)** → when the customer of a bank gives banking-related info to the bank in furtherance of the relationship, the customer will be found to have no reasonable expectation of privacy in the material, i.e., the government MAY subpoena that material from the bank without showing probable cause that the material is evidence of crime
  - The subpoena does NOT even constitute a "search" for purposes of the account-holder's 4th Amendment rights
  - A person has NO reasonable expectation of privacy w/ respect to the document b/c "the depositor takes the risk, in revealing his affairs to another, that the info will be conveyed by that person to the government."
- Facebook - gov't gathering huge amount of personal data
  - Ex. facial recognition, likes, age… if facebook has all of this info, gov't can have all this info.

"Open Fields" Doctrine

- **Rule:** open fields beyond the curtilage are NOT protected by the 4th Amendment
- **4th A free zone** = NOT a search in this zone.
- ***Hester v. United States* (US. 1924):** First case to articulate the Open Fields Doctrine, allowing warrantless searches of outdoor areas not included within the curtilage of a home.
- ***Oliver v. United States* (U.S. 1984):** even when a field is obstructed by fences/woods, the entrance of property gated and locked with "No Trespassing" signs posted, the field may be entered and searched without probable cause or a warrant
  - "Open field" "may include any unoccupied or undeveloped area outside of the curtilage"
  - C/L Origin: Rule founded on explicit language of 4th A. because an open field is not a "person, house, paper, or effect"
- *Trick is determining what is an "open field"?
    - Look @ curtilage factors
    - Curtilage = "house" under 4th A.

Curtilage → a person's "house" does not include all of a person's residential real estate, merely the actual house and the house's ***curtilage***, i.e., the area immediately surrounding and associated w/ the home

- **Curtilage factors:** (from *Dunn*)
  1. Proximity of the area claimed to be the curtilage of the home
  2. Whether the area is included within an enclosure surrounding the home
  3. The nature of the uses to which the area is put
  4. The steps taken by the resident to protect the area from observation by people passing it

Aerial Surveillance/Observation of a Curtilage (when police use an aircraft to view the defendant's property)

- Assuming the aircraft is in public, navigable, airspace, *anything the police can see with the naked eye from that airspace falls within the "Plain View" Doctrine*
  - ***California v. Ciraolo* (U.S. 1986):** flying plane over a backyard to see marijuana growing behind a 10-foot fence is NOT a "search"
    - "The mere fact that an individual has taken measures to restrict some views of his activities does not preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. . . Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed."
  - ***Florida v. Riley* (U.S. 1989):** flying helicopter over a marijuana greenhouse in Riley's backyard is NOT a "search" in accordance with *Ciraolo*. Applies *Ciraolo* to helicopters. **Limitations of *Riley*:** Flying lower than allowed by FAA regulation & Interfering with use of the property
    - Airplane flying 1,000 feet over backyard. (like *Ciraolo*) = NOT search.
      - **Key: 1,000 feet or above is normal commercial air flying height**
      - **Height requirement of airplanes does not apply to helicopters. They can fly lower.**
    - Copter flying 50 ft over farmer's field = NOT search because "open field." Different result if was backyard.
    - Current issue: DRONES. No height rules right now. Not interfering with use of property. *Katz* test really bad if start flying drones over everyone's backyards.

Rifling Through Garbage: Surveillance Outside the Curtilage, Near a House, but NOT in an Open Field

***California v. Greenwood* (1988)** → a person does not have a reasonable expectation of privacy in garbage left outside the curtilage of a home for trash removal – *what a person knowingly exposes to the public, even in his own home or office, is NOT a subject of 4th Amendment protection*

- The OBJECTIVE prong of the *Katz* Test is NOT satisfied → an individual places garbage at the curb for the express purpose of conveying it to a third party (i.e., the trash collector)
  - Police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public

Trash and other Abandoned Property

- **Rule** → trash or other abandoned property will normally NOT be material as to which the owner has an objectively reasonable expectation of privacy, therefore, when a person puts trash out on the curb to be picked up by the garbage collector, the police MAY search that trash without a warrant (*California v. Greenwood*)
- **Result** → if police suspect (even without probable cause) that a person may have committed a crime evidence of which might be contained in his trash, they can simply inspect the trash themselves, or request the trash collector to turn that person's trash over to them (regardless of the circumstances)

Decision that *Actually* Finds a Search

***Bond v. US* (2000)** → though a bus passenger clearly expects that his bag may be handled, he does not expect that the other passengers or bus employees will feel the bag in an exploratory manner, therefore, an agent's physical manipulation of an individual's bag violates the 4th Amendment

***Katz* and the New Technology**

Plain-View Doctrine: even where the devices used to gain a view of the D's property are somewhat more sophisticated than a flashlight (*Texas v. Brown*) or binoculars (*Johnson v. State*), SC will often uphold their use under the "Plain View" Doctrine if two (2) conditions are met:

(1) The view takes place from a **location where the police have a right to be** (e.g., public property); and
(2) The info obtained **could have been gotten** from "plain view" surveillance executed without the special device

***Kyllo v. US* (2001)** → the government's use of a thermal imager constituted a search b/c there is a *minimum expectation* of privacy that must be maintained – to withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the 4th Amendment

- ***Kyllo* Sense-Enhancing Technology Test** → to ensure the "preservation of that degree of privacy against government that existed when the 4th Amendment was adopted," "obtaining by sense-enhancing technology any info regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' . . . constitutes a search – at least where the technology in question is NOT available in general-public use."
- **Limitations of *Kyllo* Test**
  - **(1) Interior of Home ONLY** – court may give less protection where sense-enhancing tech is used in a non-residential context, e.g., workplace or public spaces
  - **(2) Resident or Owner –** probably only applies where the device is used against a resident or owner of the home in question
  - **(3) Not in General Public Use –** as particular tech becomes more broadly used by the civilian population, the individual's privacy interest in being shielded from the tech diminishes
  - **(4) Police CAN Get a Warrant –** Rule does not say that the police CAN'T use sense-enhancing tech, merely that the device's use constitutes a search, requiring a warrant

Electronic "Beeper" on Car

***US v. Knotts* (1983)** → the use of a beeper did NOT violate the driver's reasonable expectation of privacy in his movements over the road

- A driver voluntarily conveys to anyone who watches him the fact that he is traveling over particular roads in a particular direction to a particular destination

- "A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements form one place to another." → since the beeper merely supplied the same info that could have been obtained through ordinary plain view surveillance of such no-expectation-of-privacy movements, no 4th Amendment violation could have occurred.
  - **NOTE**: the beeper was placed into the can before the suspect purchased it so the government did not have to trespass in order to plant it; as well as it gave info that the police COULD HAVE learned through ordinary "plain view" surveillance (*See US v. Karo (1984)* – police placed a beeper in a can of ether, and then tracked the beeper in a way that allowed them to learn that the beeper was in a particular house; court held that the monitoring of the beeper when it was in the house WAS a 4th Amendment violation b/c use of the beeper revealed a critical fact about the interior of the premises, a fact that could not have been visually verified by a member of the public.)

***US v. Jones* (2012)** → Majority decision written by Scalia makes clear that the *Katz* "Reasonable Expectation of Privacy" Test did not erode the former Property-Trespass Test, but rather compliments each other – *Katz* established that the existence of a search would no longer be determined solely by use of "exclusively property-based approach," but *Katz* merely established an **alternative** non-property-based method by which a search could occur

- **Scalia Test** → When the government **(1) physically occupies private property** for **(2)** the **purpose of obtaining info** (*even if D had no reasonable expectation of privacy with regard to info that the monitoring device would disclose*), such a physical intrusion "would have been considered a 'search' within the meaning of the 4th Amendment when it was adopted."
  - **If Physical Trespass → Use Scalia Test = Physical Trespass + Attempt to Find Info (Purpose of finding info) = Search**
- **Alito Test** → Whether a search has occurred should **ALL** be decided by "asking whether D's reasonable expectations of privacy were violated by the long-term monitoring," i.e., an exclusively *Katz*-based analysis – "Relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of long-term GPS monitoring in investigations of most offenses impinges on expectations of privacy."
  - **If NO Physical Trespass → Use Alito Test = Short term monitoring is OKAY, but Long-Term monitoring is a SEARCH**
    - Alito does not define the line between short and long term, but does say that anything more than 4 weeks (28 days) is long term monitoring

Subjecting a Recidivist Sex-Offender to Nonconsensual, Life-Long, Satellite-Based Monitoring (SBM) via Ankle Monitor – Search?

- ***Grady v. NC* (2015)** → The Fourth Amendment protections extends beyond the sphere of criminal investigations, i.e., also applies in civil context. "A State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements."

Dog "Sniff Test"

Rule: High probability that Supreme Court recognizes "plain odor" seizures – the use of dogs to perform a canine "sniff test" to detect ***illegal*** did not constitute a 4th Amendment "search" at all

- ***United States v. Place* (1983) (airport)** - canine search in an airport does NOT constitute a "search" due to its "limited capabilities"
  - ***Place* Reasoning** → since a sniff test by a well-trained dog "discloses only the presence or absence of narcotics, a contraband item," the sniff test does not compromise any legitimate privacy interest of the person whose possessions are being sniffed (b/c no has the right to possess contraband, and thus no right to object to the disclosure that he is in possession of contraband.)
- ***Illinois v. Caballes* (2005) (traffic stop)**- reaffirmed *Place.*
  - ***Caballes* Reasoning** → Relied on *Place* to hold that since D's car was properly stopped for a traffic violation, the use of a dog to sniff around the exterior of his car for contraband did not amount to an extra Fourth Amendment intrusion (and thus could legally occur even in the absence of any suspicion of drug activities.)
- **Test for Odor of Contraband** → if the police, while standing in a place they have a right to be, use a dog to perform an odor test that merely determines whether *contraband* is present or not, **no search takes place**, b/c no info about a legally-possessable substance is being revealed
  - **NOTE:** Court did not answer the question of whether government may rely on a "plain odor" doctrine to run canine sniff tests in public places to find the existence of substances that may be **legally possessed**
      - Hypo: Dog sniff. Not search under Place. Sniff detect odor <u>outside</u> of bag.
      - No reasonable expectation of privacy with contraband.

- Dog sniff is NOT a search, but if police officer then opens bag = SEARCH.

***Florida v. Jardines* (2013)** → Police use of a sniffer dog even to determine solely whether contraband is present can avoid being a 4th Amendment search ONLY IF the police and the dog are *standing in a place where they have a legal right to be* – when police brought a trained drug-sniffing dog onto a homeowner's front porch to investigate whether the house contained narcotics, a 4th Amendment search occurred, regardless of whether the owner had a reasonable expectation of privacy as to the porch or as to the odors perceived by the dog

- **Issue –** Whether the police, by bring a drug-sniffing dog onto D's porch and letting him sniff, conducted a 4th Amendment search?
- **Holding/Reasoning –** Was a search; quoting *Jones*, that when "the Government obtains info by physically intruding" on persons, houses, papers, or effects, a 'search' within the original meaning of the 4th Amendment" has "undoubtedly occurred."

What is a "Seizure"?

***US v. Karo* (1984) – Issue** → Whether installation of a beeper in a container of chemicals with the consent of the original owner constitutes a seizure within the meaning of the 4th Amendment when the container is delivered to a buyer having no knowledge of the presence of the beeper?

- **What is a "Seizure"?** → (quoting *US v. Jacobsen* (1984) – A "seizure" of property occurs when (1) "there is some meaningful interference (2) w/ an individual's possessory interests in that property."

Objects Subject to Seizure

- Law enforcement officers may seize what they have probable cause to believe is criminal evidence. Four categories of seizable items are:
  (1) **Contraband** – evidence that may not be lawfully possessed by a private party
  (2) Fruits of a Crime
  (3) **Instrumentalities Used in the Commission of an Offence** (e.g., a weapon, an automobile for the get-away, etc.)
  (4) **"Mere evidence"** – an item of value to the police solely b/c it will help/aid in the apprehension or conviction of a person for an offence (e.g., blood stained shirt) (since 1967)

"Probable Cause"

Generally

- The 4th A prohibits ***unreasonable*** search and seizures – this means that searches and seizures must be supported by probable cause, i.e., a search or seizure conducted in the absence of probable cause ordinarily is considered an unreasonable one
  - ***Probable Cause to Arrest*** "exists where 'the facts and circumstances within the officer's 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
  - ***Probable Cause to Search*** "exists where 'the facts and circumstances within the officer's knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that' ***evidence subject to seizure will be found in the place to be searched***
    - Must specify an item in one of the 4 seizure categories
- Procedurally, the issue of probable cause arises in two circumstances:
  - **(1)** The police may apply to a magistrate for an arrest or search warrant. Warrants constitutionally may only be issued if there is probable cause to make the arrest or conduct the search. Therefore, the police must set out for the magistrate, under oath, the info in their possession that they believe justifies issuance of the warrant, i.e., the facts that constitute probable cause for the arrest or search → **Arrest or Search Warrant**
  - **(2)** Police may conduct an arrest or search without a warrant. Assuming that it results in seizure of criminal evidence, the D may seek to have this evidence excluded from the trial at a suppression hearing arguing that the police acted in violation of the 4th Amendment b/c they did not obtain a warrant, or that police lacked probable cause (*If the police had sought a warrant, would it properly have been granted?*) → **Warrantless Searches and Arrests**

Magistrate Must Ask:

1. **Is Information TRUSTWORTHY?**
2. **If yes, is the information ENOUGH?**

Types of Info:
1. **Direct Information (e.g.,** Oath of Affiant (person that swears on an affidavit))
2. **Hearsay Information –** entirely okay in affidavit but informant not under oath (i.e., trustworthy issue)

***Aguilar v. Texas* (1964) →** Evidence obtained pursuant to a warrant supported only by the beliefs or suspicions of an unidentified informant is not admissible in criminal proceedings.
- The Fourth Amendment demands that a warrant be issued only upon probable cause.
    - To allow police to conduct a search without first obtaining a judicial determination of probable cause would defeat the protections guaranteed by the Fourth Amendment.
- When an affidavit in support of a warrant has been reviewed by a neutral magistrate, the reviewing court will afford substantial deference to the judicial determination of probable cause.
- Nonetheless, the affidavit must provide a substantial basis for a judge to conclude that probable cause exists.
- Hearsay may be relied upon as the basis for an affidavit in support of a warrant, but the affidavit must set forth some additional information that would enable a court to assess the credibility of the hearsay allegations

***<u>Spinelli v. US</u>* <u>(1969)</u> →** An affidavit that lacks sufficient detail to explain why an informant is reliable and how he came to his conclusions does not provide the necessary probable cause to obtain a search warrant.
- In this case, the FBI failed to show:
    - that its informant was trustworthy,
    - that he obtained his information in a reliable way, or
    - that his conclusions were even valid.
- Although the FBI did corroborate some of the informant's information, it was unable to corroborate sufficient detail so as to arise to the level of probable cause.
- Therefore, the affidavit does not establish probable cause
    - Issue: Was there **"probable cause"** to issue a warrant?
    - Hold: NO, the informant's tip was not sufficient to provide the basis for a finding of probable cause.
    - Rule: **Predict future with detail = reliable**
        - Facts: described clothing with minute detail.
        - Reasoning: info was reliable.
    - Reasoning: Need part 4 of this affidavit or probable cause definitely would not be established.
    - **Judges may look at:**
        - Informant multiple times
        - Reputation of person

Untrustworthy person but gave many accurate tips = Yes, can be reliable.

If informant <u>admits</u> to being involved in criminal activity → makes informant more reliable
1. 1st hand knowledge
2. Why admit if didn't happen

Big question: How do you know?

<u>Aguilar/Spinelli 2-prong test:</u> PUT GATES TEST ON EXAM -- NOT THIS ONE.
- Material from an informant had to meet 2 separate prongs before it would constitute probable cause for a warrant.
    1. **Basis of knowledge →** must have facts showing the particular means by which the informant came upon the information which he supplied to the police
    2. **Veracity/reliability →** had to be evidence (usually in the form of an affidavit from the officer seeking the warrant) that the informant was a reliable witness (either b/c he had been reliable in the past, or b/c there was special reasons to believe that his information in this particular case was reliable)
        a. Credibility of the informant
        b. Reliability of the information
    - A/S was a rigid test; must satisfy both prongs.

- ONLY apply when <u>hearsay</u> source (as part of *Gates* test)

<u>Drug-Sniffing Dogs and Probable Cause</u>

- ***Florida v. Harris* (2013)** → The reliability of a dog as an "informant" is to be determined by the *Gates* Totality of the Circumstances Rule – if a dog has satisfactorily performed in an odor-detection training course, that fact alone will typically allow the dog's alert to constitute probable cause

***<u>Illinois v. Gates</u>* <u>(1983)</u>** → Overruled the *Aguilar/Spinelli* 2-prong test; so long as a neutral magistrate can reasonably determine that, based on the informant's information and all other available facts (i.e., the *totality of the circumstances*), there is probable cause to believe that a search or arrest is justified, he may issue the warrant

- The A/S 2-prong test isn't completely gone, but rather it should be treated as "relevant considerations in the totality of the circumstances analysis that traditionally has guided probable cause determinations."
    - The direct consequence of the holding in *Gates* is that a *strong showing* on one of the prongs can in effect make up for an inadequate showing on the other one
- **NEW/MODERN RULE**: a "totality of the circumstances" approach.
    - But A/S not gone completely… just circumstances of new test.
    - Must be more than bare conclusions
    - Common sense/practical decision
- Key to *Gates* = **corroboration**!
    - Corroboration of aspects of the informant's story may be combined w/ the story itself, in determining whether there is probable cause – this is especially likely to be the case where (as in *Gates*):
        - (1) the informant's identity is not known to the police; and
        - (2) the corroboration is of the ***future actions*** of third parties that are not ordinarily not easily predicted
            - In *Gates*, the fact that the informant correctly predicted that Gates would fly to FL sometime shortly after May 3rd, and that he would drive the family car back again immediately thereafter, justified a magistrate in concluding that it was "not unlikely" that the informant also had access to reliable info about *Gates*
    - What do police do with tip?
    - Future event prediction = important factor
- **Standard of review of magistrate's PC determination**: a "substantial basis for concluding" that a search would uncover evidence of wrongdoing
    - Deferential to magistrate
    - Problem with old de novo standard was that officers were not motivated to get warrants
    - If warrantless search, no deference given to officer PC determination
    - Review 4 corners of affidavit, not the hearing.
    - ONE exception: challenging truthfulness if think officer lied to judge to get warrant
        - "*Franks* Hearing"

<u>What may the Defendant do if he believes that the officer lied under oath to the judge who issued a search warrant?</u>

- ***Franks v. Delaware* (1978)** → The 4th Amendment requires that warrants that are founded on probable cause must be "supported by Oath of Affirmation." – therefore, a defendant may challenge the truthfulness of statements made under oath in an affidavit supporting a warrant under limited circumstances
    - "Where the defendant makes a ***substantial preliminary showing*** that a false statement knowing and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, the 4th Amendment requires that a hearing be held at the defendant's request."
    - "In the event that at that hearing the allegation f perjury or reckless disregard is established by a ***preponderance of the evidence***, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the **search warrant must be voided** and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."
        - **Steps:**
            - (1) Defendant makes "substantial preliminary showing" that affidavit contained:

- (a) False information/statement; and
- (b) knowing and intentionally, or reckless disregard for truth, included
- (2) If shown → *Franks* Hearing
- (3) Judge redacts the alleged false info from the warrant
- (4) Judge determines if probable cause exists without the alleged false info
- (5) Affidavit could still stand or warrant is voided

Legal Burdens of Proof (highest to lowest)

- Beyond a Reasonable Doubt
- Clear and Convincing
- Preponderance of
- Probable Cause
- Reasonable Suspicion

Required Degree of Probable Cause

- ***Maryland v. Pringle* (2003)** suggests that as long as the police have "***particularized suspicion***" regarding the existence of fact X, the police do **NOT** need to reasonably believe that fact X exists more likely than not – a ***1/3 chance of fact X CAN constitute probable cause***
  - 3 individuals in a car in which cocaine and money was found – each individual had "constructive possession" of the paraphernalia
  - "We think it is an entirely reasonable inference from these facts that ***any or all of*** the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe Defendant committed the crime of possession of cocaine, ***either solely or jointly."***

Probable Cause as an Objective Concept

- "Evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the police officer." *Horton v. California* (1990)
- An officer's "state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." *Devenpeck v. Alford* (2004)
  - An arrest is lawful, even if an officer incorrectly believes he has probable cause to arrest a person for Crime A (and, therefore, makes such an arrest), if based on the facts known to the arresting officer, probable cause objectively exists to arrest for Crime B.
- **Evidence from Officer's Own Observation →** in some situations, probable cause for a search or arrest can be established by the officer's own personal knowledge. In the case of an arrest, some of the kinds of evidence which a police officer might acquire first-hand and which could contribute to probable cause, are:
  - (1) the flight of a suspect when approached by the policeman;
  - (2) physical clues (e.g., footprints or fingerprints linked to a particular person);
  - (3) voluntary admissions by a suspect;
  - (4) suspicious or surreptitious conduct;
  - (5) a suspect's previous criminal record;
  - (6) a suspect's presence in a high-crime area

Arrest Warrants

General Rule → Arrest warrants are rarely used and have been held ***not to be constitutionally required***, even where the police have sufficient advance notice so that procurement of a warrant would not jeopardize the arrest. **(*US v. Watson* (1976))**

- **Arrest in a Public Place –** *Watson* allows a warrantless arrest to make a felony arrest in a public place

Constitutional Requirement for Entry of Dwelling – only situation in which an arrest warrant *may* be constitutionally required is where the police wish to enter ***private premises*** to arrest a suspect

- **Non-Exigent (**demand/urgent**) Circumstances**
  - ***Payton v. NY* (1980)** → if there are NO exigent circumstances, the police **MAY NOT enter a private home** to make a warrantless arrest b/c entry into a private home is an extreme intrusion, and that entry for purpose of making an arrest is nearly as intrusive

as an entry for a search, i.e., the 4th A requires that a neutral and detached official certify that there is probable cause to make the arrest before this intrusion may take place

- **Result of Invalid Arrest →** A warrantless arrest made in violation of *Peyton* will not prevent the D from being brought to trial (b/c he can always be re-arrested, after a warrant has been issued), but the **evidence seized during the arrest will not be admissible**
- **Confession Stemming from Arrest? →** A confession that follows a warrantless arrest in violation of *Payton* will **NOT** be excluded, even though a confession made following an arrest lacking probable cause **WILL** be excluded

- **Exigent Circumstances →** if there are exigent circumstances, so that it is impractical for the police to delay the entry and arrest until they can obtain a warrant, no warrant is necessary, assuming that the crime is a serious one
  - **Destruction of Evidence –** if police have reasonable cause to believe that the suspect will **destroy evidence** if they delay their entry until they can get a warrant, the requisite exigent circumstances exist (*Illinois v. McArthur*)
  - **"Hot Pursuit" –** if police are pursuing a felony suspect, and he runs into either his own or another's dwelling, a warrantless entry may be permitted under the "**Hot Pursuit" Doctrine**

<u>Proceeding After a Warrantless Arrest: a "*Gerstein* Hearing"</u>

- Most arrests occur outside a private residence; so, b/c of *US v. Watson*, warrantless arrests are exceedingly common
- A police officer, and NOT a neutral and detached magistrate, usually makes the initial probable cause determination – this poses the question: Is an arrestee required to be in custody until the pending trial?
  - ***Gerstein v. Pugh* (1975) →** NO – an arrestee is NOT required to remain in custody pending trial without any judicial determination that the arrest was lawful
    - ***Gerstein* Rule –** the 4th Amendment requires judicial determination of probable cause as a prerequisite to extended restraint of liberty following an arrest
      - Sole issue is whether there is probable cause for detaining the arrested person pending further proceedings
      - The standard – probable cause to believe the suspect has committed a crime – has traditionally been decided by a magistrate in a non-adversary proceeding on hearsay and written testimony
      - Whatever procedure a State may adopt, it must prove (1) a fair and reliable determination of probable cause as a condition for any significant pre-trial restrain on liberty, and (2) this determination must be made by a judicial officer either before or promptly after arrest; and (3) Timeliness requirement – a jurisdiction must provide a probable cause determination within **48 hours** after a warrantless arrest, absent a bona fide emergency or other "extraordinary circumstance." (*County of Riverside v. McLaughlin,* 1991)

<u>Exceptions to *Payton* Rule</u> → If the circumstances of the situation involve ***exigent circumstances*** (emergency/dangerous situation), then a warrantless entry would be allowed. Exigent Circumstances include:

- Hot pursuit of a fleeing felon;
- Imminent destruction of evidence;
- Need to prevent a suspect's escape; or
- Risk of danger to the police or other persons inside/outside the dwelling

<u>Arrest in a Third Person's Residence: the *Steagald* Principle</u>

- Interests Protected by Warrants:
  - **Arrest Warrant –** issued by magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect an individual from an unreasonable seizure
  - **Search Warrant –** issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police
- ***Steagald* Third-Party Principle –** "Regardless of how reasonable [the belief that a suspected individual is within a third-party's dwelling] might have been, it was never subjected to the detached scrutiny of a judicial officer. Thus, while the warrant . . . may have protected [the suspected individual] from an unreasonable seizure, it did absolutely nothing to protect [the third-party whose house was searched]'s privacy interest in being free from an unreasonable invasion and search of his home. . . *In the absence of exigent*

*circumstances . . ., judicially untested determinations are **NOT** reliable enough to justify . . . a search of a home for objects in the absence of a search warrant."*

Search Warrants

Constitutional Debate

- 4th Amendment contains 2 clauses:
  - **The "Reasonableness Clause" –** declares a right to be free from unreasonable searches and seizures of persons, houses, papers and effects
  - **The "Warrant Clause" –** sets out the requirements of any valid warrant (most especially, that it be supported by probable cause, and that it particularly describe "the place to be searched, and the persons or things to be seized."
- **2 Views on the Relationship Between the Clauses – If the police search and seize without a warrant, have they, at least presumptively, violated the 4th Amendment?:**
  - **Justice Jackson in *Johnson v. US* (1948) → "**The point of the 4th Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences 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 . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."
    - Traditional position that the 4th Amendment is better served if police officers apply for warrants, rather than act on the basis of their own probable cause determinations, i.e., "You always have to get a warrant – UNLESS YOU CAN'T"
    - *Katz v. US* – "Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the 4th Amendment – subject only to a few specifically established and well-delineated exceptions."
  - ***US v. Rabinowitz* (1950) →** The proper 4th Amendment test "is not whether it is reasonable [or practicable] to procure a search warrant, but whether the search was reasonable."
    - The text of the Amendment bars *<u>unreasonable</u>* searches and seizures*;* nowhere does it state that warrants are required, only that when warrants *<u>ARE</u>* sought they must meet certain specifications

***<u>Lo-Ji Sales, Inc. v. NY</u>* <u>(1979)</u>**

- **Items of Sale Don't Lose Privacy Expectation Under Plain View Doctrine –** even in public places, the circumstances may be such that there is a reasonable expectation of privacy against government intrusion, rending the "plain view" doctrine inapplicable (e.g., the fact that a merchant has placed items on display in order to sell them to the public does not mean that he has no legitimate expectation of privacy against government intrusion; *where a merchant displays porn books/films, he has **NOT** lost his right to object to an unreasonable search and seizure of them)*
  - However, if police had merely looked at the covers of the books/films and concluded they were obscene, this probably would have fallen within Plain View doctrine, since the customers were free to do the same
- **Magistrate That Leads Search is NOT "Neutral & Detached" →** a magistrate who not only accompanies the police to the scene to search, but actively participates in the search, is **not neutral and detached** – the court invalidated the search and its fruits b/c of the magistrate's lack of neutrality
- **Consent to Search Induced by Reference to Invalid/False Warrant →** if the police state that they have a search warrant, and the warrant is in fact *invalid* (either b/c of insufficient definiteness, lack of probable cause, etc.) the consent of the person whose premises are to be searched is similarly *invalid* – such consent is given in the face of "colorably lawful coercion," and cannot be regarded as voluntary

<u>The Warrant Particularity Requirement</u>

- The "state with particularity" requirement is intended to prevent general searches, the immediate evil "that motivated the framing and adoption of the 4th Amendment," *Payton v. NY* (1980)*,* and to prevent "the seizures of one thing under a warrant describing another." *Andresen v. Maryland* (1976)
  - "Together with other fruits, instrumentalities, and evidence of crime at this time unknown" should be read in a fair context as "authorizing only the search and seizure of evidence relating to" the particular crime under investigation (*Andresen)*

Particularity by Incorporation?

- The fact that the application (what the officer actually searches and seizes) adequately described "the things to be seized" does **NOT** save the warrant from its facial invalidity. The 4th Amendment by its terms requires particularity in the warrant, not in the supporting documents.
- A warrant **MAY** "cross-reference other documents" if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant.

Staleness Doctrine → the longer the attenuation between the criminal act and the warrant, the more likely the probable cause will "expire"

- For a warrant, must show that probable cause is present *on the day of the planned arrest/seizure* and it stays valid only for a few days after that set date
- However, police can "refresh" the probable cause by "double-checking"
- Rule is usually only applicable to fungible/expendable/sellable items (e.g., drugs, contraband)

Execution of a Search Warrant

***Wilson v. Arkansas* (1995)** → The 4th Amendment prohibition on unreasonable searches and seizures contains an implicit "**Knock-and-Announce" Per Se Rule** previously embedded in the common law

- "[HOWEVER], this is not to say that every entry must be preceded by an announcement. The 4th Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests."
- **EXCEPTIONS (where unannounced entry may be justified):**
  - (1) Under circumstances presenting a threat of **physical violence;**
  - (2) Where a prisoner escapes from him and retreats to his dwelling ("senseless ceremony" to require an officer in pursuit of a recently escaped arrestee to make an announcement prior to breaking the door to retake him);
  - (3) Where police have reason to believe that evidence would likely be destroyed if advance notice were given

Exception to "Knock-and-Announce" During Entry Where No Response From Inhabitants – If the officer identifies himself, and is then refused entry, he may use **FORCE** to break into the premises

- **Silence?** → If the occupant is known to be home, and makes no answer, the officer may break in after giving the occupant an adequate time in which to respond.
  - **EXCEPTION where evidence may be DESTROYED** (See *Richards*)

***Richards v. Wisconsin* (1997)** → the ordinary duty to give the occupant an adequate time to answer the door will **NOT APPLY** under circumstances in which this would be dangerous (e.g., the occupant is believed to be armed and violent) or would likely lead to the destruction of evidence

- In the case of evidence, the more easily disposed-of the evidence is, the less time the police must wait
- **Absent?** → If there is no one home, the officer may also break in – searches have not been held "unreasonable" solely b/c they were executed by forcible entry in the absence of the inhabitants
- Holding: **the 4th A does not permit a blanket exception to the knock-and announce requirement for this entire category of criminal activity.**
- Rule: In order to justify a "no-knock" entry, the police must have **"reasonable suspicion"** that knocking and announcing their presence, **under the particular circumstances, would be (1) dangerous or (2) futile, or that it would inhibit the effective investigation of the crime, by for example, allowing the (3) destruction of evidence.**
  - "Reasonable suspicion" standard: must be more than an "inchoate and unparticularized suspicion or 'hunch.'"
  - There must exist "some minimal level of obj. justification."
  - Less demanding standard than PC.

***Richards* Rule:** "No knock" allowed if "reasonable suspicion" that knock would:

  - (1) be dangerous
  - (2) futile OR
  - (3) lead to destruction of evidence
- Will come back to K/A in *Hudson v. Michigan* -- suppression does NOT apply.

How long to wait after knocking?

- *US v. Banks* (U.S. 2003): **15-20 seconds** long enough between knock & open, where police didn't know man was in the shower

- Search Warrant, knock, wait 3 sec, forcibly enter home. Probably not long enough
- Length of knock depends on facts and circumstances. Generally 15-20 sec is long enough.

In Anticipation of a Warrant

- *Issue* – What may the police do before they execute a warrant or even have a warrant to ensure that criminal evidence they expect to find during the search will not be destroyed or moved while they apply for the warrant?
  - ***Illinois v. McArthur* (2001) →** An officer may effectively seize the premises (e.g., not let the resident destroy evidence by keeping eye on his or preventing him from going inside/hold someone) without a warrant if the following elements are satisfied:
    - **(1)** Police have **probable cause** to believe that residence contained evidence of a crime and contraband;
    - **(2)** police had good reason to fear that, unless restrained, defendant could destroy the evidence before they could return with a warrant, i.e., reasonably could conclude that suspect, upon suspecting an imminent search, would, if given the chance, get rid of the drugs fast;
    - **(3)** police made reasonable efforts to reconcile their law enforcement needs w/ demands of personal privacy (e.g., imposing a significantly less restrictive restrain on suspect like only preventing him from entering the residence unaccompanied);
    - **(4)** police imposed restraint for a **limited period of time** that was no longer than reasonably necessary for the police, acting w/ diligence, to obtain the warrant (2 hours)

Executing a Warrant AFTER Entry – Scope of the Search of the Premises

- Once officers are lawfully on premises to execute a warrant, various search principles apply:
  - **(1)** Police **MAY** search containers large enough to hold the criminal evidence for which they are searching
    - Only allowed to search containers that could potentially contain the evidence being searched for (doesn't allow you to search anything)
      - Couldn't search a tiny box if looking for something that couldn't possibly be in that box
  - **(2)** While officers execute a search warrant, they **MAY** seize an object **NOT** described in the warrant, if they have probable cause to believe it is a seizable item (contraband, or a fruit/instrumentality/evidence of a crime)
  - **(3) *Maryland v. Garrison* (1987) →** information that becomes available to officers immediately before or during the execution of a warrant may require them to cease or narrow their search, notwithstanding the dictates of the warrant
    - If an "honest mistake" leads police to finding something beyond the scope of the warrant, the court has "recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrant," thus, allowing the newly-found evidence to be admissible

Searching Persons During the Execution of a Warrant

- A warrant may authorize the search of a person, but it must be explicit
- A warrant to search a home or other premises does not provide implicit authority to search persons found at the scene, even if the criminal evidence for which the police are looking might be on them
  - ***Ybarra v. Illinois* (1979) →** the police must have independent probable cause to search the person – "a person's mere propinquity (proximity) to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person" – as well as some justification for conducting the search without a warrant, i.e., they must be able to point to an exception to the "warrant requirement."
    - Does NOT stand for the proposition that police may **NEVER** search persons coincidentally at the scene during a warranted search

Seizure of Persons During Warranted Searches

- Although the police may NOT automatically search persons present at the scene during the execution of a search warrant, the SC created a bright line rule:
  - ***Michigan v. Summers* (1981)** → regarding seizure of persons present at scene of execution of search warrant, "a warrant to search [a residence] for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."
  - ***Bailey v. US* (2013) →** The right of detention is automatic: it "does not require law enforcement to have particular suspicious that an individual [seized under the rule] is involved in criminal activity or poses a specific danger to the officers."

- *Muehler v. Mena* **(2005)** → the right of the police to detain an occupant during a warranted search of a residence necessarily includes the right to use reasonable force to secure and maintain detention of the occupant

- HOWEVER, b/c the right of detention is automatic and can result in a relatively lengthy detention while the search is conducted, the ***Summers* Rule is limited** to:
  - the detention of occupants of the residence at the time of the search, and
  - persons discovered "immediately outside a residence at the moment the police officers execute the search warrant."
    - Once an individual has left the **immediate vicinity** of the premises to be searched, the bright-line *Summers* rule **NO LONGER APPLIES**
      - 1-mile away from the premises is too much
  - **Scalia on "General 4th Amendment Rule"** → "the general rule is that Fourth Amendment seizures are 'reasonable' only if based on probable cause. *Summers* embodies a categorical judgment that *in one narrow circumstance* – the presence of occupants during the execution of a search warrant – seizures are reasonable despite the absence of probable cause."

Warrant Clause: When Are Warrants Required?

- *Katz v. US,* "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the 4th Amendment – subject only to a few specifically established and well-delineated exceptions."

EXIGENT CIRCUMSTANCES Exception to the "Search Warrant Requirement

General Rule – Officers should not be required to get a warrant when they can't feasibly do so, in situations such that going through the warrant process could allow the criminal to (1) destroy the evidence, (2) harm another person, or (3) searching when in "hot pursuit" for a suspect. These exigent circumstances allows the police to dispense with the warrant requirement

- ***Warden v. Hayden*** **(1967)** → Exigent circumstances (the commission of a crime, information about the alleged criminal and his location) prevents neither the entry or search without a warrant invalid
- **4 Exigencies → Search without a Search Warrant**
  - **(1)** Hot Pursuit of a fleeing FELON
  - **(2)** Imminent Destruction of Evidence
  - **(3)** Need to Prevent Suspect from Escape
  - **(4)** Risk of Imminent Harm to Police or Others Inside

Police-Created Exigency Exception → if there is a serious threat of destruction of evidence, a search warrant is not needed; however, under the "police-created exigency" doctrine, if the police's own conduct "created" or "manufactured" the exigency (the threat of evidence-destruction), then the main evidence-destruction exception to the warrant requirement will NOT apply, and the police will need to get a warrant before they conduct a search

- B/c of ***Kentucky v. King*** **(2011)**, the police-created-exigency doctrine is narrowly interpreted; it will nullify the police's right to enter warrantlessly ONLY when the police "gain entry to premises by means of **(1)** an **actual** or **(2) threatened violation** of the 4Th Amendment
  - This means that as long as the police behavior is "reasonable" in Fourth Amendment terms, that behavior will not deprive the police of the ability to enter without a warrant in order to prevent the imminent destruction of evidence.
  - **Rule:** if there ARE exigent circumstances that would ordinarily relieve the police of the obligation to get a warrant, the police forfeit that right on account of the police-created-exigency doctrine ONLY IF the police were in fact violating, or threatening to violate, the Fourth Amendment
    - The exigent circumstances exception to the Fourth Amendment's warrant requirement applies to an officer-created exigency if the exigency does not arise from the officer's unreasonable or unconstitutional conduct.
      - Under the exigent circumstances doctrine, officers may enter a home without a warrant to deliver emergency aid to an individual, pursue a fleeing suspect, or to prevent the imminent destruction of evidence.
      - A prerequisite to gaining entry into a residence without a warrant under the doctrine is that the officers must have probable cause to believe that dangerous or suspicious activity is currently taking place

NOTICE → An exception to the warrant requirement does NOT necessarily (or, even usually) dispense with the probable cause requirement

Warrantless Entry of the Home

- In determining whether exigent circumstances exist, i.e., entering a home without a search warrant, "a warrantless intrusion may be justified by:
    - **(1)** Hot Pursuit of Fleeing Felon
    - **(2)** Imminent destruction of evidence;
    - **(3)** Need to prevent a suspect's escape; or
    - **(4)** Risk of Danger to the Police or to Other Persons Inside or Outside the Dwelling
        - ***Minnesota v. Olson***
- ***Welsh v. Wisconsin* (1984) →** Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government ***USUALLY*** should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.
    - ***Stanton v. Sims* (2013) →** A warrantless hot pursuit entry into a residence can be constitutional, even if it is only based on the belief that a minor crime had been committed.
- **The "Community Caretaking" Emergency Doctrine – *Brigham City, Utah v Stuart* (2006) →** "One exigency obviating (removing) the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. Law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury (i.e., an ongoing violence occurring within the home)."
    - "The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee poised to stop a bout only if it becomes too one-sided."

Searches Incident to a Lawful Arrest Exception (SILA)

- **Pre-*Chimel* Law on Search Incident to Arrest →** When the police validly arrested a person, they could constitutionally search the entire premises where he was arrested, even though they did not have a search warrant (*US v. Rabinowitz)*
- ***Chimel v. California* (1969) →** The police have a right to search the area within the defendant's IMMEDIATE CONTROL, but portions of the premises outside of that control could NOT be warrantlessly searched incident to arrest
    - When an arrest is made, it is reasonable for the arresting officer to:
        - Search the person arrested in order to remove any weapons that the suspect might seek to use in order to resist arrest or effect his escape – otherwise the officer's safety might well be endangered; and
        - Search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction and the area into which an arrestee might reach in order to grab a weapon or evidentiary items
    - There is ample justification for a search of the arrestee's person and the area **within his immediate control**, i.e., the **area from within which he might gain possession of a weapon or destructible evidence**
- **Limited Scope →** there is **NO** comparable justification for routinely searching:
    - Rooms other than that in which an arrest occurs;
    - All desk drawers or other closed or concealed areas in that room itself

Arrest Inventories – Another Warrant "Exception"

- Any person who will be incarcerated, even temporarily, undergoes a second search: an "arrest inventory."
- This inventory search, which occurs without a warrant and in the absence of probable cause, is constitutionally justified on various grounds:
    - To protect the arrestee from theft of his valuables while in jail;
    - To reduce the risk of false claims of theft by the arrestee; and
    - To ensure that contraband and dangerous instrumentalities that might have been missed by the police in the initial search incident to the arrest are not smuggled into the jail
- Therefore, regardless if you're searched at the time of the arrest, you're going to get searched at the time of booking

Search of Items Carried on Person of Arrestee

General Rule → when a search is properly made incident to a lawful arrest, the police may examine items of personal property found on the person of the arrestee

- **Includes Search of Items that are NOT Suspected of Being Weapons or Evidence** – the right to examine items found on the arrestee's person is NOT limited to items that the officer reasonably fear may be weapons or may constitute evidence of crime – rather, *ANY* physical item found on the person could be searched
  - ***US v. Robinson* (1973) →** an arresting officer does NOT need probable cause to believe that the arrestee has a weapon or criminal evidence on his person. The right to conduct the warrantless search is automatic: if the custodial arrest is based on probable cause, no more is needed
    - DO NOT need any other warrant to search things on the person or within the person's reach (including purses and content of the arrestee's pockets)
- **Cellphones and their Digital Contents →** when the police properly make a custodial arrest on a person who happens to be carrying a cell phone, the SILA doctrine does **NOT** permit the police to perform a *warrantless search of the digital contents of the phone*
  - ***Riley v. California* (2014) →** the SILA doctrine did NOT entitle the police to examine the ***digital contents*** of the cell phones without a warrant, and therefore, the police must obtain a warrant to search the contents of the phone
    - Cell phone data does not fall into the 2 justification (i.e., police safety and destruction of evidence) that ***Chimel*** laid out as reason for warrantless searches
    - **Black Letter Rule →** Answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple – ***GET A WARRANT***
    - **Other Types of Digital Devices** – presumably, rule applies not only to small handheld digital devices, but even to somewhat larger ones – tablets and laptops – found on or near the arrestee
- **Breath and Blood Tests Incident to Arrest (Drunk Driving and SILA) – *Birchfield v. North Dakota* (2016)**
  - **Breath Tests Incident to Lawful Arrest →** Warrantless breath tests, incident to lawful arrest, **are** *per se* constitutional and the State may criminalize the refusal to comply with a demand to submit to the required testing
  - **Blood Tests Incident to Lawful Arrest →** Warrantless blood tests are **NOT** justifiable as an incident to a lawful arrest b/c it extracts information that can be preserved and from which it is possible to extract information beyond the driver's BAC
- **Automobile Searches Incident to Arrest**
  - ***Arizona v. Gant* (2009) →** the SILA rationale allows a warrantless search of the passenger compartment **ONLY IF** one of two things is true:
      - **(1)** the arrestee has access to the passenger compartment at the moment of the search; OR
      - **(2)** the police reasonably believe that the passenger compartment may contain evidence of the offense for which the arrest is being made
    - The ***Chimel*** rationale authorizes police 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

<u>Search Incident to Lawful *CITATION*?</u>

- ***Knowles v. Iowa* (1998) →** When a police issues a mere traffic citation, it does **NOT** permit the police to then conduct a search of the car b/c a routine traffic stop is a relatively brief encounter and does not pose danger to the officer
  - B/c of nature of citation, once the individual is stopped and issued a citation, all the evidence necessary to prosecute that offence has been obtained and no further need to discover and preserve evidence exists
- ***Atwater v. City of Lago Vista* (2001) → Custodial Arrests:** when the police take a person into custody for a petty/minor offense (e.g., a minor traffic violation that carries only a small fine)
  - **Rule →** an individual **MAY** be arrested for minor/petty crimes b/c the officer has no definitive way of knowing whether the circumstances indicate a "major" or "minor" crime
    - "The trouble with the distinction [between "jailable" and "fine-only" offences] is that the officer might not be able to tell. It is not merely that we cannot expect every police officer to know the details of frequently complex penalty scheme, but that penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of the arrest."

<u>Pretextual Stops and Arrests (Particularly in Automobiles)</u>

- Suppose the police have a vague suspicion that a particular motorist is engaged in some illegal activity (e.g., drug smuggling), but this suspicions does not rise even to the level of permitting a warrantless "stop", let alone a warrantless search or arrest. However, suppose that the police, after further observing the motorist, notice him violate some minor traffic regulation not related to the suspected illegality. *May the police seize upon this violation as a pretext for stopping the motorist?*

***Whren v. U.S.* (1996)** → When the police's "real" reason for stopping a vehicle is something other than the traffic violation is irrelevant – once the police have probable cause to believe that even a minor traffic (or other) violation has occurred, they may stop the vehicle. Then, if the stop in turn gives them probable cause to believe that contraband is inside, they may perform a warrantless search

- I.e., if the police have probable cause to believe that a traffic (or other) law has been broken, they may stop the perpetrator, even if their motive in doing so is to seek evidence of some other crime for which they do not have probable cause or even reasonable suspicion, i.e., there's no "pretext" exception to the general rule that police may make a warrantless stop of a vehicle when they have probable cause to believe than an offense has been committed

<u>Cars and Containers</u>

<u>Search at Station After Arrest</u> – where the police arrest a driver, take him and his car to the station, and search the car at the station

- ***<u>Chambers v. Maroney</u>* <u>(1970)</u>** → a warrantless search which results in the finding of incriminating evidence is valid, despite the fact that, since the car was in police possession, a warrant could have been procured without endangering the preservation of evidence
  - **Rationale:** (1) the destruction-or-removal-of-evidence exception at least permitted the arresting officers to seize the car and deny its use to anyone; and (2) that being the case, "there is little to choose in terms of practical consequences between an immediate search [at the station] without a warrant and the car's immobilization until a warrant is obtained."
  - **Houses v Cars** → as a general principle, a *lesser showing of exigent circumstances* will allow a warrantless search of a vehicle than of a house b/c "a man's home is his castle."
- ***Carroll v. US* (1974)** → automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize
  - Driver has three (3) interests at stake (when conducting the respective search without a warrant):
    - (1) interest in locomotion (continuing to travel);
    - (2) an interest in control over his property; and
    - (3) a privacy interest in the car's content

<u>Search at Place Where Vehicle is Stopped</u> → ***California v. Carney* (1985) –** police generally have a right to conduct a warrantless search of a vehicle immediately at the place where they have stopped it (assuming that they had probable cause to make the stop)

  - The warrantless search here was valid, and fell within the vehicle exception to the requirement of a search warrant, recognized by ***Carroll***
  - *Carney* also establishes that a mobile home will be treated as a "vehicle" (with its lesser expectation of privacy), rather than a fixed dwelling, at least where the home is parked in a parking lot (may be different if the home was fixed)
- **Automobile Inventories: Another Warrant "Exception"** → A warrantless search of a car may be permissible on various grounds:
  - **(1)** If the police have probable cause to search a car, the *Carroll-Chambers-Carney* "automobile exception" comes into play;
  - **(2)** if an occupant (or recent occupant) of an automobile is arrested, the police may sometimes conduct, as an incident of the arrest, a contemporaneous search of the passenger compartment of the vehicle, even without probable cause to search;
  - **(3)** *Automobile Inventory* Warrant Exception – ***South Dakota v. Opperman*** →if the car is impounded because it has been towed for illegal parking, the Court has held, it may similarly be subjected to a warrantless "inventory search," even though the police have never had probable cause to believe it contains contraband or evidence of crime

***Collins v. Virginia* (2018)** → Whether the automobile exception to the Fourth Amendment permits a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein – the warrantless search fell outside the scope of the automobile exception and could not be justified on that basis

- The dual rationales for the automobile exception – mobility and reduced expectation of privacy – are based on the premise that automobiles are different and, therefore, less constitutionally protected than homes, b/c a home is the "first among equals"

- And, "to give full protection of that right, the Court considers the curtilage – the area immediately surrounding and associated w/ the home – to be part of the home itself for 4th Amendment purposes
- QUESTION – Is a warrant always needed if a vehicle is sitting in the driveway of a person's home? → NO
  - (1) the motorcycle was "parked and unattended" – did not discuss whether a warrantless search of a vehicle in a driveway might be justified on other warrant-exception grounds, e.g., exigency or hot pursuit of a vehicle on a public road that turns into a driveway
  - (2) Precisely where the motorcycle was parked in the driveway, fell within the curtilage of the home → based on its location, it was parked in the curtilage of the house and entitled to the same protections that a home would receive

Containers in Cars
- In *Chambers* – police found criminal evidence concealed in the compartment of the vehicle they searched
- In *Coolidge* – police found particles of gun powder on the car upholstery/floor
- In *Carney* – drugs and related paraphernalia were in plain view on a table inside the motor home
  - In all the cases, the criminal evidence was in plain view in the open

***California v. Acevedo* (1991)** → if the police have probable cause to believe that a container contains contraband, they may wait until the container is in the car, stop the car, and seize and open the container, all without a warrant
- *Holding* – the police's right to conduct a warrantless search of containers in a car should apply not only where their probable cause relates to the car as a whole (the situation in *Ross*), but also where their probable cause extends only to the container itself. The majority believed that the intrusion in this situation was no more severe than in the *Ross* "probable cause as to the whole car" situation

Containers Belonging to Passengers
- Does PC to search a car entitle the police to open containers they have reason to know belong to an occupant whom they lack probable cause to arrest?
- ***Wyoming v. Houghton* (1999)** → "police officers w/ PC to search a car may inspect ANY passengers' belongs found in the car that are capable of concealing the object of the search"
  - "Passengers, no less than drivers, possess a reduced expectation of privacy w/ regard to the property that they transport in cars"
  - "The degree of intrusiveness upon personal privacy and indeed even personal dignity" of a property search is less than the intrusiveness of a search of one's person.
  - The government's legitimate interest in effective law enforcement justified a search of all car containers that might hold drugs, and not simply those containers apparently belong to the driver.

<u>Plain View (and Touch) Doctrines</u>

***Horton v. California* (1990)** → For the plain view doctrine to be applied so that a warrantless seizure of evidence is allowable, three (3) requirements must be met:

1. Officers must not have violated the 4th Amendment in arriving at the place from which the items were plainly viewed;
   - Can't trespass to get into a position to see the viewable item
2. The incriminating nature of the items must be immediately apparent; and
   - Must be able to be viewed by the naked eye; not microscopic evidence
   - The police must, at the moment they first see the item in plain view, have probable cause to believe that the object is incriminating
3. The officers must have a lawful right of access to the object itself

- **Seizure of Unnamed Items –** as police are conducting a search, they may sometimes come across items which they would like to seize, but which are not listed in the warrant. Courts usually allow such seizures as long as the search was conducted in the proper area and the unnamed item was in "plain view" at some point during the lawful search
  - **No Requirement of Inadvertence (Unintentional) –** it is not required, for application of the plain view doctrine, that the police's discovery of an item in plain view by "inadvertent", i.e., if the police know that they are likely to find items 1, 2, and 3 in a search of D's premises, and they get a warrant listing items 1 and 2, they may seize item 3 if they encounter it in plain view while executing the search warrant, even though their spotting of 3 was no "unintentional"

- **Facts of *Horton*** – police had warrant to find fruits of robbery (i.e., 3 rings) but found weapons (as they thought they would) as well – court allowed the seizure and subsequent intro into evidence of the weapons under the plain view doctrine, even though the police discovery of the weapons was not unintentional and could easily have been covered by thee warrant
- **Application** – police may list one or a few items, and then pick up anything else they happen across while searching for the listed items

***Arizona v. Hicks* (1987)** → For a warrantless search or seizure to be reasonable under the Fourth Amendment, the plain view doctrine can only be invoked to search or seize evidence if the police have probable cause of the evidence's incriminating character.

- The plain view doctrine demands that probable cause exist before an officer may search or seize a piece of evidence.
- The Fourth Amendment protections against unreasonable searches and seizures are both due equal protections and must be treated the same under the plain view doctrine.
    - As such, just as the plain view doctrine allows police to seize evidence without a warrant when they observe incriminating evidence in plain view, it permits officers to search items by moving them for closer inspection.
- However, probable cause is necessary to invoke the plain view doctrine for a warrantless search.
    - Under the Fourth Amendment, warrantless searches and seizures are presumptively unreasonable and there is no reason why an exception to the warrant requirement should require a lesser standard of cause than that needed to obtain an actual warrant.
- In this case, the officer's inspection of the stereo equipment constituted a Fourth Amendment search because his actions allowed him to observe and record information that was not already exposed and in plain view.
    - The search of the stereo equipment was unrelated to the lawful purpose for which the officer was in Hick's apartment.
    - Also, the search of the equipment does not fall under the plain view doctrine because the officer lacked probable cause that the equipment was stolen.
- Therefore, the search is unconstitutional.
- ***Holding***: the plain view doctrine does not apply, b/c at the moment the officer picked up the stereo, he did not have probable cause for the search he performed by moving it, merely "reasonable suspicion. (By the time he seized it, he did have probable case, but he got that probable case – by learning that the serial number had been reported stolen – via the illegal search)

Plain-Touch Doctrine

- *Minnesota v. Dickerson* (1993) – "The plain-view doctrine has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search.
    - If a police officer lawfully pats down a suspect's outer clothing for weapons and feels an object whose contour or mass makes it identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons;
    - if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context."

Consent

Consent Generally → even if none of the exceptions to the requirement of a search warrant are present, the police may nonetheless make a constitutional warrantless search if they receive the consent of the individual whose premises, effects, or person are to be searched.

- ***Schneckloth v. Bustamonte* (1973)** → the consenter's ignorance of his right to refuse consent was only one factor to be considered in ascertaining the validity of the consent. "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine quo non* of an effective consent."
    - **Totality of the Circumstances –** Used a TOTC test to determine the consent's validity looking at the voluntariness of the confession. Court stressed that the issue was whether the consent was "voluntary"; the Court felt that a consent is "voluntary" as long as it is not "the product of duress or coercion, express or implied."
    - **Warning of Rights –** The police do not have to tell the consenter that he has a right to refuse
- *Ohio v. Robinette* (1996) → A consent is still voluntary regardless if the police do not inform the consenter that he is free to go after returning his driver's license upon being stopped for speeding. Although knowledge is a factor to be taken into account in voluntariness analysis, there is no categorical requirement that the police inform "detainees that they are free to go before a consent to search may be deemed voluntary."

- ***Bumper v. NC* (1968) → False Claim of Present Authority** – where an officer falsely asserts that he has a search warrant, and then procures "consent," the consent is INVALID. "When a law enforcement officer claims that he has the authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion – albeit colorably lawful coercion. Where there is coercion there cannot be consent."
    - **Consent Induced by Reference to Invalid Warrant →** *Lo-Ji Sales v. NY* – if the police state that they have a search warrant, and the warrant is in fact invalid (either b/c of insufficient definiteness, lack of probable cause, etc.), the consent of the person whose premises are to be searched is similarly invalid
- **Limiting Temporal/Scope of the Consent** – Even if a person voluntarily consents to a search, he can set limits of a temporal nature (e.g., "you may search my house for 2 mins and no more") or limit the scope of the search (e.g., "you may search my kitchen and living room, but not my bedroom")
- **Withdrawing Consent** – a person may withdraw consent after it is granted and the police must honor the citizen's wishes, unless their pre-withdrawal search gives them independent grounds to proceed.

<u>**Consent By Third Persons**</u>

- **D is Present and Objecting When Third Party Consents – *Georgia v. Randolph* (2008) →** When D is present when the third party consents to a search of the premises over which the two have joint authority, and D makes it clear that he, D, is NOT consenting, the third party's consent will NOT be binding on D, at least where it appears to the police that the third person and D have equal claim to the premises.
    - Where two parties are not living within some "recognized hierarchy" (e.g., household with parent and child; military barracks), the co-tenant who wishes to open the door to a third person "has no recognized authority in law or social practice to prevail over a present and objecting co-tenant."
    - The co-tenant's "disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have been in the absence of any consent at all."

***Fernandez v. California* (2014) →** when one resident denies entry into a dwelling, but is arrested on independent grounds, then come back to the dwelling and get consent to search by another resident, "consent by one resident of jointly occupied premises is generally sufficient to justify a warrantless search."

- *Randolph* is a "narrow exception" making clear that it was limited to situations in which the objecting occupant is present

<u>**Reasonable Mistake?**</u>

***Illinois v. Rodriguez* (1990) →** the third-party consent will be binding on the absent defendant even if the police were *mistaken* about whether the consenter in fact had joint authority over the premises, as long as the mistake was a reasonable one.

- E.g.) if the consenting third person falsely tells the police that she lives in the premises to be searched, and the police reasonably belive her, the lie will not invalidate the consent
- Even if the consenter is an "infrequent visitor" rather than a "usual resident" with no true authority to allow the police to make a warrantless entry or search; so long as the police were ***reasonably mistaken*** in their believe that the consenter had authority to consent, this is the same as if she had actually had such authority.
    - B/c the 4th Amendment bans only "unreasonable" searches and seizures, and where the police make a factual determination about a search, their reasonable mistake on the issue of authority to consent transforms the search into a "reasonable" one

Scope of Consent

- A consent search is invalid, even if the consent was voluntary, if the police exceed the scope of the consent granted
- *Florida v. Jimeno* (1991) → it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of his car, i.e., suspect granted the officer permission to search his car, and did not place any explicit limitation on the scope of the search
    - It is objectively reasonable for the police to conclude that the general consent to search respondents' car included consent to search containers within the car which might bear drugs
    - The 4th Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable

- The standard for measuring the scope of a suspect's consent under the 4th Amendment is that of "objective" reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?

REASONABLENESS CLAUSE: THE DIMINISHING ROLES OF WARRANTS AND PROBABLE CAUSE

THE *TERRY* DOCTRINE

***Terry v. Ohio* (1968) →** a stop-and-frisk could be constitutionally permissible despite the lack of probable cause for either full arrest or full search, and despite the fact that a brief detainment not amounting to a full arrest was a "seizure" requiring some degree of 4th Amendment protection

- **"Seizure" →** Court agreed that the detainment of the defendant on the street was a sufficient intrusion on his freedom that it was a "seizure" within the meaning of the 4th Amendment
- **"Search" →** Court also agreed that the "pat-down" of the defendant was a "search" within the meaning of the 4th Amendment, even though it was not a full-scale body search
- **Not Unreasonable →** Court rejected the argument that b/c a 4th Amendment seizure and search took place, "probable cause" was required, i.e., a stop-and-frisk does not require probable cause because the exigent circumstances (the need to act quickly) justified dispensing with the warrant requirement, allowed the Court to conclude that probable cause was not constitutionally required
  - **Only Test →** the only constitutional test is whether the stop and/or frisk was ***unreasonable***
- **Rule →** "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquires, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the 4th Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken."
- **Frisk Permissible under *Terry* →** *Terry* indicates that where the officer wishes to conduct a frisk in connection with a stop, he must follow a two-step process:
  - **(1)** must first merely pat down the outside of the suspect's clothing, to feel for hard objects which might be weapons; and
  - **(2)** only if he feels such an object may he reach inside a pocket or article of clothing.
    - **Limited Purpose of Frisk →** when the frisk does occur, it must be limited to the search for weapons, i.e., item which could not be weapons may not be examined, and areas not within the control of the suspect may not be searched
      - E.g.) If an officer is searching for a weapon and feels something that reasonable could be contraband, the officer may not expand the search (remove the object) unless he already has probable cause to believe that the object is contraband
    - **"Plain Touch" Doctrine Applies During Frisk →** under the Plain View doctrine, once the police legally view an object and recognize it to be contraband or evidence, they may seize it without warrant. A Plain Touch variant applies during a *Terry* frisk, so that if the officer, while staying within the narrow limits of a frisk for weapons, feels what he has probable cause to believe is a weapon, contraband or evidence, the officer may expand the search or seize the object
- **Reason to Fear Danger –** even if a *Terry* stop is justified, the frisk may take place ONLY IF the officer has a reasonable belief that the suspect may be armed. A reasonable belief that the suspect has contraband, or that a frisk will turn up evidence of criminality, is not sufficient to frisk

The "Terry Doctrine" After a Crime has been Committed → *US v. Hensley* (1985) – the *Terry* doctrine applies under circumstances in which the police believe "crime was afoot," as well as, when an officer seeks to investigate a *completed **felony***: Stops are allowed if the "police have a reasonable suspicion, grounded in specific and articulatable facts, that a person they encounter was involved in or is wanted in connection with a completed felony."

Pat-Downs

- In *Minnesota v. Dickerson*, the Minnesota SC stated that the officer determined that the lump was contraband only after "squeezing, sliding, and otherwise manipulating the contents of the defendant's pocket" – a pocket which the officer already knew contained no weapon. . . It is clear that the police officer overstepped the bounds of the "strictly circumscribed" search for weapons allowed under *Terry*.

- The officer's continued exploration of the suspect's pocket after having concluded that it contained no weapon was unrelated to "the sole justification of the search under *Terry*: the protection of the police officer and others nearly." It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize

When the Purpose of the Seizure Changes: Traffic Stops that Becomes Something More

- In determining whether the seizure and search were "unreasonable" our inquiry is a dual one:
  - **(1)** whether the officer's action was justified at its inception; and
  - **(2)** whether it was reasonably related in scope to the circumstances which justified the interference in the first place
- *May a police officer temporarily detain a person lawfully on a traffic violation, and then use the opportunity to conduct an investigation unrelated to the reason for the original detention?*
  - In *Rodriguez v. US* (2015) – a routine traffic stop is comparable to a brief *Terry* seizure
    - As part of such a stop, ordinary inquiries incident to a traffic stop, e.g., checking the driver's license, determining whether there are any outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance – are permitted
    - In this case, all of these permitted procedures were done before the dog was brought to the scene – this latter process "prolonged the time reasonably required to complete the mission" of issuing the warning ticket
    - The "reasonableness of a seizure depends on what the police in fact do. The critical question is not whether the dog sniff occurs before or after the officer issues a ticket, but whether the conducting the sniff 'prolongs', i.e., adds time to the stop"

<u>"*Terry* Seizures" Versus De Facto Arrests</u>

- **Brief Detention at the Station –** *Terry* and *Adams*, in holding that a 4th Amendment seizure might sometimes be permissible on less than probable cause, i.e., reasonable suspicion, spoken only of ***on-the-street*** encounters.
  - If the suspect is required to come to the police station, the *Terry/Adams* rationale will **NOT apply**
  - The line dividing a *Terry*-stop from an intrusion so severe that the full protection of the 4th Amendment is triggered, is "crowed when the police, without probable cause or a warrant, forcibly *remove a person from his home or other place in which he is entitled to be* and transport him to the police station, where he is detained, although briefly, for investigative purposes." *Hayes v. Florida* (1985)
    - Such station-house detention, even though brief and unaccompanied by interrogation, is "sufficiently like an arrest to invoke the traditional rule that arrests may be constitutionally be made only on probable case."

Lack of Actual Arrest Irrelevant – *Dunaway v. NY* (1979) → Probable cause is necessary for a station-house detention accompanied by interrogation, even if no formal arrest is made

- Insofar as the defendant was taken into custody, the intrusion on his privacy was much more severe than an on-the-street stop, and that the situation should therefore not be handled under the *Terry* "balancing test" approach
- Instead, ***probable cause was required***, and since it was lacking, the confession was the tainted fruit of an invalid seizure
- The mere fact that the defendant was not told he was under arrest, was not "booked", and would not have had an "arrest record" had the investigation proved fruitless, did not prevent the seizure from being serious enough to require probable cause
  - **Fingerprinting –** the rationale for *Terry* will NOT allow the police, acting without probable cause, to require a suspect to come to the station for ***fingerprinting*** (*Hayes v. Florida*)

Moving Suspects

- *Florida v. Royer* (1983) → (officer moves individual suspected of trafficking marijuana into an interrogation room) an interaction that begins as a consensual inquiry in a public place cannot be escalated into an investigatory procedure in a police interrogation room under mere suspicion of criminal activity
  - Any consensual aspects of an encounter are evaporated if the suspect reasonably believed that he was being detained and was not free to leave, i.e., the suspect is de facto arrested
- *Pennsylvania v. Mimms* (1977) → (officer asks suspect to exit vehicle without probable cause then sees a bulge of a gun) → Balancing the competing interests, *when an officer legally stops a driver on the highway, he may order the driver out of the car without further justification*
  - "The additional intrusion of getting out of the car can only be described as *de minimis* (too minor). The driver is being asked to expose very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be

briefly detained: the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it."

- *Maryland v. Wilson* (1997) → (can officer order a passenger out of the car at stop?) – Again, balancing officer safety vs personal liberty, since innocent passengers are inevitably seized when the driver is stopped, this change in circumstances (i.e., being ordered out of the car) was again too minor an additional intrusion to outweigh police safety

Length of the Detention

- *US v. Sharpe* (1985) → (distinguishing an investigative stop from a *de facto* arrest)
  - "Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop."
  - "The brevity of the invasion of the individual's 4th Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion, we have emphasized the need to consider the <u>*law enforcement purposes to be served by the stop*</u> as well as the <u>*time reasonably needed to effectuate those purposes*</u>"
  - "in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria."
  - "In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine <u>*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 defendant*</u>.
    - Court should consider *whether the police are acting in a swiftly developing situation*
    - The question is *whether the police acted unreasonably in failing to recognize or to pursue an available alternative*

<u>**Seizures vs. Non-Seizure Encounters**</u>

- Overarching Issue → what degree of interference with a person's mobility must exist before a 4th Amendment "seizure" has occurred, i.e., what constitutes a "stop"?
  - ***US v. Mendenhall*** **(1980) Test →** Established test for determining whether an encounter constitutes a 4th Amendment "seizure": "A person has been 'seized' within the meaning of the 4th Amendment only if, in view of all of the circumstances surrounding the incident, a ***reasonable person*** would have believed that he was **not free to leave**.
    - Following examples of circumstances that "might indicate a seizure, even where the person did not attempt to leave:'
      - **(1)** the **threatening presence** of several officers;
      - **(2)** the **display of a weapon** by an officer;
      - **(3)** some **physical touching** of the person; or
      - **(4)** the use of **language/tone of voice** indicating that compliance with the officer's request might be **compelled**

"Bus Sweeps"

- *Florida v. Bostick* (1991) → **"Feel free to decline" Standard –** a seizure will be deemed NOT to have occurred if "a reasonable (and innocent) person would feel free to decline the officers' requests or otherwise terminate the encounter."
  - **Remember:** the normal standard necessitates a consideration of "all the circumstances surrounding the encounter. The traditional rule is a seizure does not occur so long as a reasonable person would feel free "to disregard the police and go about his business."
- *US v. Drayton* (2002) → **Police Need NOT Inform Passengers of Right NOT to Cooperate –** Court decided that when a court answers the question "did the passengers reasonably believe they were free NOT to cooperate?" the fact that the officers **failed to inform** the passengers that they were free NOT to cooperate **does not matter**
  - Therefore, most interrogations of bus passengers will probably be found NOT to be seizures, and thus not to pose 4th Amendment problems
- **Significance →** these two cases seem to establish that the ordinary bus-based drug-interdiction scenario – in which multiple officers, whether in uniform or not, and whether visibly armed or not, explain that they are performing a drug interdiction effort and ask each passenger for permission to search his bags and person – will **not constitute a 4th Amendment seizure**.
  - If there is NO seizure, any consent given will be valid even though the entire procedure was done without any individualized suspicion

Pursuit by Police

- ***California v. Hodari D.* (1991) →** (Does a chase itself constitute a "seizure"?) – until the suspect **submits** to the chase (by stopping), there is NO seizure. There will not be a seizure until two things happen:
    - **(1)** the suspect stops in response to the chase or to the police orders; and
    - **(2)** a reasonable person in the suspect's position would believe that he was **not free to leave** once stopped
  - **Rule:** where a show of authority is made to a suspect, and the suspect does not yield, no seizure takes place. "An arrest requires either physical force or, where that is absent, submission to the assertion of authority."
  - **Application:** *Hodari* rationale probably applies beyond the "chase" situation:
    - (1) officer says "freeze" or fires a warning shot;
    - (2) officer, driving a police car, puts on his flashing lights or his sirens; or
    - (3) in an airport setting, a narcotics agent approaches a group of passengers w/ his gun drawn, and announces a "baggage search"
      - In any of these situations, if the suspect flees, tries to dispose of evidence, or does anything other than immediately submit, his actions will be admissible even though the initial encounter was made at a time when the police had no probable cause to make a stop or other seizure

<u>**Reasonable Suspicion – Degree of Probability Required for a Stop**</u>

- *Issue:* What is the degree of probability of criminal conduct must exist before a stop is justified under *Terry*
- **Flight as a Cause for Suspicion →** the fact that an individual has attempted to flee when seen by the police will normally raise the police's suspicion, and may even without more justify the police in making a *Terry*-style stop. The ***combination of flight and presence in what the officer knows is a high-crime area*** will generally be enough for a stop (*Illinois v. Wardlow*)
  - ***Illinois v. Wardlow* (2000) →** the combination of D's presence in an area of heavy narcotics trafficking, plus his "unprovoked flight upon noticing the police," were enough to trigger a *Terry* stop
    - **Flight by itself probably NOT enough** – Court does not seem to be saying that unprovoked flight, by itself, would necessarily be enough to justify a *Terry* stop; it is the combination of unprovoked flight plus presence in a high crime area that seemed to have created enough suspicion to justify a stop
- **Tip from an Informant – *Alabama v. White* (1990) →** When the police want to make a stop based on an *informant's tip*, they may similarly do so on "***reasonable suspicion,"*** and do not need to have probable cause. Whether the informant's tip is reliable enough to give right to the required "*reasonable suspicion*" is to be determined by the ***"totality of the circumstances."***
  - ***Totality of the Circumstances* Test** is the same test used to determine whether an informant's tip supplies "probable cause," but the degree of reliability needed to create "*reasonable suspicion*" for a stop is less than the reliability needed to furnish true probable cause
  - **Prediction of Future Events →** when the court applies the "totality of the circumstances" test to evaluate information from an informant (especially an ***anonymous*** one) a key factor is *whether the informant has **predicted future events** that someone without inside information would have been unlikely to know*
    - **Tip Without Corroboration is NOT Enough – *Florida v. J.L.* (2000) →** "an anonymous tip must provide predictive information that gives the police means to test the informant's knowledge or credibility. Reasonable suspicion requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."
  - ***White* Holding/Principle →** an anonymous tip will be sufficiently reliable to permit a stop if and only if, prior to the stop, the police have been able to ***verify that the informant's assertion that criminality is afoot is a RELIABLE one***
    - Low reliability + extensive corroboration = enough to create reasonable suspicion
- **911 Anonymous Tip – *Navarette v. California* (2014) →** Under appropriate circumstances, an anonymous tip can demonstrate sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop
  - The reporting that the individual had been run off the road by a specific vehicle necessitates eyewitness knowledge, the basis of which lend significant support to the tip's reliability
  - The caller's ***use of the 911 system*** is one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call
- **Mistake of Law by Officer Leading to Reasonable Suspicion? – *Heien v. NC* (2014) →** an officer's misunderstanding of the law was reasonable (in view of an ambiguity in the code provision) and, therefore, there was reasonable suspicion justifying the stop of the vehicle

- The SC has recognized that "searches and seizures based on mistakes of fact can be reasonable, . . . and reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion [and probable cause]."

- **Stop-and-Identify Statutes – *Hiibel v. 6th Judicial District Court of Nevada* (2004) →** the principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop if request for identification was "reasonably related in scope to the circumstances which justified" the stop, i.e., a state law requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with 4th Amendment prohibitions against unreasonable searches and seizures.

Expanding the Scope of the *Terry* Balancing Approach

- Thus far, *Terry v. Ohio* involved persons, rather than property – specifically, the warrantless "brief" seizure and, sometimes "minimal" frisk-searches of persons
  - However, once we shift from the Warrant Clause to the Reasonableness Clause, a court balances the individual's Fourth Amendment interests against the government's interest in criminal law enforcement, there is nothing that conceptually limits this approach to stop-and-frisk (or stop-and-question) scenarios
- *Terry* Balancing Approach extends to:
  - Justifying some warrantless, probable-cause-less, limited seizures and searches of *property*
  - Minimal *non*-frisk searches of persons (including some DNA searches)

Protective Sweeps

- Remember *Chimel*'s ruling that a warrantless search incident to lawful arrest must be limited to areas within the arrestee's "immediate control."

***Maryland v. Buie* (1990) →** where an arrest takes place in the suspect's home, the officers may conduct a *protective sweep* of **all or part of the premises**, if they have a "reasonable belief" based on "specific and articulable facts" that another person who might be dangerous to the officer may be present in the areas to be swept.

- **Nature of Protective Sweep –** a "protective sweep" is a quick and limited search of premises incident to arrest, and is conducted to protect the safety of the arresting officers or others
  - It is NOT a full search of the premises, but may extend "only to a cursory inspection of those spaces where a person may be found hiding."
- **Requirements:**
  - In order to search the rest of the house, need articulable facts supporting a reasonable suspicion that someone else is in the house
- **Adjacent Spaces**
  - "Specific and articulable facts" are NOT needed for the officers to search in **closets** and other spaces **immediately adjoining** the place of an arrest, to make sure that no possible attacker lurks there
  - This may be done as a precautionary measure, even where there are no specific facts suggesting a risk of attack, and does not count as a "protective sweep"
- **Summary:**
  - As an incident to the arrest the officer can, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched
  - There must be **articulable facts** which, taken together with the **rational inferences** from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene
  - A protective sweep, aimed at protecting the arresting officer, is not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found
    - The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises

Notes:

- **Brief Seizure of Property?**
  - *US v. Place* (1983) → extended the *Terry* analysis of temporary seizures of persons to personalty (personal, movable property)
    - *Facts* – DEA took luggage of suspect for 90 mins before subjecting it to a "sniff test", which reacted positively

        - *Rule* → when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope
- **Car Frisks?**
    - The police may ordinarily search a car without a warrant if they have probable cause to do so
    - The police may search portions of the car as an incident to a lawful arrest of a car occupant (or a recent occupant), even without probable cause
    - *Penn. V. Mimms* – police may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous
    - *Adams v Williams* – the police, acting on an informant's tip, may reach into the passenger compartment of an automobile to remove a gun from a driver's waistband even where the gun was not apparent to police from outside the car and the police knew of its existence only because of the informant's tip
    - *Michigan v. Long* (1983) → the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the reasonable inference from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.
        - "The issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."
- **DNA Testing of Arrestees**
    - *Maryland v. King* (2013) → When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment."
        - *Intrusion into the Human Body* – Virtually any 'intrusion into the human body' will work an invasion of 'cherished personal security' that is subject to constitutional scrutiny"
        - *Issue*: Whether the intrusion, i.e., search, is reasonable upon balancing the privacy-related and law enforcement-related concerns
        - *Reasonableness of DNA Testing* – DNA testing is reasonable in view of the "need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody. When probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving those interests."
        - **Allow warrantless DNA sample when:**
            - **(1)** Arrest is supported by PC; and
            - **(2)** Suspect is going to be held in custody

<u>Reasonableness in a "Special Needs" (And Non-Criminal) Context, i.e., Special Needs Searches</u>

- Searches and seizures conducted by police in furtherance of their criminal law enforcement responsibilities ***<u>VS</u>***. searches and seizures conducted by police, and by other public officials, in furtherance of "community caretaking functions," i.e., non-law enforcement purposes
    - **Automobile Inventories** – when an automobile must be towed as a result of illegal parking, the police may routinely inspect the contents of the car, not as part of a criminal investigation, but simply to make sure that belongings are properly inventoried for safekeeping purposes
    - *South Dakota v. Opperman* (1976) → *"Special Inventory Exception to the Warrant Requirement"* – since automobile inventories are not criminal investigations, the Warrant Clause including the probable clause requirement do NOT apply. The Reasonableness Clause, alone, must be considered, and the police may inventory automobiles under specified circumstances in the absence of probable cause or even reasonable suspicion
- ***"Special Needs Exception to the Warrant Requirement"*** → a search or seizure comes within the "special needs" category when a perceived need, *beyond the normal need for criminal law enforcement*, makes the warrant and/or probable cause requirements of the 4th Amendment impracticable or irrelevant
    - In such circumstances, the Court evaluates the governmental activity by applying the reasonableness balancing standard
- **Administrative Searches**

- *Camara* (*v. Municipal Court* (1967)) & *See* (*v. City of Seattle* (1967))→ except in the event of emergency or consent, residences and commercial buildings may not be entered to inspect for administrative code violations without an administrative search warrant.
  - The "probable cause" for these administrative warrants can be supplied by showing of non-arbitrary justification to inspect the particular premises, e.g., that all the buildings in the area are due to be inspected
- *New York v. Burger* (1987) → Court approved *WARRANTLESS* administrative searches of "closely governmentally regulated industries even in the absence of emergency or consent
  - Owner and operators of commercial premises are in a "closely regulated" industry and therefore has a reduced expectation of privacy; ergo, the warrant and probable-cause requirements have lessened application in this context
  - As in other situations of "special need," where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspect of commercial premises may well be reasonable within the meaning of the 4th Amendment
  - Despite the fact that the searches were conducted by police officers, and that the officers, serving as agents of an administrative agency, could have cited Burger for violation of administrative regulations, without ever conducted the search that turned up criminal wrongdoing
  - Court did not focus on the motives of the officers in the case – all that mattered was that the administrative regulations had a *non-penal purpose*

- **Birth of the "Special Needs" Doctrine – School Searches**
  - *New Jersey v. T.L.O.* (1985) → Neither the warrant requirement nor probable cause applies to searches by public school officials
    - Warrant Requirement – it is "unsuited to the school environment," because it would "unduly interfere with the maintenance of the swift and informal disciplinary proceedings needed in the schools."
    - Probable Cause Requirement – "Where a careful balancing of governmental and public interests suggests that the public interest is best served by a 4th Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard," i.e., **public school teachers and administrators may search students without a warrant if two (2) conditions are met:**
      - **(1)** There are **reasonable grounds** – not necessarily "probable cause" in criminal context – "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"; and
      - **(2)** once initiated, the search is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction."
  - **A "Special Needs" School Search That Went Too Far**
    - *Safford Unified School District #1 v. Redding* (2009)
      - *Issue*: "Whether a 13-year-old student's 4th Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school."
      - *Rule:* the concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts
      - *Reasoning:* the content of the suspicion failed to match the degree of intrusion. . . What was missing from the suspected facts (pills were prescription-strength ibuprofen) that pointed to the student was any indication of danger to students from the power of the drugs or their quantity, and any reason specific to this student to suppose she was carrying pills in her underwear.
- **Airport Searches**
  - *US v. Aukai* (9th Cir. 2007) → (defendant didn't bring identification to airport so had to go through screening process which resulted in discovery of drug paraphernalia after defendant wanted to leave the airport) – search was constitutional and characterized as a valid "administrative search," therefore not dependent upon defendant's consent
    - Court invoked "special needs" doctrine, ruling that "the scope of such searches is not limitless. A particular airport security search is constitutionally reasonable provided that it:
      - (1) 'is no more extensive than necessary, in the light of current technology, to detect the presence of weapons or explosives and

- (2) it is confined in good faith to that purpose."

- **Border Searches**
  - *US v. Ramsey* (1977) → at the border and its functional equivalent (e.g., at an airport where an international flight arrives), a person may be stopped and her belongings searched without a warrant and in the absence of individualized suspicion of wrongdoing, "pursuant to the longstanding right of the sovereign to protect itself" from entry of persons and things dangerous to the nation
  - *US v. Flores-Montano* (2004) → a suspicion-less international border search is constitutionally reasonable even when border agents, without reasonable suspicion, seize a person's car at the international border, remove the gas tank, and search it
  - *Seizures Conducted by "Roving Border Patrol"* (where agents stop a car without notice on a little-traveled road)
    - *US v. Brignoni-Ponce* (1975) → the roving border patrol agents need reasonable suspicion of criminal activity to detain the car occupants briefly
  - *Seizures Occurring at a Fixed Interior Checkpoint* (a permanent stop along a well-traveled highway)
    - *US v. Martinez-Fuerte* (1976) → vehicle occupants may be stopped for questioning at fixed interior checkpoints without individualized suspicion of wrongdoing
- **Sobriety Checkpoints on Highways**
  - ***Michigan Department of State Police v. Sitz* (1990)** → Although highway police may not randomly stop cars in order to check for traffic violations, the police may set up a fixed checkpoint on the highway so as to test for drunkenness; even though a stop at such a "sobriety checkpoint" is a "seizure," such stops may be made of all drivers even though the police have no particularized suspicion about any one driver
    - **Balancing Test:** The SC weighed three (3) factors to determine whether the checkpoint is constitutional:
      - (1) State's interest in preventing accidents caused by drunk drivers;
      - (2) the effectiveness of sobriety checkpoints in achieving that state interest; and
      - (3) the level of intrusion on an individual's privacy caused by the checkpoints
    - **No Discretion –** *Sitz* apparently applies only where the police stop **ALL** cars passing the checkpoint; if the police stop less than all, presumably they must have some particularized suspicion before they may stop a specific person
  - **Random Stops under *Delaware v. Prouse*** → Random stops without individualized suspicion – even if made just for the purpose of verifying driver's license and related information – are **NOT PERMISSIBLE,** because they give too much discretion to the officer
- **Traffic Stops for General Criminal Investigation – Drug Checkpoint**
  - ***Indianapolis v. Edmond* (2000)** → The police cannot use random warrantless traffic stops to pursue general criminal investigative objectives, i.e., they may not conduct warrantless traffic stops where the primary purpose is "to detect evidence of ordinary criminal wrongdoing."
    - A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing; court has recognized only limited circumstances in which this usual rule does not apply, i.e., suspicionless searches:
      - "Special needs"
      - Administrative purposes
      - Fixed Border Patrol checkpoints
      - Sobriety checkpoints
      - Roadblock with purpose of verifying drivers' licenses and vehicle registrations
    - **Never** would a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing be constitutional without individualized suspicion
    - *"Circumstances that MAY justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control:*
      - Roadblock set up to thwart an imminent terrorist attack"
      - Roadblock to catch a dangerous criminal who is likely to flee by way of a particular route
        - "The exigencies created by these scenarios are far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction"
        - "We decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control
- **Drug Testing**

- Suspicionless drug testing (by means of urinalysis, breathalyzer, or blood) has been upheld by the Supreme Court in various circumstances:
    - Drug testing of railroad personnel involved in train accidents (*Skinner v. Railway Labor Executives' Association* (1989));
    - Random drug testing of federal customs officers who carry weapons or are involved in drug interdiction (*National Treasury Employees Union v. Von Raab* (1989))
    - Random urine testing of school students involved in athletics (*Vernonia School District 47J v. Acton* (1995)) or other extracurricular activities (*Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002))
- In drug testing cases, the SC considers the "nature and immediacy" of the government's concerns regarding drug use
    - Court has found a "compelling," "substantial," or "important" governmental or societal need for drug testing that could not be accommodated by application of ordinary probable cause or reasonable suspicion standards
- This governmental interest of random drug testing is weighed against the individual's privacy interest of those subjected to the testing
    - Blood, breath, and urine testing is minimal and not very intrusive
    - With the employees, their expectation of privacy was "diminished by reason of their participation in an industry . . . regulated pervasively to ensure safety."
- Not all suspicionless drug testing is allowed:
    - *Chandler v. Miller* (1997) → the 4th Amendment "shields society" from urinalysis drug testing that "diminishes personal privacy solely for a symbol's sake." (GA's req. that candidates for state office pass a drug test "did not fit within the closely guarded category of constitutionally permissible suspicionless searches.")
    - *Ferguson v. City of Charleston* (2001) → Testing for the objective of generating evidence for law enforcement purposes does not fit within the closely guarded category of "special needs" and required a search warrant

Chapter 5 – Remedies for Fourth Amendment Violations

Standing

- Two important 4th Amendment rules:
    - *The Exclusionary Rule*
        - Rule that evidence obtained in violation of the 4th Amendment is suppressed at trial
        - The police will less likely violate the 4th Amendment if they know that the fruits of their unconstitutional conduct will be excluded from a criminal trial
    - *Standing*
        - Before evidence can be excluded, a court must determine whether the person seeking exclusion has the right to bring the 4th Amendment claim
        - *Alderman v. US* (1969) → Each defendant (on an individual basis) has to prove, personally, that he had "standing" to raise the 4th Amendment claim – "The established principle is that suppression of the product of a 4th Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence."
        - *Jones v. US* (1960) → "the 4th Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."
- *US v. Payner* (1980)
    - IRS investigation of financial activities of US citizens in Bahamas. Payner's belongings were not searched but the evidence implicated his wrongdoing
        - Paynor does NOT have standing to sue
        - Starting point for STANDING issue – *is the defendant the person whose rights were violated?*
- ***Rakas v. Illinois* (1978) →** a defendant may seek to exclude evidence derived from a search or seizure only if his "**legitimate expectation of privacy" (the *Katz* Test) was violated**
    - **Result? →** A mere possessory interest in the premises searched, or mere presence at the scene of the search, will not confer standing, if the defendant had not legitimate expectation of privacy that was violated by the search
        - In *Rakas*, several automobile passengers, had no legitimate expectation of privacy with respect to the car's interior
        - After *Rakas*, did the holder of the possessory interest have a legitimate expectation of privacy with respect to the premises?
    - **Presence at Scene of Search**

            - *Target Theory Rejected* – The theory that any defendant at whom a search is "directed" has standing to contest the legality of the search was rejected by SC b/c it would involve difficulties in determining who the person at whom a search was directed was
            - ***New Approach*** → new one-stop analysis of 4th Amendment cases, by which the standing issue no longer exists as a distinct question, but is instead handled as part of a single inquiry into whether the defendant had a legitimate expectation of privacy which was unreasonably violated by the search
            - *Presence at Search NOT Automatically Sufficient* – legitimate presence on the premises searched would NOT by itself allow a constitutional challenge to that search b/c it might "permit a casual visitor who has never seen, or been permitted to visit the basement of another's house to object to a search of the basement if the visitor happened to be in the kitchen of the house at the time of the search."
- **Are Homes Like Cars When It Comes to Standing?**
    - *Minnesota v. Olson* (1990) → an **overnight guest** has a legitimate expectation of privacy and therefore has standing to object to the police's warrantless entry of the premises where the guest is staying
- ***Minnesota v. Carter* (1998) →** a **business visitor** to premises will normally **NOT** have standing to object to a search of the premises, at least where the visit is a brief one unaccompanied by any real personal relationship between guest and host; this is true even where the visit takes place at a home rather than office or other traditional place of business; i.e., someone temporarily in another's house, and present to conduct a business transaction, does not have a reasonable expectation of privacy in the house
- *Rawlings v. Kentucky* (1980) → the *Rakas* test – whether the petitioner had a reasonable expectation of privacy in the area searched – is the exclusive test for determining whether a defendant may successfully challenge a search
    - *Facts:* police ordered a woman to empty her purse, which the defendant put LSD in with her permission; defendant claimed ownership over the LSD found within the purse
    - *Held:* Defendant did NOT have a legitimate expectation of privacy in the search of the woman's purse
    - *Rule:* Ownership is only one factor of the test

<u>Exclusionary Rule</u>

"Independent Source" and "Inevitable Discovery" Doctrines

- **2 step test:** 4th A analysis → if violated exclude the evidence?
- Exclusionary rule is not automatic.
- Remember
    - Weeks = announced ER
    - Mapp = ER incorporated to states
- General rule? 4A violation = exclusion of evidence
    - Fruit of poisonous tree doctrine: Tainted evidence is excluded
    - Find constitutional violation and then see if piece of evidence came from that.
- <u>Exceptions to ER:</u>
    1. Independent source
    2. Inevitable discovery
    3. Attenuation
    4. Good faith
    5. Impeachment
- Exclusionary Rule:
    - 1. What poisoned the tree (constitutional violation)
    - 2. What is the fruit (evidence)?
    - 3. Did the fruit come from the poisoned tree?
    - 4. If so, is there an exception that sufficiently removes the poison from the fruit?

Independent source doctrine → the "fruits of the poisonous tree" doctrine should not apply where the secondary facts in question came from two sources, only one of which was related to the original illegality

- Facts obtained indirectly through constitutional violations "do not become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."
  1. Evidence initially located via constitutional violation
  2. Later, same evidence is located constitutionally
     - Evidence is not subject to ER, if second search not based on first search
     - Evidence may be fruit of a poisonous tree, but it is also fruit of a non-poisonous tree
  - 2 scenarios:
    - First (Murray):
      - 1. Evidence initially located via constitutional violation
      - 2. Later, same evidence is located constitutionally
        - Evidence is not subject to ER, if second search not based on first search
        - Evidence may be fruit of a poisonous tree, but it is also fruit of a non- poisonous tree
    - Second:
      - 1. Evidence initially located lawfully
      - 2. Later, same evidence is located constitutionally
        - Evidence is not subject to ER
      - Ex. Officer 1 searches house with consent and finds drugs. Then, second officer pushes in out of way and gets drugs.
  - When you find something twice, only needs to be legal once.
  - Independent = evidence found <u>twice</u> (one good & one bad) but only seized once, seized second time.
    - Gov't must show that <u>would have</u> gotten SW without illegal 1st search based on facts
  - Doesn't happen often. Ex. Kentucky v. King was 2 separate searches.

- ***Murray v. US*** **(1988) –** **<u>Independent Discovery Doctrine</u>**
  - **"Rediscovery" of Evidence –** in the situation where the police are illegally on premises, discover particular evidence, then apply for a warrant, and "rediscover" the evidence, as long as the trial court is convinced that the illegal entry did not contribute either to the officer's decision to attempt to get a warrant or to the magistrate's decision to grant the warrant, the evidence will be admissible even though its initial discovery was illegal
  - **Rule: Independent Discovery Doctrine –** so long as the prosecution can show that the officers would have applied for and properly received a warrant even had they not first entered the premises illegally, the evidence found could be admitted; it does not make any difference that the evidence that was actually discovered during the initial warrantless entry
  - **Requirements:**
    - *Murray* appears to allow admission of evidence under the "independent source" exception when three (3) requirements are satisfied:
      - **(1)** Police must have been on the premises **illegally** at the moment they discovered the evidence or contraband in question, i.e., the police ended up in premises for which they did not have a search warrant, and as to which no exception to the search warrant exists;
      - **(2)** Although police didn't have a search warrant, at the moment of entry they must have had knowledge that would have **entitled them to procure a search warrant**, i.e., police had probable cause to believe that evidence of crime would be found on the premises; and
      - **(3)** The police must show that they would probably have **eventually applied for a search warrant** even had they not engaged in the illegality

- **<u>Inevitable Discovery Doctrine</u> –** ***Nix v. Williams*** **(1984) →** "If the prosecution can establish that the information ultimately or inevitably would have been discovered by lawful means – here the volunteers' search – then the deterrence rationale has so little basis that the evidence should be received."
  - **Rule:** evidence may be admitted if it would "inevitably" have been discovered by other police techniques had it not first been obtained through the illegal discovery and therefore, an exception to the poisonous-tree doctrine

- **Burden of Proof –** the prosecution bears the burden of showing, by a preponderance of the evidence, that the info would inevitably have been discovered by lawful means
    - This is the **SAME** standard as for the **Independent Discovery Doctrine**
- **Applies Where Derivative Evidence is a Weapon or a Body** whose location the police learn about form an illegal source or improperly-obtained confession

"Attenuation" (or "Dissipation of Taint"/"Purging the Taint") Doctrine

- **Purged Taint Situation →** when the police obtain a piece of evidence indirectly through a constitutional violation, and neither the independent source nor the inevitable discovery exceptions seem to apply. In such a situation, it may nonetheless be the case that the exclusionary rule does not apply due to the "purged taint" doctrine
- **Purged Taint Doctrine Defined –** if enough additional factors intervene between the original illegality and the final discovery of evidence, neither the "deterrence" nor "judicial fairness" rationales behind the exclusionary rule applies; therefore, the evidence may be admissible despite the fact that it would not have been discovered "but for" the illegality
- ***Wong Sun v. US* (1963) →** the applicability of the "fruit of the poisonous tree" doctrine is determined by "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary/initial taint."
    - **Holding →** Evidence that has been acquired through illegal police conduct is admissible when it has been so far removed from the illegal action so as to dissipate the taint of illegality
    - **Rule →** While evidence obtained through illegal police conduct must be excluded at trial as it is "fruit of the poisonous tree," the connection between the illegal police conduct and a relevant piece of evidence can become so attenuated as to dissipate the taint, and such evidence may then be admissible
- ***Utah v. Strieff* (2016) →** an officer's discovery of the valid arrest warrant attenuated (reduced) the connection between the unlawful stop and the evidence seized incident to arrest
    - **Justice Thomas Articulating Three Attenuation Factors from *Brown v. Illinois* (1975) –** three factors the Court will take into account in deciding whether the taint from the illegality has been "purged":
        - **(1)** the **'Temporal Proximity"** of the illegality to the fruit
            - Shorter time, e.g., two hours between illegal arrest to confession of the arrestee (*Brown v. Illinois*) → Inadmissible
            - Longer time, e.g., several days (*Wong Sun*) → Admissible
        - **(2)** the "presence of **Intervening Circumstances**" between the illegality and the fruit; and
            - Presence of valid arrest warrant unconnected with illegal stop was enough to "attenuate" the connection between the unlawful stop and the resulting search (*Strieff*) → Admissible
            - No intervening events of significance (*Brown*) → Inadmissible
        - **(3)** Of "particular" importance, "the **Purpose and Flagrancy of the Official Misconduct**"
            - The illegality "had a quality of purposefulness" – the police conceded that their purpose for arresting D without probable cause was solely investigatory, making this an "expedition for evidence in the hope that something might turn up" (*Brown)* → Inadmissible
            - Officer was at most negligent and should have asked D whether he would speak with him, instead of demanding that he do so (*Strieff*) → Admissible

Good Faith Exception to Exclusionary Rule

***United States v. Leon* (1984) →**

- *ISSUE:* Whether the 4th Amendment exclusionary rule should 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?
- *Deference to Magistrate's Determination of Probable Cause for Warrant* → the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination with three (3) exceptions:
    - **(1)** Knowing or reckless falsity of the affidavit on which the probable cause determination was made (*Franks v. Delaware*);
    - **(2)** the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant

application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search (*Lo-Ji Sales Inc v. NY*)
  - **(3)** Reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."
- *Purpose of Exclusionary Rule* – designed to deter police misconduct rather than to punish the errors of judges and magistrates
- *Birth of Good Faith Exception* – "Even assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the 4th Amendment, it cannot be expected, and should not be applied, to deter ***objectively reasonable law enforcement activity*** . . . This is particularly true when an **officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope . . . It is the MAGISTRATE'S responsibility to determine whether the officer's allegations establish probable cause. An officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient [and] penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of 4th Amendment violations."**
- **Rule →** Evidence obtained pursuant to a facially valid warrant that an officer received in good faith from a judge or magistrate, which is later determined to be invalid need not be suppressed at trial **UNLESS (4 exceptions):**
  - **(1)** Officer lied (or reckless disregard of truth) in affidavit;
  - **(2)** Magistrate wholly abandoned judicial role (look for bias magistrate facts);
  - **(3)** "Bare bones" affidavit (so lacking in indicia of Probable Cause) (quantity is not the same as quality, but short affidavit probable bare bones); and
  - **(4)** Facially deficient because clearly lacks particularity, i.e., fails to particularize the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid

Other Applications of Good Faith Exception:

Hudson v. Michigan **(2006)** → Even if on particular facts the 4th Amendment requires the police to knock and announce themselves, their failure to do so will NOT require that any evidence they end up seizing be excluded from the defendant's criminal trial; even if the D can show that certain evidence would not have been acquired by the police but for their failure to wait for the door to be answered, the evidence will still be admissible against the D

- **Issue:** Whether violation of the knock-and-announce rule requires the suppression of all evidence found in the search?
- **History of Exclusionary Rule**
  - *Wilson v. Arkansas* → the knock-and-announce rule is a command of the 4th Amendment, as well as a common-law principle
  - *Weeks v. US* → adopted the federal exclusionary rule for evidence that was unlawfully seized from a home without a warrant in violation of the 4th Amendment
  - *Mapp v. Ohio* → applied the exclusionary rule to the states through the 14th Amendment
  - Court rejected the "indiscriminate application" of the rule, and have held it to be applicable only "where its remedial objectives are thought most efficaciously served," i.e., "where its deterrence benefits outweigh its 'substantial societal costs.'"
- **Attenuation**
  - Exclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression . . . But even if the illegal entry here could be characterized as a but-for cause of discovering what was inside, we have "never held that evidence is 'fruit of the poisonous tree' simply because "it would not have come to light but for the illegal actions of the police.'" Rather, but-for cause, or "causation in the logical sense alone," can be **too attenuated** to justify exclusion."
  - "Attenuation can occur when the causal connection is remote. Attenuation also occurs when, even give n a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."
- **Interests Protected by Knock-and-Announce**
  - "Interests protected by the knock-and-announce requirement are quite different [than cases excluding the fruits of unlawful warrantless searches] – and do not include the shielding of potential evidence from the government's eyes":
    - (1) Protection of human life and limb, b/c an unannounced entry may provoke violence in supposed self-defense by the surprised resident;

- (2) Protection of property – Breaking a house absent an announcement would penalize someone "'who did not know of the process, of which, if he had notice, it is to be presumed that he would obey it'." (Gives individual opportunity to obey the law)
- (3) Protects those elements of privacy and dignity that can be destroyed by a sudden entrance (it assures the opportunity to collect oneself before answering the door)

- What the knock-and-announce rule has NEVER protected is one's interest in preventing the government from seeing or taking evidence described in a warrant
- ***If the interests that WERE violated have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable***

***Herring v. US* (2009)** → If the police reasonably (but mistakenly) believe that there is an **arrest warrant outstanding** for a particular suspect and arrest him, evidence found during a search incident to this wrongful arrest will be **admissible**, at least where any police misconduct consist of "**nonrecurring and attenuated negligence**"

- **Non-Systemic Negligence by Police –** SC extended the exception for good-faith reliance on an apparently-outstanding arrest warrant to a situation in which the error was committed **by the police department**
- **Reasoning –** Since the error was unintentional, and arose from "nonrecurring and attenuated negligence" by the police, suppressing the evidence would not have a deterrent effect on police misconduct, and therefore should not be required
  - The exclusionary rule existed only to deter official wrongdoing; "the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional."
  - An error arising from "nonrecurring and attenuated negligence," should not trigger the exclusionary rule; the rule should only be triggered by "police conduct that is **sufficiently deliberate that exclusion can meaningfully deter it,** and **sufficiently culpable** that such deterrence is **worth the price paid by the justice system."**
  - The exclusionary rule serves to deter "**deliberate, reckless, or grossly negligent conduct,** or in some instances **recurring or systemic negligence"**
- **Objective Test –** Whether a reasonably well-trained arresting officer would have known that the search was illegal in light of all the circumstances
  - If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified . . . should such misconduct cause a 4th Amendment violation
  - If a case where systemic errors were demonstrated, it might be reckless for officers to rely on an unreliable warrant system
- **Conclusion –** When police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its way.

Good Faith Situation Summary:

- If a police officer believes that there is a **valid outstanding arrest warrant** for a suspect, and the officer's belief it is **reasonable** under all the circumstances as known to him, a search done pursuant to that arrest warrant will NOT be invalidated even though there was really no warrant, and even though the incorrect info given to the officer was the result of negligence by the court system or by the police themselves
- The focus is on the facts as the **arresting officer reasonably believed them to be.** Thus, if a reasonable person in the arresting officer's situation would have known that the warrant records were riddled with systemic errors, the officer's reliance on the info that a warrant was outstanding might be "reckless" and thus not in good faith
- It will be very difficult for a suspect to ever get an arrest based on a warrant – and the consequent search incident to that arrest – thrown out on grounds that the warrant did not exist or was improperly issued. It won't be enough for the suspect to show that the incorrect info that the warrant existed was due to negligent data-entry or systems-maintenance by the police department itself. The suspect will apparently have to show:
  - **(1)** the incorrect info that the warrant existed was due to negligent data-entry or systems-maintenance by the police department itself;
  - **(2)** that info in the police arrest-warrant system was either:
    - **(a)** filled with deliberate falsehoods; or
    - **(b)** so systemically riddled with negligent errors as to make the system's operation reckless; and

- **(3)** that the falsity or systemic error-proneness was so widely known with the department that the arresting officer could not reasonably have had confidence in the information he was given

Reliance on Later-Overruled Legal Principle, i.e., a Reasonable Error about what the Appropriate Legal Rule is

- ***Davis v. US* (2011) →** when the police conduct a search that is legal under a binding legal precedent that is later overruled, the police and prosecution get the benefit of *Leon*, so that the exclusionary rule will not be applied to keep out the results of the search
  - **Broader Significance –** *Davis* means that *Leon* will be applied (preventing application of the exclusionary rule) whenever the police obtain evidence "as a result of **non-culpable, innocent police conduct."**
  - **Situation in *Davis* –** Police arrested defendant using, at the time of the arrest, good legal precedent. After D was convicted but while his appeal was will pending, the SC overruled the legal precedent his arrest was relied upon
  - **Issue –** If the police rely on binding legal precedent that makes a search legal, does the *Leon* good-faith exception apply if that precedent is later overruled, so that the search would be illegal?
  - **Holding –** the police and prosecution should get the benefit of the precedent on which they relied, even though while the case was still pending the precedent turned out to be bad law
  - **Rationale –** The *Leon* good-faith exception should apply, "because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both truth and public safety." So police reliance on what turns out to be an erroneous – but is at the time, binding – appellate decision falls within the general rule that the good-faith exception applies to all "nonculpable, innocent police conduct."

Police Interrogations & Confessions

Investigation Failures

***Brown v. Mississippi* (1936) →** The Due Process Clause of the 14th Amendment requires that state action be consistent with fundamental principles of liberty and justice, i.e., "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in doing so it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, only limited by the requirement of due process of law."

- *Issue:* Whether convictions, which rest solely upon confessions shown to have been extorted by officers of the State by brutality and violence, are consistent with the due process of law required by the 14th Amendment?
- "The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination – where the whole proceeding is but a mask – without supplying corrective process."

***Colorado v. Connelly* (1986) →** (Facts: schizophrenic man heard "voice of God" telling him to confess to an unsolved murder or committed suicide) Some sort of "state action" is required to support a claim of violation of the Due Process Clause of the 14th Amendment

- "The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause."
- "The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution."

Voluntariness Standard - violation of Due Process clause

- Was suspect's will **overborne** by police conduct?
- Totality of the circumstances
- Factors:
  - Violence
  - Threats of violence (*Arizona v. Fulminante*)
  - Threats of non-violent conduct (taking away children, etc.)
  - Nutritional or sleep deprivation
  - Psychological pressures

Miranda → identity/knowing officer matters

For involuntary confession → all that matters is that actually officer

***Miranda v. Arizona* (1966)** → the prosecution may not use statements, whether exculpatory or inculpatory, stemming from **custodial interrogation**, i.e., 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, of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination

- **Rule of Law –** When an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized; ergo, procedural safeguards must be employed to protect the privilege and to notify the person of his right to silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required:
  - **(1)** Warned prior to any questioning that he has the right to remain silent;
  - **(2)** That anything he says can be used against him in a court of law;
  - **(3)** He has a right to the presence of an attorney;
  - **(4)** If he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires;
  - **(5)** Can stop the interview at any point in the process
- **Application:**
  - Custodial AND
  - Interrogation
- ***Miranda* Waiver**
  - "Do you understand your rights as I have read them to you? Do you wish to talk with me?"
  - Suspect must be knowing and intelligent in this understanding
  - Prosecution's burden to show that suspected waived rights
- **Exceptions to *Miranda***
  - Suspect/defendant tells officer he knows his rights, and officer can quit reading them → *Miranda* is Constitutional Rule and MUST be read no matter the suspects background
  - *Undercover Officer* → Statement is allowed; matters ONLY that Defendant KNOWS if the individual is a STATE ACTOR
    - *Reasoning?* → police interrogation room is so intimidating that suspect needs warning of rights; no intimidation factor in jail and practically, no undercover officer could read rights
    - ***Illinois v. Perkins* (1990)** → Encounters between suspects and *UNDERCOVER* officers are **NOT** subject to *Miranda* – "warning are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement"
  - *Confession WITHOUT Miranda* → Can ONLY use to impeach a witness's testimony
    - ***Harris v. NY* (1971)** → statements taken in violation of *Miranda* could be used to impeach a defendant's testimony
  - ***New Jersey v. Potash* (1979)** → statements taken in violation of the "pure" 5th Amendment could NOT be used to impeach testimony, i.e., a defendant's compelled statements, as opposed to statements taken in violation of *Miranda*, may NOT be put to any testimonial use against him in a criminal trial
    - Court drew a distinction between:
      - A *Miranda* violation; and
      - A violation of "the constitutional privilege against compulsory self-incrimination in its most pristine form"
  - ***Michigan v. Tucker* (1974)** → prophylactic *Miranda* warnings are "not themselves rights protected by the Constitution but are instead measures to insure that the right against compulsory self-incrimination is protected," i.e., requiring *Miranda* warnings before custodial interrogation provides "practical reinforcement" for the 5th Amendment right
  - ***New York v. Quarles* (1984)** → There is a "**public safety**" exception to the requirement that *Miranda* warnings be given before a suspect's answer may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved
    - "The doctrinal underpinnings of *Miranda* [do NOT] require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety."
    - "The need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the 5th Amendment's privilege against self-incrimination"
    - **Test:** An officer may question a suspect without first reading the suspect his *Miranda* warning and the statements may be admitted to trial when:

- **(1)** The officer is **reasonably prompted** (an objectively reasonably officer would find that the cost of asking question was for a purpose more than merely to obtain evidence useful in convicting the suspect)
- **(2)** to **protect** the:
  - **(a) Officer safety OR**
  - **(b) Public safety**
- **(3)** from **immediate harm**

***Oregon v. Elstad* (1985)**

- **Second Confession as Fruit of the First:** applicable when there are two successive confessions (by the same suspect) creating the issue of whether the second confession is tainted by the earlier confession that is not the fruit of any still-earlier illegality, but that is itself an illegally-obtained "poisonous tree."
  - May arise where the defendant is **legally arrested**, is given ***insufficient*** *Miranda* warnings, confesses, is then given **adequate** *Miranda* warnings, and confesses again; the second confession is, if considered by itself, valid; but is it nonetheless tainted fruit of the earlier, unlawful, confession?
- *Starting Premise:* "A confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint'."
- **General Outcome:**
  - **(1)** the second confession will NOT be deemed tainted as long as it was "voluntarily made," and the Court will **presume** that the second confession is indeed voluntary if made after warnings, even though that confession followed an earlier unwarned confession
  - **(2)** Second confession is more likely to be deemed voluntarily made if the underlying circumstances do not make the second confession a **mere continuation** of the first (i.e., the second is more likely to be found voluntary if the two were meaningfully **separated by time, place, or interrogator**, or if it was made clear to the suspect that the first, unwarned, confession would not be admissible)
  - **(3)** The second confession is less likely to be deemed tainted if the failure to warn prior to the first confession was the result of an **inadvertent mistake** by the police?
  - **(4)** Where the place follow an **intentional "two-step"** practice of eliciting an unwarned confession, then immediately giving a warning under circumstances that lead the suspect to believe that even the already-made confession can be used against him (so that the suspect sees no reason not to repeat the confession after the warning), the second confession **will** probably be deemed involuntary and tainted (***Missouri v. Seibert***)
- The police have **no duty to warn a suspect of prior statement's inadmissibility**
- **Test:**
  - **(1)** Was suspect in police custody?
  - **(2)** Was a confession made before or after a *Miranda* warning was given?
  - **(3)** Was a second confession made?
  - **(4)** Was the second confession knowingly and voluntarily made? (Second confession presumed voluntary if made after *Miranda* warning)
    - Were the two confessions separated by:
      - Time?
      - Place?
      - Interrogator?
    - Was it made clear to the suspect that the first, unwarned, confession would not be admissible?
    - Was the failure to warn prior to first confession the result of an inadvertent mistake by police?
- **Rule:** A second confession is not tainted by a first, *Miranda*-less confession if the second confession was **knowingly and voluntarily made**, i.e., it would not be invalidated merely because there was a prior, illegally-obtained confession having the same substance as the second

***Dickerson v. US* (2000)** → Congress cannot legislatively supersede a decision by the US Supreme Court that interprets and applies the Constitution

- This means that ***Miranda* is based upon the Constitution**, i.e., the *Miranda* principle is in some sense constitutionally-derived, not a mere pronouncement about how prosecutions ought to be carried out

***Missouri v. Seibert* (2004)**

- **Background:** Police departments in years after *Elstad* adopted a conscious **"two step" approach** to interrogation, in which the police would **intentionally procure an unwarned** (and inadmissible) confession, give *Miranda* warnings, and then hope to get the suspect to give an (admissible) **confirmation of what he had already confessed to**
- **Holding:** this two-step approach will at least sometimes lead to a **tainted, and inadmissible, second confession** – it is inconsistent with the purpose of *Miranda* for a police department to maintain a policy whereby suspects subject to custodial police interrogation are initially denied their *Miranda* warnings, and then are subject to the same questioning for a second time
- "When *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."
  - "It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before.
  - "These circumstance [below] must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a **reasonable person** in the **suspect's shoes** would not have understood them to convey a message that she retained a choice about continuing to talk:
    - The completeness and detail of the questions and answers in the first round of interrogation;
    - The overlapping content of the two statements;
    - The timing and setting of the first and the second round;
    - The continuity of police personnel; and
    - The degree to which the interrogator's questions treated the second round as continuous with the first; or
    - A police strategy adapted to undermine the *Miranda* warnings
- **Kennedy Concurrence**
  - "The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* UNLESS the deliberate two-step strategy was employed.
  - If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made.
  - Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example:
    - A substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn;
    - An additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient."

***Miranda* "Custody"**

- ***Berkemer v. McCarty* (1984)**
  - **Issues:**
    - Does *Miranda* govern the admissibility of statements made during custodial interrogation by a suspect accused of a misdemeanor traffic offense?
      - **Rule:** a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested
    - Does the roadside questioning of a motorist detained pursuant to a traffic stop constitute a custodial interrogation for the purposes of *Miranda*?
      - **Background:** Long acknowledged that "stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of the 4th Amendment, even though the purpose of the stop is limited and the resulting detention is brief."

- **Rule:** circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police, and therefore, a typical traffic stop is NOT "custodial interrogation"
  - **Central Principle of *Miranda*:** If the police take a suspect into custody and then ask him questions without informing him of the rights enumerated in *Miranda*, his responses cannot be introduced into evidence to establish his guilt (can be used to impeach witness)
  - **Outcome:**
    - **Traffic Stops** – stops of motorists for minor traffic violations will normally not be "custodial"; a traffic stop is "presumptively temporary and brief," and the motorist knows that "in the end he will likely be allowed to continue on his way"
      - **Test:** whether one in the motorist's position would believe that he was or was not free to leave
    - **Minor Crimes –** there is **no "minor crimes" exception** to the *Miranda* requirement – if an interrogation meets all the standard requirements for *Miranda* warnings (especially if suspect is "in custody"), these warning must be given **no matter how minor the crime, and regardless of the fact that no jail sentence may be imposed for it**
- **"Custody" Test →** "*Miranda* becomes applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest'."
  - Objective test from suspect's perspective
  - Based on the totality of the circumstances
- **In Prison but NOT in Custody?**
  - *Maryland v. Shatzer* (2010)
    - *FACTS:* prisoner was interrogated for a crime he was not already serving time for; prisoner requested counsel, police terminated the interrogation
    - *ISSUE:* Can a prisoner be said not to be in custody when he is incarcerated? Was this a break in *Miranda* custody?
    - *HOLDING:* Yes – though being in prison meets the *Berkemer* Test whether "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest," "the freedom-of-movement test only identifies a necessary and not a sufficient condition for *Miranda* custody."
      - The freedom-of-movement *Berkeme*r test is not a sufficient condition for custody because "*Miranda* is to be enforced 'only in those types of situations in which the concerns that powered the decision are implicated'."
      - The "inherently compelling pressures" of custodial interrogation end when the prisoner returns to his normal prison life

***Miranda* Interrogation**

- ***Rhode Island v. Innis* (1980)**
  - *Miranda* Court Defined "*Interrogation*" → "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."
  - *Miranda* Court Concern → *Miranda* Court was not merely concerned with just *express questioning* of the suspect but rather, "the' interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination."
    - "Interrogation," as conceptualized in *Miranda*, must reflect a measure of compulsion above and beyond that inherent in custody itself.
  - **Rule →** The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent
    - The term "interrogation" under *Miranda* refers not only to express questioning, but also to ***any words or actions on the part of the officer (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.***
    - The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police, reflecting the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police
      - A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation

- However, since the police cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they ***should have known were reasonably likely to elicit an incriminating response***
  - *Footnote 8:* Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known their words/actions were reasonably likely to elicit an incriminating response from the suspect

<u>Waiver and Invocation of the *Miranda* Rights</u>

- Did the suspect make statements in response to custodial police interrogation?
  - Yes? → Did police give the *Miranda* warnings to the suspect?
    - Yes? → Did suspect waive their *Miranda* rights?
  - No? → No Issue

- **Two Different Rights and Their Implications:**
  - (1) (The Right to Counsel) The right to have questioning cease until the suspect can consult a lawyer → police may not initiate any attempt to get a waiver for some significant period of time
  - (2) The right to remain silent → the police MAY continue to question, or to attempt to get a waiver (with the proviso that anything the suspect says prior to making a valid waiver may not be used against him at trial)
  - *Berghuis v. Thompkins* (2010) → "Both protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked"
- For a suspect to be deemed to have waived either *Miranda* right, the prosecution will have to show that the waiver was "***knowing and voluntary***"
  - **Voluntary →** it was the product of a free and deliberate choice rather than intimidation, coercion, or deception
  - **Knowing →** must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it
- Waivers can be:
  - **Express →** If a suspect signs a standard waiver form or orally, e.g., "I understand these rights but I'm willing to talk to you."
    - Express waivers will be valid as long as there is no indication of coercion or of basic lack of understanding by the suspect
  - **Implied →** an intent to waive can be inferred from the actions and words of the person being interrogated
    - Most common form of implied waiver comes when the suspect is read his rights, and then answers one or more questions – "a defendant's subsequent willingness to answer questions after acknowledging his *Miranda* rights is sufficient to constitute an implied waiver."
- ***North Carolina v. Butler*** **(1979)**
  - *FACTS:* Suspect did not explicitly orally waive rights nor would he sign a waiver form but began speaking after stating he understood his rights
  - *ISSUE:* Must a waiver of the *Miranda* rights be explicit?
  - ***Rule*** **→**Where a defendant does not invoke his right to remain silent after fully understanding his *Miranda* rights, he implicitly waives his rights by making a voluntary statement to the police
    - The question is whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case
      - Mere silence is NOT enough to waive the right to remain silent
      - Waiver can be clearly inferred from the actions and words of the person interrogated
  - **Therefore:**
    - Suspect can implicitly waive rights by talking
    - Silence alone is insufficient
      - **Silence + Understanding Rights + Course of Conduct = Waiver**
    - Presumption = Non-waiver
    - Waiver can be:
      - Express or implied from circumstances
      - Need NOT be in writing
    - Request for lawyer MUST be **unambiguous**

- Clear statement, "I want a lawyer" = GOOD
- "Maybe" and officer does not have to clarify = NOT Sufficient → when the suspect makes an ambiguous request regarding his desire for counsel, not only do the police not have to stop the questioning, they do not even have to make attempts to clarify whether the suspect is requesting the lawyer
  - **TEST:** Would a reasonable police officer know the statement was a request for an attorney?
    - An OFFICER does NOT have to ask clarifying questions, but should

- ***Berghuis v. Thompkins*** **(2010)** → Just as an invocation of the *Miranda* right to counsel must be unambiguous, so an invocation of the right to **remain silent** must be unambiguous; therefore, if D had said he wanted to remain silent, or that he did not want to talk to the police, this would have been unambiguous enough to invoke his right to cut off questioning
  - Under *Berghuis*, the prosecution must demonstrate only **three (3) things** in order to establish an **implied waiver of the right to silence:**
    - **(1)** that the police gave the *Miranda* warnings;
    - **(2)** that the suspect **answered** one or more questions following the warnings; and
    - **(3)** that the suspect **understood** the warnings
  - If prosecution can show these three things, then the fact that the police continued to interrogate the suspect at length after he made an ambiguous indication about whether he was invoking his right to silence will not matter
      - If want to invoke right to silence, must say that
      - If silent, then speak = waiver
      - Police can continue interrogation until have clear invocation
      - No clarifying questions required
- **Waiver *AFTER* Successful Invocation of the Right**
  - If a suspect does invoke with sufficient clarity either his right to remain silent or right to counsel, can his later words or conduct be deemed to "undo" that invocation?
  - **Policy Reasons Behind Undoing Invocation of Rights** → If the courts make it too easy for the suspect to undo the invocation, it will create incentive for the police to "badger" the suspect to change his mind
  - ***Edwards v. Arizona*** **(1981) – Undoing a 5th Amendment Right to Counsel Invocation**
    - **Rule** → An accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself **initiates** further communication, exchanges or conversations with the police
      - **Response to Later Questioning –** waiver will NOT be established by the mere fact that the suspect responded to later police-initiated interrogation (even if that interrogation was preceded by a new reading of the *Miranda* warnings)
    - **"Initiates the Conversation" Waiver Test** → Once a suspect indicates a desire to have a lawyer, any subsequent waiver of that right will not be measured by the usual tests for waiver (i.e., the "knowing and voluntary" standard); instead, the only way the suspect may waive a previously-asserted desire to have a lawyer present at interrogation is by initiating the conversation with the police
    - **Bottomline:** If the D invokes his right to an attorney, then the police may not question him again until he has consulted with an attorney unless:
      - **(1) an attorney is present**" (*Miranda* 5th A right to counsel during custodial interrogation)
      - **(2)** Defendant **initiated** the conversation

Final Exam Checklist:
Criminal Procedure Checklist

Standing?

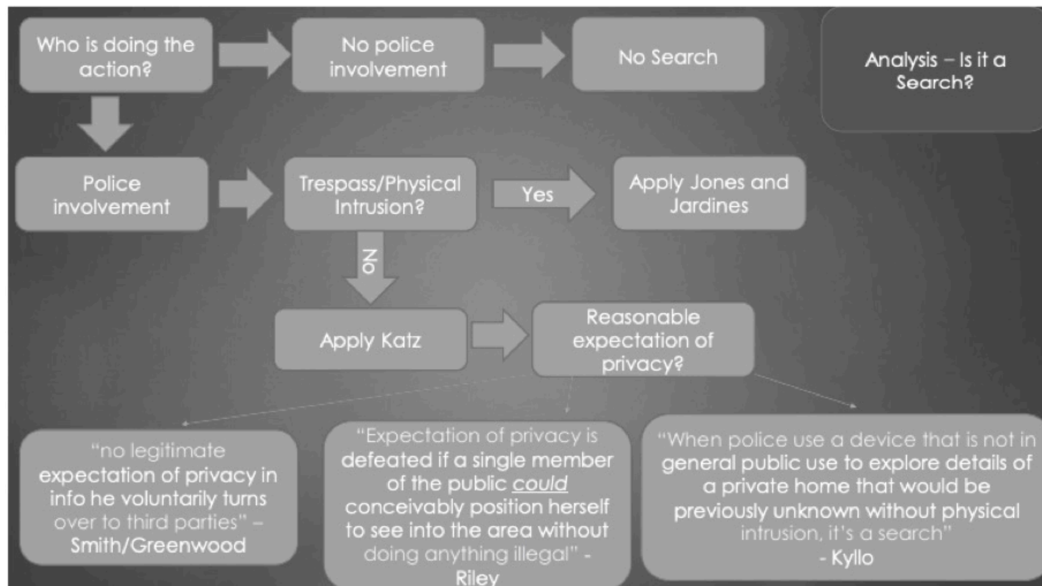
- **TEST:** Reasonable Expectation Of Privacy in area searched or items seized
- **Cars:** Owner → Has standing if present; Driver → **ALWAYS** has standing; Passengers/Non-Owners → No standing
- **Rental Cars:** Someone in otherwise lawful possession and control of rental car has a REOP in it even if rental agreement does NOT list him as authorized driver
- **NO** Vicarious assertion → 4A rights are **PERSONAL** rights
- **Overnight Guests:** Have REOP and therefore standing
- **Temporary Guest Commercial Purposes: NO** REOP and therefore **NO** standing

1. **Was the actor a private citizen or the State?**
   a. Private citizen? → Was the private citizen acting as a "deputy" to the State?
      i. Yes? → Go to #2
      ii. No? → The Constitution does not protect against private conduct
   b. The State → Go to #2

State Action?

- **(a.)** State actor who engages in unreasonable S&S
- **(b.)** State actor who directs private party to engage in unreasonable S&S
- **(c.)** 4A does **NOT** apply to private party acting alone who engages in S&S → Always allowed in (no suppression)

2. **Is the victim a US citizen?**
   a. Yes → Go to #3
   b. No → Does the individual have (1) a sufficient connection with the US community and (2) accepted some societal obligations? (*US v. Verdugo-Urguidez*)
      i. Yes? → Go to #3
      ii. No? → Constitution only protects US citizens



3. **Did a "search" occur?**
   a. **Was there a trespass into a constitutionally protected area?** (4th Amendment only protects "person, home, and effect")
      i. House? → "The house is man's castle" – very likely a search; Go to d.
      ii. Curtilage? (*Dunn* Factors) → likely a search
         1. Proximity of area claimed to be the curtilage of the home?
         2. Whether area is included within an enclosure surrounding the home?
         3. Nature of the uses to which the area is put?
         4. Steps taken by resident to protect the area from observation by people walking by?
      iii. Open field? → No constitutional protections
      iv. Car? → not constitutionally protected but depends on where car is
      v. Public Place? → Usually no expectation of privacy; go to b.
   b. ***Katz + Jones* Test** – Did the individual have a reasonable expectation of privacy?
      i. Was there (1) a physical trespass for (2) the purpose of obtaining information (monitoring)? (*Jones/Jardines*)
         1. Yes? → Search
         2. No? → Go to *Katz* Test
      ii. *Katz* Test:
         1. Did the individual have an **actual** (subjective) expectation of privacy? (always yes)
         2. Does society (objectively) recognize this as a **reasonable expectation**?
      iii. **Key *Katz* Language:** What a person **knowingly exposes to the public**, even in his own home/office/car, is NOT subject to 4A protections; but what he **seeks to preserve as private**, even in an area accessible to the public, may be constitutionally protected
   c. **"Monitoring" Situations**
      i. **Wiretapping**? → Requires Title III Order – requires greater standard than probable cause + the exhaustion of other investigative techniques
      ii. **Telephone Pen Register**? → Requires Pen Register Order – lower standard than probable cause
      iii. **Undercover Agent**? → Individual assumes the risk/misplaced trust; not a search (*Hoffa*)
      iv. **Bugged/Unbugged Informant**? → no 4th Amendment protection for "wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it" (*White*)
      v. **Banking Information** → government may subpoena bank for info without showing PC (*Miller*)

vi. **Aerial Surveillance**? → If police can view from public area and doesn't interfere with use of property; not a search
vii. **Thermal Scan**? → If gov. uses device NOT in public use, to explore details of home that would have previously been unknowable without physical intrusion, the surveillance is a search and presumptively unreasonable w/o a warrant (*Kyllo*); *Was it more than naked-eye surveillance?*
viii. **Electronic Monitoring/GPS Tracking**? → When NO physical trespass but monitoring for info: Short-term is OKAY (not search); Long-term (even on public roadways) is SEARCH (28 days is example of long-term) (*Jones*)
ix. **Beeper**? Was beeper in house? No = not a search (*Knotts*); Yes = Search (*Karo*)
x. **Dog Sniff**? (Human sniff is never a search)
    1. **House?** → Trespass; an officer is allowed to: (1) approach door; (2) knock on door; (3) wait briefly; and (4) leave if nobody answers (anything more than this is trespass)
    2. **Apartment**? → If individual cannot (1) bar access to the apartment building, nor (2) exclude people from the common areas, then not a search (*Nguyen*)
    3. **Airport**? → no search; airport is not constitutionally protected area; only search if look into bag (*Place*)
    4. **Car/Traffic Stop**? → no search; car in a public area is not constitutionally protected (*Caballes*)
    5. **Bottomline** → If the police, standing in a place they have a right to be, use a dog to perform an odor test that merely determines whether contraband is present or not, no search

d. **Exceptions**?
   i. **Plain View Doctrine**? → Even where the devices used to gain a view of the D's property are somewhat more sophisticated, the SC will uphold their use if: (1) the view takes place from a location where the police have a right to be (public property) and (2) info obtained could have been gotten from "plain view" surveillance executed without the special device
      1. **Plain Smell** → an officer does not have to avert senses to anything suspicious that they can legally perceive from a public area
   ii. **Third Party Doctrine**? → Any information voluntarily conveyed to a third party removes all reasonable expectation of privacy; thus police don't need warrant to get info you conveyed to 3rd party
   iii. **False-Friend Doctrine**? → Anything an individual conveys to another party no longer has expectation of privacy; no protection for wrongdoer's misplaced trust
   iv. **Physical Manipulation of Effect**? → an individual does not have the expectation that his effect will be felt in an exploratory manner, i.e., an agent's physical manipulation of a bag violates 4th Amendment

4. <u>**Was there a "seizure"?**</u>
   a. **Seizure Test: (1)** Meaningful interference **(2)** With an individual's possession interest in property
   b. **Objects Subject to Seizure (Four Categories)**
      i. Contraband → illegally possessed items
      ii. Fruits of a crime (stolen property/money)
      iii. Instrumentalities Used in Commission of an Offense (e.g., weapons, cars)
      iv. "Mere Evidence" – an item of value to police solely b/c it will aid in apprehension/conviction of a person for an offense (blood stained shirt)
   c. **Seizure of People (*Terry*)**
      i. **General:**
         1. All arrests = seizures
         2. Not all seizures = arrests (e.g., *Terry* stop)
         3. Not all interactions with the police = seizures (e.g., consensual interactions)
         4. Constitutional test = whether the stop and/or frisk was reasonable

5. Not a probable cause requirement – lesser standard
6. *Terry* Balancing Test = Individual's Personal Liberty vs. Officer Safety

ii. **Steps of Police Encounter to Arrest**

1. Consensual Encounter → No 4th violation
2. *Terry* Stop-and-frisk → seizure but not arrested; pat-down = search; no PC needed
    a. 4th Amendment Triggered when:
        i. *Terry* Stop - Officer restrains freedom to walk away with reasonable suspicion a crime is afoot or committed = seizure
        ii. *Terry* pat down with reasonable suspicion to believe the suspect is armed and dangerous = search
3. Arrest → seizure; PC is required

iii. ***Terry* Doctrine**

1. ***Terry*-Stop Rule**
    a. Requirement: Reasonable suspicion to believe that a criminal activity has occurred or is about to be committed
    b. Purpose: prevent crime, i.e., if you see smoke, there might be fire
    c. Very brief
    d. Two steps:
        i. Pat down outside of clothing feeling for hard objects that might be weapons;
        ii. Only if a potential weapon is felt, can the officer reach into the pocket/article of clothing
2. ***Terry*-Frisk Rule**
    a. Requirement: Reasonable suspicion to believe that suspect is presently armed and dangerous
    b. Purpose: officer safety
    c. Limited Search Scope:
        i. Only outer clothing using only palms of hands
        ii. Only can search for weapons
        iii. Can't ask individual to empty pockets
        iv. Can't be looking for contraband
3. ***Terry* Doctrine AFTER Crime Committed**
    a. May stop an individual if police have a reasonable suspicion grounded in specific and articulate Lee facts, that a person the police encountered was involved in or is wanted in connection with a completed **felony** (*Hensley*)
        i. Does not address completed MINOR offenses
4. **Seizure v. Non-Seizure Encounters →** When does a seizure of a person occur, i.e., required degree of interference?
    a. **Definition of Seizure:** "A person has been 'seized' within the meaning of the 4th Amendment only if, in view of all of the circumstances surrounding the incident, an (objective & innocent) reasonable person would have believed that he was not free to leave. (*Mendenhall*)
        i. Following examples of circumstances that "might indicate a seizure, even where the person did not attempt to leave:'
            1. (1) the threatening presence of several officers;
            2. (2) the display of a weapon by an officer;
            3. (3) some physical touching of the person; or

4. (4) the use of language/tone of voice indicating that compliance with the officer's request might be compelled
5. Other Factors:
    a. Whether the police give back identification, ticket, or personal belongings back (*Royer*)

ii. DO NOT care about the subjective thoughts and beliefs of officer UNLESS they are communicated to Defendant
    1. MUST go through every step of police encounter to determine at what point a seizure occurs

b. A Fourth Amendment seizure occurs where the police exercise physical force over a subject or where a subject submits to an officer's show of authority. (*Hodari*)
    i. **Moment of seizure**: Freedom of movement is restrained by:
        1. **(1)** physical force (unless breakaway)
        2. **(2)** submission to claim of authority)

c. Pursuit by Police – Does a chase itself constitute a "seizure"? – until the suspect submits to the chase (by stopping), there is NO seizure. **There will not be a seizure until two things happen:**
1. (1) the suspect stops in response to the chase or to the police orders; and
2. (2) a reasonable person in the suspect's position would believe that he was not free to leave once stopped

ii. **Rule**: where a show of authority is made to a suspect, and the suspect does not yield, no seizure takes place.
    1. **Exam Rule:** a 4th A seizure occurs where the police:
        a. (1) Exercise physical force over a subject; or
        b. (2) where a subject submits to an officer's show of authority
    2. "An arrest requires either physical force or, where that is absent, submission to the assertion of authority." (*Hodari*)

iii. Application: Hodari rationale probably applies beyond the "chase" situation:
    1. (1) officer says "freeze" or fires a warning shot;
    2. (2) officer, driving a police car, puts on his flashing lights or his sirens; or
    3. (3) in an airport setting, a narcotics agent approaches a group of passengers w/ his gun drawn, and announces a "baggage search"

iv. In any of these situations, if the suspect flees, tries to dispose of evidence, or does anything other than immediately submit, his actions will be admissible even though the initial encounter was made at a time when the police had no probable cause to make a stop or other seizure

d. **Bus Sweeps/Stops**
    i. **"Feel Free to Decline" Standard –** a seizure will be deemed NOT to have occurred if, considering circumstances surrounding the encounter, "a reasonable (and innocent) person would feel free to decline the officers' request or otherwise terminate the encounter." (*Bostick*)
    ii. Police do NOT have to inform the passengers that they have a right to NOT cooperate (*Drayton*)
        1. A reasonable person would feel free to leave/terminate encounter

        2. **Normal Standard –** Would a reasonable person feel free to "disregard the police and go about his business?"
        3. **Factors:**
            a. Was aisle open or blocked by police?
            b. Did police brandish weapon?
            c. Did police threaten suspect?
            d. Did police tell anyone to stay put?
            e. What was the tone of the police's voice?

e. **Brief Seizure of Property**
    i. **Rule –** when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope (*Place*)
    ii. The length of time that luggage is seized must be reasonable

f. **DNA Testing of Arrestees**
    i. **Rule:** when officer makes an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained into custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is REASONABLE under the 4th Amendment (*King*)
    ii. **Intrusion Into Human Body –** Virtually any intrusion into the human body will be an invasion of "cherished personal security" that is subject to constitutional scrutiny
    iii. **Allow warrantless DNA sample when:**
        1. Arrest is supported by PC; and
        2. Suspect is going to be held in custody

iv. What is Reasonable Suspicion? → Issue: What is the degree of probability of criminal conduct must exist before a stop is justified under Terry

1. Must be able to articulate why using specific facts (specific and articulatable facts)
2. Hunch/Feeling < Reasonable Suspicion < Probable Cause
    a. RS can turn into PC, e.g., *Terry* pat discovers gun, this gives officer PC
3. Hearsay is allowed to create Reasonable Suspicion, but not PC
4. **Common Reasonable Suspicion factors**:
    a. Based on training and experience
    b. High crime area
    c. Time of day
    d. Reliability of info
    e. Evasive or violent behavior
    f. Furtive/jumpy movements;
    g. Visible bulge of weapon;
    h. Officer to suspect ratio;
    i. Type of crime committed (violent v. non-violent)
    j. Criminal history
5. **Flight as a Cause for Suspicion →** the fact that an individual has attempted to flee when seen by the police will normally raise the police's suspicion, and may even without more justify the

police in making a Terry-style stop. The combination of flight and presence in what the officer knows is a high-crime area will generally be enough for a stop (*Illinois v. Wardlow*)

a. *Illinois v. Wardlow* (2000) → the combination of D's presence in an area of heavy narcotics trafficking, plus his "unprovoked flight upon noticing the police," were enough to trigger a Terry stop
b. Flight by itself probably NOT enough – Court does not seem to be saying that unprovoked flight, by itself, would necessarily be enough to justify a *Terry* stop; it is the combination of unprovoked flight plus presence in a high crime area that seemed to have created enough suspicion to justify a stop
c. **Reasonable Suspicion From Flight Rule: Flight + Something Else (High Crime Area) = RS**

6. **Tip from an Informant** – *Alabama v. White (1990)* → When the police want to make a stop based on an informant's tip, they may similarly do so on "reasonable suspicion," and do not need to have probable cause. Whether the informant's tip is reliable enough to give right to the required "reasonable suspicion" is to be determined by the "totality of the circumstances."
   a. **Totality of the Circumstances Test** is the same test used to determine whether an informant's tip supplies "probable cause," but the degree of reliability needed to create "reasonable suspicion" for a stop is less than the reliability needed to furnish true probable cause
   b. **Prediction of Future Events** → when the court applies the "totality of the circumstances" test to evaluate information from an informant (especially an anonymous one) a key factor is whether the informant has predicted future events that someone without inside information would have been unlikely to know
   c. **Tip Without Corroboration is NOT Enough** – *Florida v. J.L.* (2000) → "an anonymous tip must provide predictive information that gives the police means to test the informant's knowledge or credibility. Reasonable suspicion requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."
   d. **White Holding/Principle** → an anonymous tip will be sufficiently reliable to permit a stop if and only if, prior to the stop, the police have been able to verify that the informant's assertion that criminality is afoot is a RELIABLE one
      i. **Low reliability + extensive corroboration** = enough to create reasonable suspicion
7. **911 Anonymous Tip** – *Navarette v. California* (2014) → Under appropriate circumstances, an anonymous tip can demonstrate sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop
   a. The reporting that the individual had been run off the road by a specific vehicle necessitates eyewitness knowledge, the basis of which lend significant support to the tip's reliability
   b. The caller's use of the 911 system is one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call
8. **Mistake of Law by Officer Leading to Reasonable Suspicion**? – *Heien v. NC* (2014) → an officer's misunderstanding of the law was reasonable (in view of an ambiguity in the code provision) and, therefore, there was reasonable suspicion justifying the stop of the vehicle
   a. The SC has recognized that "searches and seizures based on mistakes of fact can be reasonable, . . . and reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion [and probable cause]."
   b. **Rule:** RS can be based on a reasonable mistake of law & reasonable mistake of fact
      i. For Mistake of Law need:

        1. **(1)** an ambiguous statute;
        2. **(2)** that has not been interpreted by a court before
9. **Stop-and-Identify Statutes** – *Hiibel v. 6th Judicial District Court of Nevada* (2004) → the principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop if request for identification was "reasonably related in scope to the circumstances which justified" the stop, i.e., a state law requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with 4th Amendment prohibitions against unreasonable searches and seizures.
    a. **Can't simply arrest for failure to identify** – must first have a lawful stop for some other reason (e.g., assault)
    b. **Rule** – request for identification must be "reasonably related in scope and circumstances which justified the stop," AND initial stop must be based on independent Reasonable Suspicion of criminal activity
    c. **Stop-and-Identify Statute Test:**
        i. Was there a lawful stop based on reasonable suspicion?
        ii. Does the state have a stop-and-identify statute?
            1. If "yes" to both, then can arrest
10. **Policy Goal → OFFICER SAFETY; NOT preventing destruction/finding of evidence**
11. ***Terry* Frisk v. SILA**
    a. Terry Frisk
        i. RS (before arrest)
        ii. Outer Clothing
        iii. Justification – officer safety
    b. SILA
        i. PC leads to lawful arrest (contemporaneous w/ arrest)
        ii. Full search including containers possessed at time of arrest, pockets
        iii. Justification – officer safety and prevention of destruction of evidence
12. ***Terry* Frisks & Plain Touch Doctrine**
    a. **Rule →** if officer, while searching for weapons, feels what he has PC to believe is a weapon, contraband or evidence, officer may expand the search or seize the object and a warrantless seizure would be justified
        i. **Initial Touch Test:**
            1. Officer in lawful place
            2. Officer *Terry* frisks outer layer of clothing; no manipulation
            3. If immediately apparent from initial touch that item is incriminating, then police can seize
                a. Can be based on officer training and experience
13. **Traffic Stop to *Terry* Stop-and-Frisk**
    a. **Question:** May a police officer temporarily detain a person lawfully on a traffic violation, and then use this opportunity to conduct an investigation unrelated to the reason for the original traffic violation? (*Rodriguez*)
        i. YES – a routine traffic stop is comparable to a brief *Terry* stop
    b. **Rule:** Can't prolong traffic stop beyond purpose of original stop UNLESS officer has Reasonable Suspicion of crime beyond traffic violation
        i. Police should call dogs at beginning of traffic stop to prevent prolonging stop

c. As part of a stop, ordinary inquiries incident to a traffic stop, e.g., checking the driver's license, determining whether there are any outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance – are permitted
    i. The critical question is not whether the dog sniff occurs before or after the officer issues a ticket, but whether the conducting the sniff 'prolongs', i.e., adds time to the stop"

14. **Moving Suspects & Making Them Get Out of Car**
    a. After a suspect is stopped for traffic violation, i.e., detained, the officer may order the driver out of the car without further justification (*Mimms*)
    b. An officer may order a passenger of a car to also get out of the car without further justification (*Wilson*)
15. **Terry Seizures v. De Facto Arrests – Station House Seizures In Formal Custody**
    a. In order to lawfully bring a suspect into formal police custody and interrogate him at the police station (e.g., forcibly removing a person from their home or other place), the police must have Probable Cause (*Hayes*)
        i. Such station-house detention, even though brief and unaccompanied by interrogation, is "sufficiently like an arrest to invoke the traditional rule that arrests may be constitutionally be made only on probable case."
    b. Probable cause is necessary for a station-house detention accompanied by interrogation, even if no formal arrest is made (*Dunaway*)
    c. Police must have probable cause to require a suspect to come to the station for **fingerprinting** (*Hayes)*
    d. **De Facto Arrest Factors**:
        i. Placed in police car?
        ii. Taken to police station?
        iii. Placed in interrogation room?
        iv. Not told free to leave?
        v. Booked?
        vi. Fingerprinted?
        vii. Length of Time?
16. **Length of Detention – Investigative Stop vs. De Facto Arrest**
    a. A *Terry* stop can last only as long as necessary to determine **diligently** whether crime is happening or going to happen (*Sharpe*)
    b. "In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it 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 defendant."
        i. Court should consider whether the police are acting in a swiftly developing situation
        ii. The question is whether the police acted unreasonably in failing to recognize or to pursue an available alternative
    c. "In evaluating whether an investigative detention is unreasonable, common sense and human experience must govern over rigid criteria."

v. **Protective Sweeps**
1. Where an arrest takes place in the suspect's home, the officers may conduct a protective sweep of all or part of the premises, if they have a "reasonable belief" based on "specific and

articulable facts" that another person who might be dangerous to the officer may be present in the areas to be swept. (*Buie*)

   a. (1) SILA of closets and spaces immediately adjoining arrest where person could be found, AND
      i. REMEMBER: Only search where a person could be found; not a full investigatory search of all sized containers
   b. (2) Sweep of entire house (where person could be found) if RS to believe somebody else is present
      i. **Rule**: After arrest (police mistakenly think this is automatic) CAN do protective sweep but it is NOT automatic. Must have some RS that someone else is in the house.
         1. **Protective Sweep** = QUICK and CURSORY, i.e., a "protective sweep" is a quick and limited search of premises incident to arrest, and is conducted to protect the safety of the arresting officers or others
            a. It is NOT a full search of the premises, but may extend "only to a cursory inspection of those spaces where a person may be found hiding."
         2. **Reason**: Based on officer safety.
         3. Plain view: (1) Lawfully there (2) Lawful right of access (3) immediately apparent
      ii. Requirements: In order to search the rest of the house, need articulable facts supporting a reasonable suspicion that someone else is in the house
2. **Adjacent Spaces** → "Specific and articulable facts" are NOT needed for the officers to search in closets and other spaces immediately adjoining the place of an arrest, to make sure that no possible attacker lurks there
   a. This may be done as a precautionary measure, even where there are no specific facts suggesting a risk of attack, and does not count as a "protective sweep"
3. **Summary:**
   a. May search the person, containers on the person, and everything in the person's immediate grabbing area incident to a lawful arrest
   b. As an incident to the arrest (SILA) the officer can, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched
   c. Searching the rest of the house for person - There must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene
   d. A protective sweep, aimed at protecting the arresting officer, is not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found
      i. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises
4. **Car Frisks/Sweeps**
   a. **General:**
      i. Police may ordinarily search a car without a warrant if they have PC to do so

ii. Police may search portions of the car as SILA of a car occupant (or a recent occupant), even w/o PC
iii. Police may order driver/passengers out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is reasonable belief they are armed and dangerous (*Mimms*)
iv. The police, acting on an informant's tip, may reach into the passenger compartment to remove a gun from a driver's waistband even where the gun was not apparent to police from outside the car and the police knew of its existence only b/c of the informant's tip (*Adams v. Williams*)

b. **Rule:** Search of passenger compartment of a car, limited to areas where a weapon may be, is permissible if the police have a reasonable belief based on "specific and articulable facts" that reasonably would lead the officer to believe the suspect is dangerous and may gain immediate control of weapons (*Long*)
   i. This is QUICK search, looking for potential weapons
c. **Requires**: Need Reasonable Suspicion that suspect poses a danger & may gain control of weapons in car
   i. **NOT** necessarily danger from the currently arresting crime
d. Limitations:
   i. Can't open glovebox, sealed containers, etc.
e. Plain View Doctrine applies

5. **<u>Was it Reasonable? Did police have adequate grounds?</u>**
   a. **Probable Cause to ARREST** → exists where the facts and circumstances within the officer's knowledge and of which they have reasonably trustworthy info 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. Violation of the law has been committed;
      ii. The person to be arrested committed the violation
   b. **Probable Cause to SEARCH** → exists where the facts and circumstances within the officer's knowledge and of which they have reasonably trustworthy info are sufficient in themselves to warrant a man of reasonable caution that **evidence subject to seizure will be found in the place to be searched** (most specify 1 of 4 categories)
      i. The specific items to be searched for are connected w/ criminal activity; and
      ii. These items will be found in the place to be searched
   c. **Issue of Probable Cause arises in two ways:**
      i. Police apply to **magistrate** for SW or AW – warrants can only be issued if there is probable cause; police set, under oath, the info/facts they believe justifies issuance of a warrant. Magistrate must ask:
         1. Is info trustworthy?
         2. If yes, is there enough information?
            a. Magistrate must also be: (Neutral and Detached)
            b. **Standard of Review for Magistrate's Determination –** did magistrate have a "substantial basis for concluding" that a search would uncover evidence of wrongdoing based on the 4 corners of the affidavit (not the hearing)
               i. Can challenge truthfulness of officer's affidavit via *Franks* Hearing
      ii. Police conducting a **warrantless** arrest or search – the D may seek to have evidence excluded if they believe police violated 4th b/c didn't obtain a warrant or lacked PC
   d. **Informant Information?**
      i. **Totality of the Circumstances Test (*Gates*)** → So long as a neutral magistrate can reasonably determine that, based on the informant's info and all other available facts, there is PC to believe that a

search/arrest is justified, he may issue warrant; Key to *Gates* test is **corroboration/future event predictor**

1. ***Aguillar/Spinelli* "Factors"**
    a. **Basis of Knowledge** → how did informant come across information
        i. Personal observations of officer and inferences from other observable facts (presumed trustworthy)
        ii. Informant/Tipster statements → Must implicate/suggest criminal activity
            1. If anonymous → prediction of future activity usually sufficient
            2. If tipster → if correct about X, Y, and Z, he is probably correct about criminal activity
    b. **Veracity/Reliability** → how reliable and credible is the witness; did tip predict future with details?
        i. *Gates* allows a strong showing on one of the prongs to make up for an inadequate showing on the other
        ii. Presumed reliability of affiant under oath (police, detective, prosecutor)
        iii. Innocent citizen → good reputation; making statements against own interest
        iv. Past record of informant's reliability
        v. Corroboration of police and informant/tipster info (more = better)
2. **Staleness Doctrine** → a tip/info from an informant can grow "stale" if sat on for too long without acting

e. **Arrest Warrants**
    i. **Remember:**
        1. An arrest is a "seizure", but not all seizures are arrests
        2. All arrests MUST be supported by probable cause, but do not always need a warrant
        3. Only NEED AW to get into the home of the arrestee
        4. If warrantless arrest, suspect needs PC hearing within 48 hours (*Gerstein* Hearing)
        5. Interest Protected by AW —> issued by magistrates upon showing of PC to believe that subject has committed an offense; therefore, AW serves to protect an individual from an unreasonable seizure
        6. Summary:
            a. Public Place = PC ONLY (no warrant needed)
            b. Home = PC + AW (+ "Reason to believe home" requirement)
            c. 3rd Party Home = PC + SW
    ii. **Arrest in Public Area**
        1. An arrest warrant is not required to make a felony arrest in a public place; just need PC only
        2. Porch is considered public
    iii. **Arrest in Residence**
        1. Absent exigent circumstances, the police **may not** enter a private home to make a warrantless arrest; must have PC + AW from magistrate (*Watson*)
        2. If there are NO exigent circumstances, the police may NOT enter a private home to make a warrantless arrest b/c entry into a private home is an extreme intrusion (*Payton*)
            a. **Result of Invalid Arrest?** —> a warrantless arrest made in violation of *Payton* will NOT prevent the D from being brought to trial, but evidence seized during the arrest will not be admissible
            b. **Confession Stemming from Warrantless Arrest? —>** confession that follows a warrantless arrest will NOT be excluded

c. **Confession Following An Arrest Lacking PC —>** confession made after arrest with no PC WILL be excluded

3. Need "Reason to believe suspect is within" the suspect's home to go in (*Payton*)

iv. **Arrest in 3rd Person's Residence (*Steagald* Third-Party Principle)**

1. Absent exigent circumstances, need probable cause and a SW to search a home
2. Reasoning? —> b/c 3rd party did not commit crime that opened door to police

v. **Exigent Circumstances (Exceptions to *Payton*):**

1. Hot pursuit of a fleeing felon;
2. Imminent destruction of evidence;
3. Need to prevent a suspect's escape; or
4. Risk of danger to the police or other persons inside/outside the dwelling

f. **Search Warrants**

i. **Remember:**

1. SW are not required but "searches conducted outside the judicial process, without prior approval by judge/magistrate, are per se unreasonable under 4th Amendment – subject to exceptions" (*Katz*)
   a. Today: no SW warrant required, but *strong preference* for SW; MAY REBUT presumption if falls under an exception
   b. Federal Rules of Criminal Procedure Rule 41 —> lists everything that should be on a SW
      i. **Violation of Rule 41? —>** Does NOT result in suppression of evidence
2. If getting a warrant, must be authorized by neutral and detached magistrate – judge cannot join the search (*Lo-Ji Sales*)
3. If getting a warrant OR if police conduct warrantless search, must have PC
4. Particularity Requirement – preventing general warrants
   a. Particularly describes the PLACE to be searched
   b. Particularly describes the ITEMS to be seized
      i. Particularity by Incorporation —> warrant MAY cross reference other documents that are ATTACHED to warrant
5. Supported by Sworn Affidavit
6. Inventory, Receipt, and Return
7. Staleness Doctrine – PC must be present on the day of the planned arrest/seizure
8. Interest Protected by SW —> issued upon showing of PC to believe that the legitimate object of a search is located in a particular place; therefore, safeguards an individual's interest in the privacy of his home and possession against unjustified intrusion of the police

ii. **Knock-and-Announce**

1. 4th Amendment prohibition on unreasonable searches and seizures contains an implicit "**Knock-and-Announce" Per Se Rule** previously embedded in the common law (*Wilson*)
2. **Where Unannounced Entry Justified –** Must knock-and-announce before entering, with exceptions:
   a. Threat of physical violence;
   b. Prisoner escapes from police and retreats into his dwelling;
   c. Reason to believe that evidence will likely be destroyed if advance notice given
3. *Richards* Rule – To justify a **"no-knock" entry**, police must have "reasonable suspicion" that knocking and announcing presence, under particular circumstances, would be:
   a. (1) dangerous or
   b. (2) futile, or

c. it would inhibit the effective investigation of the crime, allowing the (3) destruction of evidence
    i. "Reasonable Suspicion" Standard – must exist "some minimal level of objective justification" (less demanding than PC)
4. Silence/Refusal after Knock-and-Announce
    a. If occupant is known to be home, but won't answer or refuses entry, officer may use **force to break in** after giving the occupant an adequate time to respond
5. Must wait approximately **15-20 seconds** before entering (*Banks*)

iii. **In Anticipation of Warrant (*McArthur*)**
1. Police may ensure a suspect doesn't destroy evidence while a warrant is obtained, i.e., allowed to hold someone while police go get warrant
2. Police must maintain the status quo
3. **Reasonable to secure scene/suspect while wait for SW if:**
    a. (1) PC to believe residence contained evidence of crime/contraband
    b. (2) Good reason to fear that, unless restrained, suspect could/would destroy evidence
    c. (3) Didn't arrest suspect but reasonably restrain them (e.g., watching them/making sure they don't go in house alone)
    d. (4) limited time period that was no longer than reasonably necessary for police, acting with diligence, to obtain warrant (e.g., 2 hours was okay)

iv. **Destroying property in a search**
1. If going to damage property, must show reason to believe destruction is necessary

v. **Scope of Search of Premises After Entry –** once officers are lawfully on the premises to execute a warrant, various principles apply
1. Police may search any container large enough to hold the criminal evidence sought in warrant (only allowed to search containers that could potentially contain evidence sought – not search everything)
2. Police may seize items not described in warrant, if they have PC to believe it is seizable item (e.g., contraband, fruit of crime, instrumentality, evidence of crime)
    a. Plain View Doctrine
3. Info that becomes available immediately before or during search may require police to cease/narrow search
4. If police, acting in good faith belief, make reasonable and honest mistake and find something beyond scope of warrant, search can still be valid, e.g., searching wrong apartment (*Garrison*)
    a. Court has recognized "need to allow some latitude for honest mistakes that are made by officers in dangerous and difficult process of making arrests and executing search warrants"

vi. **Anticipatory SW**
1. Situations when police know drugs are going to be delivered to a residence
2. Two (2) requirements:
    a. (1) PC to believe something to occur; and
    b. (2) if it occurs, PC to believe contraband is in a specified place/home
3. Rule is about the HOUSE, not the PERSON

vii. **Detaining/Searching Person During Warranted Searches**
1. SW must explicitly authorize the search of the person
2. A warrant to search a home or other premises does NOT implicitly authorize the search of persons found at the scene, even if the criminal evidence for which police are searching for might be on them

a. Police must have independent probable cause to search the person plus an exception to warrant requirement (Independent PC + Exception to Warrant Requirement = Search of Person at Scene) (*Ybarra*)
    i. "a person's mere proximity to others independently suspected of criminal activity does NOT, without more, give rise to PC to search that person"

3. May automatically **detain** anyone at location of search for length of search with use of "reasonable force" to secure and maintain detention, i.e., no PC needed (*Summers*)
    a. May detain using handcuffs (*Mueller*)
4. May **detain** individuals in the **immediate vicinity** of the premises to be searched; 1 mile away was too far (*Bailey*)
    a. **Summary:**
        i. Immediate Vicinity = Curtilage + a bit more (1 mile away = too far)
        ii. May automatically DETAIN:
            1. Occupants of residence at time of search; AND
            2. Persons discovered immediately outside residence at time of search
        iii. Must have independent grounds for PC + Exception to **search** person at scene of crime

viii. **Summary – Broad Categories of Exceptions to SW**
1. Exceptions dispense with search warrant requirement; do NOT dispense with PC requirement
2. Always require "reasonableness"
3. Prosecution must prove exceptions apply if no SW – "Before agents of gov. may invade the sanctity of the home, burden is on the gov. to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries"
4. If have SW, burden on Defendant to prove they don't apply
5. **<u>6 broad categories of exceptions to SW Requirement:</u>**

a. **(1) Search Incident to Lawful Arrest (SILA) —> MUST BE CONTEMPORANEOUS to arrest, i.e., no time in between**
    i. Is the arrest lawful (supported by PC)?
    ii. ***Chimel* Rule →** when an arrest is made, it is reasonable for arresting officer to:
        1. Search the person arrested to remove any dangers to police officer; (this right to conduct a warrantless search on arrestee is automatic, i.e., need no further PC to believe arrestee has weapons/drugs (*Robinson*)) and
            a. This includes looking into "containers" that are on the person (*Robinson*, e.g., heroin in cig pack, purses, wallet, etc.)
            b. When a SILA occurs, police may examine items of personal property found on the person of the arrestee, not limited to items suspected of being weapon
                i. This is more than a pat-down; a thorough search
        2. Search & seize evidence within the area of the arrestee's immediate control (grabbing area)
            a. Rationale: (1) officer safety and (2) prevention of destruction of evidence
    iii. **Arrest Inventories →** When an individual is incarcerated, even temporarily, upon booking, without a warrant or PC, they will be searched (protect arrestee from theft; reduce false claims of theft; ensure safety of arrestee, prisoners, and police)
        1. **Body Cavity Search? —>** Not under Arrest Inventory search; must show evidence that something is being concealed first
    iv. **Cell Phones & Electronic Storage Devices → NO SILA;** Cannot search through cell phone with SILA exception; need a warrant b/c cell phone doesn't fit *Chimel* concerns (policy decision; not reconciled w/ *Robinson*) (*Riley*)
        1. Officer can prevent phone from locking if seized in unlocked state
        2. Need a warrant if NOT physical SILA

b. (2) Plain View (and Touch) Doctrine

i. Applies to seizures; NOT searches b/c no additional search/intrusion into home
ii. Police may seize unnamed items as long as search was conducted in proper area and unnamed item was in "plain view"
iii. No inadvertence requirement for police – don't have to find item by "accident" or unintentionally
iv. For doctrine to be applied so that warrantless seizure of evidence is allowed, **3 requirements**:
    1. Officer must have lawful right to be in place that view is from, i.e., can't trespass to get into viewable position;
    2. Officer must have lawful right to access object; and
    3. The object's incriminating nature must be "**immediately apparent**" – object has to be viewable and not microscopic (*Horton*)
        a. Officer needs PC (when looking at surrounding circumstances) to believe an object is incriminating and thus subject to seizure; not merely reasonable suspicion (*Hicks*)
v. **Plain Touch**
    1. Officer may lawfully pat down a suspect's outer clothing for weapons and if upon feeling the contours/mass makes the objects identity immediately apparent, its warrantless seizure would be justified by same practical considerations in plain view doctrine (*Dickerson*)

c. (3) Automobile

i. **SILA of Cars (*Gant*)** → May search passenger compartment if:
    1. Arrestee is **recent occupant** of car who is **unsecured** and within **reaching distance of passenger compartment** at time of search (has access at moment of search); ***OR***
    2. ***Reasonable to believe*** evidence related to crime of arrest will be found inside the vehicle (less than PC standard – based on articulatable facts (training/experience))
        a. This is automatic and can be done without PC
ii. **SILA & Drunk Driving (*Birchfield*)**
    1. Warrantless Breath Tests → per se constitutional
    2. Warrantless Blood Tests → not justifiable under SILA
        a. May be allowed under different warrant exception (exigent circumstances?)
iii. **SILA to Lawful Citation**
    1. Officer **cannot** search car for citational offense – warrantless searches of car incident to citation is unconstitutional (*Knowles*)
        a. Routine traffic stop is relatively brief encounter and does not pose danger to the officer
iv. **Custodial Arrest & Minor Crimes**
    1. **Custodial Arrest Defined:** when police take individual into custody for a petty/minor offense (e.g., minor traffic violation that carries small fine)
    2. B/c officer won't know whether a situation could constitute a major or minor crime, officer can arrest for a "minor" citation/offense, however, depends on state law (*Atwater*), i.e., for "minor" offense, police may be able to arrest but depends on state law
        a. "Penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of the arrest"
v. **Pretextual Stops and Arrests in Automobiles** (when officer uses a minor traffic violation to stop for a different suspected reason)
    1. If the police have PC to believe that a traffic (or other) law has been broken, police may stop the perpetrator, even if their motive in doing so is to seek evidence of some other crime for which they do NOT have PC or even reasonable suspicion (*Whren*)

2. Commercial vehicles can be stopped/searched at any time?

vi. **Car Search at Station After Arrest**
   1. Police may search the car at station either:
      a. (1) immediately at station w/o warrant; or
      b. (2) seize car at station and wait for warrant (*Chambers*)
   2. NOT SILA b/c not contemporaneous to arrest

vii. **Car Search at Place Where Stopped/Found**
   1. Police generally have a right to conduct a warrantless search of vehicle immediately at place where stopped with PC to make stop
   2. **Mobile Homes (RVs)** – Will be treated as a car, rather than house, based on ***Carney* Factors**:
      a. Location**;**
      b. Readily Mobile;
      c. Licensed vehicle;
      d. Connected to Utilities;
      e. Convenient Access to Public Roads

viii. **Automobile In Driveway/Curtilage Search**
   1. If within the curtilage of the home, gets the protection that the home would require
   2. Look to exactly where the automobile is parked b/c sometimes part of the driveway is OUTSIDE of the curtilage

ix. **Automobile Exception**
   1. CAN search **trunk**, hidden compartments, and every inch of car with PC to believe car contains articles that officer entitled to seize (*Carroll*)
   2. With SILA, only can search passenger compartment; not trunk
   3. Does NOT have to be contemporaneous to arrest b/c NOT SILA
   4. Rationales:
      a. Increased mobility of car;
      b. Reduced expectation of privacy on public roads

x. **Automobile Inventories**
   1. If car is impounded b/c it was towed for illegal parking, it may be subjected to a warrantless "inventory search," even if police have never had PC to believe it contains contraband/evidence of crime (*Opperman*)
      a. Warrant requirement does NOT apply b/c this is a non-investigative police inventory
      b. Apply reasonableness balancing test
   2. MUST have police department written policy of doing this – Look to the policy of the police department
   3. Police CANNOT open a locked suitcase in an inventory search b/c police had no policy in respect to opening closed containers in an inventory search (*Wells*)

xi. **Containers in Cars**
   1. If have PC, can open all containers within the car where the evidence to be seized could be found – if PC is ONLY for trunk, can only search trunk (*Acevedo*)
   2. If have PC, police may search/inspect ANY passengers' belongings founding in the car that are capable of concealing the object of the search (even if you don't have PC to suspect that passenger of crime) (*Houghton*)
      a. Search limited by size of items sought and size of container

xii. **Car Searches Synthesis – Warrantless Search of Car Valid:**
   1. Automobile Exception – if police have PC, can search entire car, besides trunk (*Carroll*)
   2. When occupant or recent occupant arrested, SILA contemporaneous search of passenger compartment (even without PC to search) (*Gant*)

3. Automobile Inventory when car is towed or impounded (without PC + police department written policy)
4. SW required if in driveway/curtilage of home, or not on road recently
5. *Terry* Sweep/Search of Car (*Michigan v. Long*)

d. (4) Consent

- i. **General**
  1. Dispenses w/ PC & SW requirement
  2. Consent can be revocable and defined by the scope of the consenter
  3. Consent does NOT have to be in writing (most of the time)
  4. Must be voluntary
     - a. Involuntary – look for threats or manipulation
  5. Prosecution bears burden to show that consent was valid and voluntarily given, i.e., not the result of duress or coercion, express or implied
- ii. **Totality of the Circumstances Test**
  1. Consent is voluntary as long as not the product of duress, coercion, express or implied
  2. **Warning of Right to Refuse? —>** Voluntariness does not require proof of knowledge of a right to refuse (this is just a factor) → Police DO NOT have to tell the consenter that he has a right to refuse (*Bustamonte*)
  3. **Voluntary Test:**
     - a. Totality of the Circumstances;
     - b. Consenter's will was overborne by the police
  4. **Traffic Stop —>** Consent is still voluntary regardless if the police do not inform the consenter that he is free to go after returning his driver's license upon being stopped for traffic violation (*Robinette*)
     - a. After warning, don't have to tell individual he can go before asking to search
     - b. Police can't prolong search
  5. **False Claim of Present Authority –** Where an officer falsely asserts that he has a valid search warrant to get consent, the consent is invalid, i.e., coercion (*Bumper*)
- iii. **Consent by Third Person**
  1. **Default/General Rule (*Matlock*) →** if you live with someone, they can give consent b/c they have "common authority" over the premises (assume the risk by living with someone); but if have own separate living space, clearly police need your consent to search unless "common authority"
     - a. **Considerations:**
       - i. Mutual Use of Property?
       - ii. Joint access/control of property?
       - iii. Right to let people come & go from property
  2. **When tenants all present, but one is objecting →** when D is PHYSICALLY present and objecting when a 3rd party consents to a search of the premises over which joint authority is shared, the third party's consent will not be binding on D (*Randolph*)
     - a. **HOWEVER, look for RECOGNIZED HIERARCHY →** If there's an ownership structure (e.g., parents house, military barracks), the individual with the most authority has say over consent
     - b. **RULE:** When any co-tenant declines consent to search, the no trumps the yes; must be (1) physically present (in front of police); and (2) objecting
       - i. Police could wait for objecting party to leave
  3. When one resident denies entry into a dwelling, but is arrested on independent grounds, then police come back and get consent from other co-resident, that consent is valid (*Fernandez*)
- iv. **Reasonable Mistake / Apparent Authority**

1. A third-party consent will be valid on the absent defendant even if the police were mistaken about whether the consenter in fact had joint authority over the premises, as long as mistake was reasonable
    a. An individual may lie and say they live at the premises and give consent, if police reasonably believe the liar then the lie will not invalidate the consent
    b. Even if consenter is an infrequent visitor or usual resident with no true authority; so long as police were ***reasonably mistaken*** in their belief that the consenter had authority to consent, consent is valid
2. **Apparent Authority Test →** Objective standard: would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises? (*Rodriguez*)
    a. Reasonable mistake of fact is okay
    b. Did consenter have a key, say "our" apartment

v. **Scope of Consent**
1. A consent search is invalid, even if the consent was voluntary, if the police exceed the scope of the consent granted
    a. It is reasonable for an officer to consider a suspect's general consent (with no stipulations or limitations) of his car to include the consent to examine a paper bag or other containers within his car (*Jimeno*)
    b. This wouldn't include prying open a briefcase

e. (5) Exigent Circumstances – a warrantless intrusion may be justified by:

i. Hot Pursuit of Fleeing Felon

ii. Imminent Destruction of Evidence
1. Warrantless entry to ascertain blood-alcohol content before "destroyed" by passage of time is unlawful (*Welsh*)

iii. Need to Prevent Suspect from Escape

iv. Risk of Imminent Harm to Police or Others Inside
1. **"Police Created Exigency" →** no such thing; only if police:
    a. (1) threaten or
    b. (2) actually engage in a 4th Amendment violation will entry be unlawful (*King*)
2. As long as the police behavior is "reasonable" in 4th A terms, the behavior will not deprive the police of the ability to enter without a warrant

f. (6) Special Needs & Non-Criminal Context

i. **"Special Needs Exception to the Warrant Requirement" —>** a search or seizure comes within the "special needs" category when a perceived need, beyond the normal need for criminal law enforcement, makes the warrant and/or PC requirements of the 4th A impracticable or irrelevant
1. In such circumstances, the Court evaluates the governmental activity by applying the **reasonableness balancing standard**

ii. **Emergency Community Caretaking Doctrine →** law enforcement may enter a home/car w/o a warrant to render emergency assistance or protect an occupant from imminent harm (*Stuart*)

iii. **Automobile Inventories —>** when an automobile must be towed as result of illegal parking, the police may routinely inspect the contents of the car, not as part of a criminal investigation, but simply to make sure that belongings are properly inventoried for safekeeping purposes (must have written policy) (*Opperman*)

iv. **Administrative Searches:**
1. **Housing Code Inspections —>** Court approved warrantless administrative searches of "closely governmentally regulated industries" even in the absence of emergency or consent (*NY v. Burger*)

   a. Did not matter that police performed the search – all that mattered was that the administrative regulations had a **non-penal purpose**

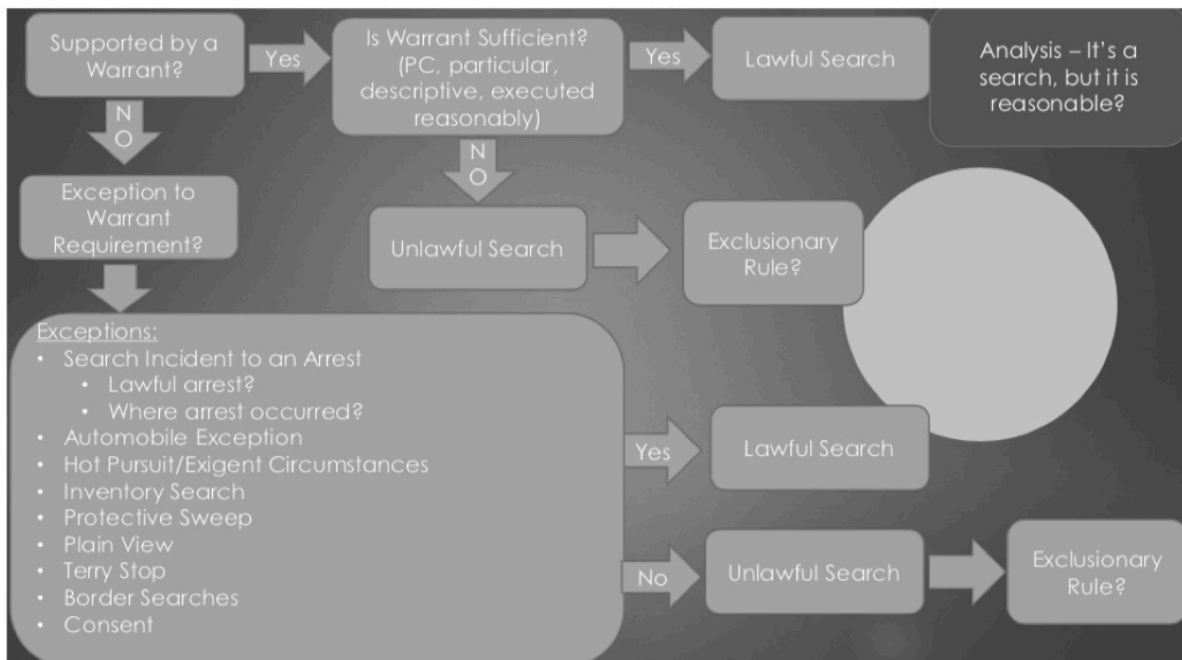
2. **School Searches —>** public school teachers and administrators may search students without a warrant if:
   a. **(1)** there are reasonable grounds – NOT necessarily "probable cause" in criminal context – for suspecting that the search will turn up evidence that student has violated or is violating either the law or the rules of the school; and
   b. **(2)** once initiated, the search is not excessively intrusive in light of the age and sex of the student and the nature of the infraction
3. **Airport Searches —>** a particular airport security search is constitutionally reasonable provided that it:
   a. **(1)** is no more extensive than necessary, in the light of current technology, to detect the presence of weapons or explosives; and
   b. **(2)** it is confined in good faith to that purpose
4. **Probation & Parole Searches**
   a. **Probation —>** No SW needed, no PC needed, RS required
   b. **Parole —>** No SW, no PC needed, no RS
      i. **Limitation on BOTH:** search MUST be made by probation or parole officer
      ii. Drug/blood test at any time
      iii. Applies to houses, cars, etc.
5. **Border Searches**
   a. **General:**
      i. At the border and its functional equivalent (airport), a person may be stopped and her belongings searched w/o a warrant and in the absence of individualized suspicion of wrongdoing, "pursuant to the longstanding right of the sovereign to protect itself" from the entry of persons and things dangerous to the nation" (*Ramsey*)
      ii. A suspicion-less international border search is constitutionally reasonable even when border agents, without RS, seize a person's car at the international border, remove the gas tank, and search it (*Flores-Montano*)
   b. **Seizures by Roving Border Patrol —>** the roving border patrol agents need RS of criminal activity to detain the car occupants briefly (*Brignoni-Ponce*)
   c. **Seizures at Fixed Interior Checkpoints —>** vehicle occupants may be stopped for questioning at fixed interior checkpoints without individualized suspicion of wrongdoing (*Martinez-Fuerte)*
6. **Sobriety Checkpoints on Highways**
   a. **General:**
      i. Checkpoints must be either (1) fixed and stop all cars or (2) system of randomized (e.g., every 3rd car)
      ii. **No discretion -** Officer cannot have any discretion; if police stop less than all, presumably they must have some particularized suspicion before they may stop a specific person
      iii. Individualized suspicion requires PC to stop
      iv. What is the primary purpose of the checkpoint? (Highway safety = okay); (General crime control = not okay)
   b. **Sobriety Checkpoints —>** State's interest in preventing drunk driving and the degree of intrusion on motorists weighs in favor of the state program (*Sitz*)
      i. No PC, no RS, just "reasonable" seizure
      ii. 25 sec stop —> need RS or PC to pull to side and stop for longer
   c. **License/Registration Checkpoints —>** checkpoints for verifying licenses and registrations may be permissible; but cannot have any discretion (*Prouse*)

d. **Drug Checkpoint —>** b/c the primary purpose of the checkpoint is indistinguishable from the general interest in crime control, unconstitutional (*Edmond*)
    i. NEVER would a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing be constitutional without individualized suspicion, UNLESS possibly for emergency situation (terrorist attack, dangerous criminal on particular route)

e. **REMEMBER:** State constitutions may afford more protections
    i. State can set rules and give MORE protection to citizens IF State Court makes clear that it is relying on state law/constitution

7. **Drug Testing —>** suspicion-less drug testing (urine, blood, breath) has been upheld by SC in some circumstances so long as the reason is not indistinguishable from general interest in crime control according to the following factors:
    a. Primary purpose of program;
    b. Threat of arrest for failure to pass;
    c. Involvement of law enforcement officials;
    d. Nature and immediacy of the government's concerns regarding drug testing

6. **Remedies for 4th Amendment Violations**
    a. **Standing**



i. **General —>** before evidence can be excluded, court must determine whether the person seeking exclusion has the right to bring the 4th Amendment claim
    1. Each defendant (on an individual basis) has to prove, personally, that he had "standing' to raise the 4th A claim – "the established principle is that suppression of the product of a 4th A violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." (*Alderman*)
    2. The 4th A rights are personal rights which, like some other constitutional rights, may NOT be vicariously asserted. (*Jones*)
    3. **Remember:** Standing must be asserted at **suppression hearing**

ii. **Starting Point —>** Is the defendant the person whose rights were violated? (*Payner*)

iii. ***Rakas* Standing Test —>** Only a person with a legitimate expectation of privacy (Objective *Katz* Prong) in the place searched or thing seized may challenge a search or seizure as unconstitutional
    1. Defendant bears the burden of proving standing in the defendant's first motion to suppress
    2. **Note for Cars:** a passenger of a car always have standing to challenge the initial **stop;** as well as the owner if the owner is present
    3. **Exception:** Passengers of car can show a reasonable expectation of privacy in some areas of the car search if that passenger has legitimate ownership over the object (e.g., if the search was through the passengers wallet/purse/container/etc.)

iv. **Houses**
    1. **Overnight Guests —>** has a legitimate expectation of privacy and therefore has standing to object to the police's warrantless entry of the premises where the guest is staying (*Olson*)
    2. **Business Visitor** —> normally NOT have standing to object to a search of the premises, at least where the visit is a brief one unaccompanied by any real personal relationship between guest and host, even where the visit takes place at a home rather than an office or other traditional place of business (*Carter*)
        a. Someone temporarily in another's house, and present to conduct a business transaction, does not have a reasonable expectation of privacy in the house
        b. Just commercial purposes = no standing

b. **4th Amendment & The Exclusionary Rule (Fruit of the Poisonous Tree Doctrine)**

i. **Purpose of Exclusionary Rule:**
    1. To deter police misconduct —> creates punishment for violation and incentive for police NOT to violate 4th A
    2. Judicial integrity —> "if the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy." (*Mapp*)

ii. **Steps:**
    1. What was the alleged constitutional violation, i.e., what poisoned the tree?
    2. What is the evidence obtained, i.e., what is the fruit?
    3. If not for the violation, would that evidence have been found, i.e., did the fruit come from the poisoned tree?
    4. If so, is there an exception that sufficiently removes the poison from the fruits?

iii. <u>**Exceptions to Exclusionary Rule:**</u>

1. **Independent Source Doctrine**
    a. **General:** In the situation where the police are illegally on premises, discover particular evidence, then apply for a warrant, and "rediscover" the evidence, as long as the trial court is convinced that the illegal entry did not contribute either to the officer's decision to attempt to get a warrant or to the magistrate's decision to grant the warrant, the evidence will be admissible even though its initial discovery was illegal

b. **Rule:** so long as the prosecution can show that the officers would have applied for an properly received a warrant even had they not first entered the premises illegally, the evidence found could be admitted
    i. **NOTE:** it does not make any difference that the evidence that was actually discovered during the initial warrantless entry
c. **Requirements according to *Murray*:**
    i. **(1)** police must have been on the premises **illegally** at the moment they initially discovered the evidence/contraband in question, i.e., the police ended up on the premises for which they did not have a SW, and no exception to SW exists;
    ii. **(2)** although police didn't have a SW, at the moment of entry they must have had knowledge that would have **entitled them to procure a SW**, i.e., police already had PC to believe that evidence of crime would be found on the premises; and
    iii. **(3)** the police must show that they would probably have eventually applied for a SW even had they not engaged in the initial illegality
d. **Summary:**
    i. **Government must show that they were going to get SW regardless of the initial discovery by proving:**
        1. **(1)** The agents were going to seek the SW before they discovered the evidence/contraband during the illegal search; and
        2. **(2)** Was any of the info obtained during the illegal search presented to the magistrate in the support of the SW?
e. **Burden of Proof –** Preponderance of the evidence

2. **Inevitable Discovery Doctrine**
    a. **General:** Evidence may be admitted if it would "inevitably" have been discovered by other lawful police techniques had it not first been obtained though the illegal discovery
        i. Harder to prove that Independent Source
    b. **Burden of Proof:** prosecution bears burden of showing, by a preponderance of the evidence, that the info would inevitably have been discovered by lawful means
    c. **Application:** applies where derivative evidence is a weapon or body whose location the police learn from an illegal source or improperly-obtained confession

3. **Attenuation ("Dissipation of Taint"/ "Purging of Taint") Doctrine**
    a. **General:** when the police obtain a piece of evidence indirectly through a constitutional violation, if enough additional factors intervene between the original illegality and the final discovery of evidence, neither the "deterrence" nor "judicial fairness" rationales behind the exclusionary rule applies; therefore, the evidence may be admissible despite the fact that it would not have been discovered "but for" the illegality (*Wong Sun*)
    b. **Attenuation Factors:**
        i. Length of time between initial violation and final discovery;
        ii. Flagrant of initial violation;
        iii. Amount of intervening causes;
        iv. Presence of an act of free will
    c. **Justice Thomas Articulating Three Attenuation Factors from *Brown v. Illinois*:**
        i. **(1)** the temporal proximity of illegality/constitutional violation and the evidence obtained from it:
            1. Shorter time (2 hours between illegal arrest to confession of the arrestee) —> Inadmissible
            2. Longer time (several days) —> Admissible
        ii. **(2)** presence of intervening circumstances between the illegality and the fruit:
            1. Presence of valid AW unconnected w/ illegal stop was enough to "attenuate" the connection between the unlawful stop and the resulting search —> Admissible

2. No intervening events of significance —> Inadmissible

iii. **(3)** of particular importance, the purpose and flagrantly of the official misconduct:

1. The illegality had a quality of **purposefulness –** the police conceded their purposes for arresting D without PC was solely investigatory, making it an "expedition for evidence in the hope that something might turn up" —> Inadmissible
2. Officer was at most negligent and should have asked D whether he would speak with him, instead of demanding that he do so —> Admissible

4. **Good Faith Exception**
   a. **Only Applies to SW (**or AW but must more rare)
   b. **General Rule —>** Evidence obtained through reasonable reliance on a facially valid search warrant, that is later determined to be invalid, is not gathered in violation of the 4th A and such evidence is admissible at trial (*Leon*)
   c. **Application:** When police obtain evidence in reasonable reliance on a SW which appears facially valid, but which is later determined to be invalid
   d. **Reasoning —> "**It is the magistrate's responsibility to determine whether the officer's allegations establish PC. An officer cannot be expected to question the magistrate's PC determination or his judgment that the form of the warrant is technically sufficient and penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of 4th A violations." (*Leon*)
   e. **Four (4) Exceptions:**
      i. Officer lied (or reckless disregard of truth) in affidavit on which the PC determination was made (*Franks*);
      ii. Magistrate wholly abandoned judicial role and was no longer "detached and neutral" (*Lo-Ji Sales*);
      iii. "Bare Bones" Affidavit that is so lacking in indicia/indication of PC (quantity is not the same as quality, but short affidavit probably bare bones);
      iv. Facially deficient b/c clearly lacks particularity, i.e., gives too much deference to police
         1. If no exceptions, then admit evidence
   f. **Other Applications of Good Faith Doctrine:**
      i. Evidence admitted when police officer relied on a state statute that was later declared unconstitutional (*Krull*);
      ii. Evidence admitted when police officer relied on an error of a court-managed database (*Evans*);
      iii. If the police fail to properly follow the knock-and-announce rule, the evidence they find may still be admitted at trial (*Hudson*);
         1. "What the knock-and-announce rule has NEVER protected is one's interest in preventing the government from seeing or taking evidence described in a warrant"
      iv. Where police personnel act negligently (i.e., via a clerical error by sheriff's office), but not recklessly, and lead an officer to reasonably believe an AW exists, the evidence obtained pursuant to that unlawful arrest remains admissible, at least where any police misconduct consist of "non recurring and attenuated negligence" (*Herring*)
         1. The Exclusionary Rule serves to deter "**deliberate, reckless, or grossly negligent conduct,** or in some instances **recurring or systemic negligence"**
         2. **Objective Test:** Whether a reasonably well-trained arresting officer would have known that the search was illegal in light of all the circumstances
         3. **Summary:** when police mistakes are the result of negligent, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its way
      v. A search conducted in objectively reasonable reliance upon binding appellate precedent that has since been overruled is not subject to the exclusionary rule (*Davis*)
      vi. **NC does not have a GF exception in Constitution but legislature enacted one** (*Carter*)

vii. **Summary:** If the interests that were violated have nothing to do with the seizure of the evidence, or the policies/interests behind the reasons for the rules, the exclusionary rule is inapplicable
    1. Look to the interests protected by the constitutional guarantee and whether suppression of that evidence would serve that interest
    2. General rule is that the good-faith exception applies to all "non-culpable, innocent police conduct."

viii. **Question to ask —>** Would suppression of the evidence do anything to deter police misconduct?

5. **Impeachment**
    a. **General:**
        i. Only applies if defendant goes to trial
        ii. Unlawfully obtained evidence may be used to show defendant is lying for impeachment purposes if defendant takes the stand and denies evidence

7. **<u>Police Interrogations & Confessions (5th Amendment)</u>**
    a. **Applicable Constitutional/Legal Doctrines:**
        i. **Voluntariness (5th & 14th Due Process)**
        ii. **Self-Incrimination & *Miranda* (5th)**
        iii. **Right to Counsel (5th & 6th)**

    b. **Voluntariness Doctrine – Voluntary Confessions**
        i. **Torture & Confessions**
            1. The Due Process Clause of the 14th Amendment requires that state action be consistent with fundamental principles of liberty and justice
                a. Violence used to get confession violates the Constitution, i.e., convictions resting solely on confessions induced by violence perpetrated by state actors are not consistent with the Due Process Clause and such evidence is therefore inadmissible at trial (*Brown*)
            2. The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause
                a. Some sort of **state action** is required to support a claim of violation of the Due Process Clause of the 14th Amendment (*Connelly*)
        ii. **Voluntariness Standard –** Would a reasonable person believe that police conduct was sufficient to overbear the suspect's will?
            1. **Test —>** Based on the **totality of the circumstances**, was the suspect's will **overborne** by police conduct?
            2. **Factors:**
                a. Presence of violence?
                b. Threats of violence? (*Fulminante*)
                c. Threats of non-violent but coercive conduct? (E.g., taking children away, etc.)
                d. Nutritional or sleep deprivation?
                    i. Interrogation for over 7 hours
                    ii. Through the night
                e. Psychological pressures?
                    i. History of mental/emotional instability (*Spano*)
                    ii. Amount of officers present at once
                    iii. Denying/ignoring request for attorney
                    iv. Use of police officer friend to sympathize

3. **Police Promises** → Police must be able to keep all promises made or else confession is involuntary → may only indicate they will bring cooperation to prosecutor's attention
4. **Police Trickery/Deception** → **"**Reasonable" deception is allowed, but should try everything else first because police run the risk of losing credibility with the jury because of lying

c. **Self-Incrimination (5th & *Miranda*);**
   i. **General Rule** → Police must give procedural safeguards (i.e., *Miranda* warning) whenever suspect is in **custody** being **interrogated** by the **police** (PIC)
   ii. **Purpose** → *Miranda* is a prophylactic rule, i.e., it is not a constitutional right, but it protects a suspect's constitutional right against self-incrimination guaranteed by the 5th Amendment
   iii. ***Miranda's* Premise** → the danger of coercion results from the interaction of custody and official interrogation, whereby the suspect may feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess; protecting a suspect in a "police dominated atmosphere" from compulsion
   iv. ***Miranda* Warning:**
      1. Right to remain silent;
      2. Anything you say can & will be used against you in a court of law;
      3. Right to consult with an attorney AND have attorney present during questioning;
      4. If cannot afford an attorney, one will be appointed to you;
      5. Right to stop the interview at any point
   v. **NOTE: Non-*Mirandized* Statements May Be Used for Impeachment Purposes**
   vi. **Offense General** → Once *Miranda* Rights are invoked by suspect, rights apply to ALL crimes, not just the ones arrested for, i.e., cannot talk about anything
   vii. **No Vicarious Assertion** → suspect must invoke for himself
   viii. *Miranda* is a constitutional decision and cannot be override by congress (*Dickerson*)
   ix. ***Miranda* applies to MISDEMEANORS;** applicable regardless of severity of offense
   x. **Questions to ask:**
      1. Is the suspect in **<u>CUSTODY</u>?**
         a. Custodial Interrogation: 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
            i. Custodial interrogation is so inherently coercive that a confession cannot be voluntarily given absent protective safeguards (*Miranda*)
            ii. Where an investigation is no longer an inquiry into an unsolved crime, but has begun to focus on a particular person (*Escobedo*)
         b. Custody Test → Would a reasonable person in the suspect's position, based on the totality of the circumstances, understand his freedom to terminate questioning and leave?
            i. *Berkemer* Test → Whether a reasonable person in the suspect position (objective) would believe that his freedom of action/movement is curtailed to a degree associated with a formal arrest under the totality of the circumstances? Factors include:
               1. Location of suspect and police, e.g., in public vs. at police station;
               2. Duration of interaction;
               3. Statements made;
               4. Physical restraints;
               5. Release at the end of questioning?

ii. **Bottomline →** Whether the relevant environment/interaction presents inherently coercive pressures at issue in *Miranda*

c. **Undercover officer/Confidential Informant →** an undercover law enforcement officer posing as a fellow inmate does not need to give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response; *Miranda* does not forbid mere strategic deception by taking advantage of a suspect's misplaced trust (*Perkins*)
   i. **Caveat:** a confession to a paid informant masquerading as an organized crime figure in exchange for the truth is involuntary under the *Bustamonte* Totality of the Circumstances test (*Fulminante*)

d. **Custody in Prison Setting →** the "inherently compelling pressures" of custodial interrogation ends when the prisoner returns to his normal prison life, so a release back into general prison population constitutes a break in *Miranda* custody (*Shatzer*)
   i. **General Population →** Not in custody
   ii. **Interrogation room →** In custody when removed from general population and put in police interrogation

e. **Age of Suspect →** Would a reasonable child feel free to leave? (*JDB*)

f. **Traffic Stops →** Considered a 4A seizure, but NOT in custody for purposes of *Miranda*

2. Is the suspect being **<u>INTERROGATED</u>?**
   a. ***Innis* Test →** The Miranda safeguards come into play whenever a person in custody is subjected to:
      i. either express questioning or its functional equivalent; and
      ii. any words or actions on the part of the officer (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.
         1. Focus is on the suspect's perception; police intent is relevant unless it is made explicit
         2. Unless a police officer reasonably should know that their comments/actions will elicit an incriminating response from suspect, comments made between police officers in the presence of a suspect do not constitute interrogation for *Miranda* purposes (*Innis*)
            a. Officers cannot play on a suspect's unusual susceptibility
   b. **Routine Booking Exception:** if part of routine booking, *Miranda* is not applicable to questions seeking:
      i. Name; address; age; date of birth; weight; height

3. Is the interrogation being performed by the **<u>POLICE</u>?**
   a. *Miranda* warning must be given when the defendant **KNOWS/BELIEVES** he is speaking with a state actor
   b. *Miranda* warnings are not required when the suspect is unaware he is speaking to a law enforcement officer and gives a voluntary statement

xi. ***Miranda* Exceptions**

1. **Impeachment Purposes**
2. **Public Safety**
   a. **Rule →** The police may question a suspect without first reading a suspect his Miranda warnings, and the suspect's statements may be admitted at trial, where the exigency of

a situation requires that public safety take precedence over a suspect's Fifth Amendment privilege.

b. **Test:**
   i. **(1) The officer is reasonably prompted (**an objectively reasonably officer would find that the reason of asking question was for a purpose more than merely to obtain evidence useful in convicting the suspect**)**
   ii. **(2) to protect the:**
      1. **(a) Officer safety OR**
      2. **(b) Public safety**
   iii. **(3) from immediate harm**

xii. ***Miranda* & Exclusionary Rule**
1. When a *Miranda* violation occurs, only the confessions/unwarned statement will be inadmissible
2. Physical fruit/evidence of *Miranda* is NOT suppressed (*Patane*)
3. No fruit of poisonous tree for *Miranda* (*Quarles*)
4. **HOWEVER:** a "pure" 5th Amendment violation results in suppression of evidence
   a. "Pure 5th": violation of "the constitutional privilege against compulsory self-incrimination in its most pristine form," e.g., forcing suspect to speak, gun to head
5. **Statements depend on officer's intent (*Elstad/Seibert*)**
   a. If Miranda violation was **intentional** then statements as a result of violation are **excluded**
      i. **Two-Step Interrogation Technique is unconstitutional (*Seibert*)** - "These circumstance [below] must be seen as challenging the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk:
         1. The completeness and detail of the questions and answers in the first round of interrogation;
         2. The overlapping content of the two statements;
         3. The timing and setting of the first and the second round;
         4. The continuity of police personnel; and
         5. The degree to which the interrogator's questions treated the second round as continuous with the first; or
         6. A police strategy adapted to undermine the Miranda warnings
   b. If Miranda violation **not intentional** (good faith) then statements as a result of the violation are **not excluded** (*Elstad*)

***Elstad* General Outcome:**
- **(1)** the second confession will NOT be deemed tainted as long as it was "voluntarily made," and the Court will **presume** that the second confession is indeed voluntary if made after warnings, even though that confession followed an earlier unwarned confession
- **(2)** Second confession is more likely to be deemed voluntarily made if the underlying circumstances do not make the second confession a **mere continuation** of the first (i.e., the second is more likely to be found voluntary if the two were meaningfully **separated by time, place, or interrogator**, or if it was made clear to the suspect that the first, unwarned, confession would not be admissible)
- **(3)** The second confession is less likely to be deemed tainted if the failure to warn prior to the first confession was the result of an **inadvertent mistake** by the police?
- **(4)** Where the place follow an **intentional "two-step"** practice of eliciting an unwarned confession, then immediately giving a warning under circumstances that lead the suspect to believe that even the already-made

confession can be used against him (so that the suspect sees no reason not to repeat the confession after the warning), the second confession **will** probably be deemed involuntary and tainted (***Missouri v. Seibert***)

- The police have **no duty to warn a suspect of prior statement's inadmissibility**
- **Test:**
  - **(1)** Was suspect in police custody?
  - **(2)** Was a confession made before or after a *Miranda* warning was given?
  - **(3)** Was a second confession made?
  - **(4)** Was the second confession knowingly and voluntarily made? (Second confession presumed voluntary if made after *Miranda* warning)
    - Were the two confessions separated by:
      - Time?
      - Place?
      - Interrogator?
    - Was it made clear to the suspect that the first, unwarned, confession would not be admissible?
    - Was the failure to warn prior to first confession the result of an inadvertent mistake by police?
- **Rule:** A second confession is not tainted by a first, *Miranda*-less confession if the second confession was **knowingly and voluntarily made**, i.e., it would not be invalidated merely because there was a prior, illegally-obtained confession having the same substance as the second

d. Right to Remain Silent (*Miranda*)

i. Invocation of the right to remain silent in a *Miranda* context must be **explicit and unambiguous**

1. Until the suspect clearly and explicit invokes right, police may continue interrogation until clear invocation

ii. Waiver – may be explicit or implied from words and actions

1. Implied Waiver = Silence + Understand Rights + Course of Conduct (*Butler*)

2. Where a defendant does not invoke his right to remain silent after fully understanding his Miranda rights, he implicitly waives his Miranda rights by making a voluntary statement to police (*Berghuis v. Thompkins*)

a. **Implied Waiver by Silence Steps:**

i. Were *Miranda* rights given to suspect?

ii. Did suspect acknowledge he understood his rights?

iii. Did suspect answer any questions after both these steps?

1. If yes to all, statement is admissible

b. MERE SILENCE IS NOT ENOUGH to invoke – suspect must invoke his 5A right to gain its protection, i.e., it is NOT automatically applied

c. "A defendant's subsequent willingness to answer questions after acknowledging his Miranda rights is sufficient to constitute an implied waiver."

3. Presumption = non-waiver

4. Police do NOT have to ask **clarifying questions** (but should)

5. **Unknown Representation →** a waiver of *Miranda* rights is still valid even if suspect does not know he already has an attorney b/c what happens without the suspect's knowledge has no impact on the voluntariness of his waiver

a. Law enforcement has NO obligation to tell a suspect everything going on; they merely have to read the suspect his *Miranda* rights

iii. **Once suspect invokes right to remain silent →** police must **scrupulously honor** suspect's choice to remain silent, but may return a few hours later to continue questioning (less stringent that Right to Counsel) (*Mosley*)

e. **Right to Counsel (5th)**

i. Request for an attorney must be clear and **unambiguous –** invocation cannot be implied (*Berghuis*)

1. **Test:** Would a reasonable officer know the statement was a request for an attorney?

ii. **Waiver** may be explicit or implied (same as right to remain silent)

iii. **Once suspect invokes right to counsel →** then the police may not question him again until he has consulted with an attorney unless:

1. (1) an attorney is present (Miranda 5th A right to counsel during custodial interrogation); OR
2. (2) Δ initiated the conversation—would be a waiver; OR (*Edwards)*
3. (3) at least 14 days have passed since the last attempt and the suspect is re-*Mirandized (Shatzer*)
   a. Any questions continued after explicit invocation will be inadmissible

iv. **5th Amendment violation →** Can only occur while in custody

5th Amendment Exclusionary Rule

Exclusionary Rule

- Applies to *Miranda* violations (made explicit in *Miranda v. Arizona)*
- Applies to violations of DP Clause
- Applies to violation of self-incrimination clause of 5th A

Fruit of Poisonous Tree Doctrine

- Applies to violations of Due Process Clause (both physical evidence and statements)
- Applies to violations of self-incrimination clause of 5th A (both physical evidence and statements)
- Generally, does not apply to *Miranda* violations:
- Does not apply to physical fruits (*US v. Patane*)
- Does not apply to statement fruits (*Elstad*)
- But does apply to two-step interrogation techniques when performed as a deliberate attempt to bypass Miranda (*Missouri v. Seibert*)

Right to Counsel—What we KNOW NOW

6th Amendment

- Right to counsel for any crime involving actual confinement, both in state and federal court (*Gideon, AL v. Shelton*)
- Right to counsel attaches at initial appearance (*Rothgery v. Gillespie*) and ends after first level of appeal (*Ross v. Moffit*)
- Law enforcement can't question you without an attorney or waiver after indictment and retention of counsel (*Massiah v. US*)
- Law enforcement can't question you without an attorney pre-indictment after you affirmatively request to speak to an attorney (*Escobedo v. IL*)

5th Amendment

- Custodial interrogation is so inherently coercive, suspects must be told they have a right to counsel prior to any interrogation or confession being used against them (if they knowingly waive the right and answer (*Miranda*).
- When in custody, invocation of right to counsel must be explicit (*Davis)*
- When in custody, when right to counsel is invoked, police cannot "try again" *(Edwards v. Arizona*) unless a 14 day or more break in custody occurs (*Shatzer*)

f. **Right to Assistance of Counsel (6th)**

i. **When does 6th Amendment attach? →** at the commencement of the adversarial proceedings; when the defendant is **indicted** and **arraigned**, i.e., at initial appearance and ends after first level appeal

1. **Indictment:** when defendant is formally charged with a criminal offense

2. **Arraignment:** when defendant is officially called before the court, informed of the offenses against him, and asked to enter a plea of guilty, not guilty, etc.

ii. **Once Attached**: Allowed to approach and ask Q's, **UNLESS** Miranda Edwards "Wall" is up already
   1. If not advised of MR's yet, once in custodial interrogation, must be read MW's and must obtain a waiver in order to continue
   2. Law enforcement may initiate interrogation of a suspect in custody after the court has appointed counsel to the suspect so long as it is consistent with Edwards-Shatzer (Montejo v. Louisiana)
      a. 6A right to counsel does not preclude police from attempting to interrogate someone in custody under Miranda

iii. **Invocation**: Automatically invoked at commencement of adversarial process, unless Miranda waiver
   1. Police allowed to approach once 6A attached unless Edwards "Wall" is UP

iv. Law enforcement CANNOT question you after indictment and retention of counsel unless:
   1. Waiver; or
   2. Attorney present

v. After affirmatively requesting to speak to an attorney, LE cannot question you without an attorney

vi. **6th Amendment Violation**
   1. Must be violated by a state actor, not a private actor
   2. Violation when federal agents **deliberately elicit (Deliberate Elicitation)** incriminating statements after indictment from defendant in the absence of his retained counsel (*Massiah*)
      a. This includes use of UNDERCOVER or INFORMANT
      b. Focuses on SUBJECTIVE intent of officers
   3. **Listening? →** Police & CI must take some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. (*Kuhlmann*)

vii. **Waiver**
   1. **Waiver**: An accused who has been admonished with the MR's has been sufficiently apprised of the nature of his 6A rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one
      a. **NOTE:** Miranda Waiver = 6A Right to Counsel Waiver
   2. Whether a defendant has effectively waived his right to have counsel present is a matter of constitutional law, and the burden rests on the prosecution to show that the defendant made an intentional relinquishment of a known right to counsel. (*Brewer v. Williams*)
      a. An effective waiver requires actual relinquishment of a right and where a defendant consistently relies on the advice of counsel in dealing with the police, any suggestion that he waived his right to counsel is refuted.
   3. Miranda warnings sufficiently inform a defendant of the dangers and disadvantages of representing himself during post-indictment questioning and therefore a defendant knowingly and intelligently waives his Sixth Amendment right to counsel when he waives his Miranda rights and chooses to speak to the police. (*Patterson*)
      a. Waive *Miranda* = Waive 6th
      b. *Edwards* rule DOES NOT apply for 6th Amendment (*Montejo*)
         i. Once 6 A right to counsel attaches, police may come & ask to talk to you (*Montejo*)

viii. **6th Amendment & Exclusionary Rule**
   1. Violation of the 6th Amendment → excludes the statement AND the evidence
   2. **ER Exceptions**:
      a. Independent Source Doctrine
      b. Inevitable Discovery Doctrine

c. Attenuation Doctrine
d. Good Faith Doctrine
e. GFD Exceptions

ix. **Offense SPECIFIC → ONLY applies to the charge you are indicted for**

1. ***"Blockburger"* Test**: Offenses are considered the "same offense" only when proving the elements of the greater will always prove the elements of the lesser (line up elements)
2. **Steps**:
   a. What offense was defendant indicted for?
   b. Were questions related to that offense?
3. Invoking one's Sixth Amendment right to counsel for an offense where formal charges have been brought, does not automatically invoke one's Miranda rights for other offenses where charges have not yet been formally brought. (*McNeil*)
   a. When a defendant invokes his Sixth Amendment right to counsel during a judicial proceeding, he has **NOT** effectively invoked his Miranda right to counsel for offenses for which he has not yet been formally charged (*McNeil*)
      i. Cannot anticipatorily invoke Miranda rights.
   b. **HOWEVER:** invoking *Miranda* in regards to a **general offense**, police can't speak to defendant about anything

8. Police Lineups & Eyewitness Identification

a. **<u>Four Types:</u>**
   i. **(1.)** In-Court ID during Trial
   ii. **(2.)** Show-Up ID
   iii. **(3.)** Lineup
   iv. **(4.)** Photo Array

b. **Legal Rules RE:** Eyewitness Identifications
   i. **(1.)** Due Process
   ii. **(2.)** 6A Right to Counsel

9. Due Process and Eyewitness Identifications

a. **<u>Violates Due Process If:</u>**
   i. **(1.)** Procedure was unnecessarily suggestive, **AND**
   ii. **(2.)** Unreliable
      1. **FACTORS:**
         a. Opportunity to view suspect at time of crime
         b. Degree of attention
         c. Accuracy of prior description
         d. Level of certainty
         e. Time gap

b. **Show-Ups:** Unnecessarily suggestive → Only admissible if exigent circumstances (about to die)
   i. Police still frequently do these, but just **<u>NOT</u>** allowed to use at Trial

10. 6A Right to Counsel with Identifications

a. **Post-Indictment Lineup:** Considered to be a "critical stage" in the adversarial process, so if lineup, 6A attaches
   i. **Rule:** A witness identification of a criminal suspect conducted in the absence of legal representation violates the Sixth Amendment right to the assistance of counsel.

b. **IN-Court ID:** If prosecution can prove by clear and convincing evidence that the in-court ID was not the product of the police lineup, might not be excluded
    i. **FACTORS:**
        1. **(1.)** Prior opportunity to observe alleged criminal act
        2. **(2.)** Existence of any discrepancy between any pre-lineup description and the D's actual description
        3. **(3.)** Any ID prior to lineup of another person
        4. **(4.)** ID by picture of the D prior to lineup
        5. **(5.)** Failure to ID the D on a prior occasion
        6. **(6.)** Lapse of time between alleged act and the lineup ID
        7. **(7.)** Those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup

c. **Photo Array:** There is **NO** 6A right to counsel at a photo lineup, even if such a procedure occurs after formal criminal proceedings have commenced (D is not present)

d. **Only time 6A Violation:** Post-6A Attachment / In-Person Lineup

11. Right to Appointed Counsel

a. **RULE:** States are required to appoint a government-funded attorney for indigent criminal D's for all felony criminal cases (*Gideon*)

b. <u>Three Main Systems (State):</u>
    i. **(1.)** Public Defenders
    ii. **(2.)** Contract Lawyers
    iii. **(3.)** Appointed Lawyers

c. Felony vs. Misdemeanor
    i. **Felony: <u>ALWAYS</u>** appointed counsel
    ii. **Misdemeanor:** If convicted of a misdemeanor and the D's request for appointed counsel is denied, the judge may **<u>NOT</u>** sentence D to any jail time
        1. An **ACTUAL** sentence of imprisonment is required for appointed counsel in misdemeanor cases

d. Which 6A right is more fundamental?
    i. **Jury Trial Right:** Offenses punishable by **6 MONTHS OR MORE** → Right to jury trial
        1. Authorized → D can have this right and **NO** right to appointed counsel (Actual)

e. **First Appeal:** D has a right to counsel on **<u>FIRST</u>** appeal
    i. Not right given in Constitution, but every state by statute has provided right to an appeal

12. *Pro Se* D's (Right to Decide Whether to Have Counsel)

a. **RULE:** D's have a Constitutional right to represent themselves in court OR to waive assistance of counsel (same result) → Technical knowledge of law does not matter
    i. **WAIVER:**
        1. **(1.)** Knowing
        2. **(2.)** Intelligent
        3. **(3.)** Voluntary
        4. **(4.)** Advised of Dangers → Judge must advise D of dangers of representing himself and to make certain that this is his final decision, because once it's done, it's done
    ii. **History:** Originally, D's were required to represent themselves
    iii. **Implied Within 6A Text:** "Right" implies the option to have assistance of counsel (Attorney is assistant, **<u>NOT</u>** master)

b. **Standby Counsel:** Counsel appointed to sit in court with D and answer any Q's he has

i. Technical Advisor → Not actually representing the D
ii. D may reject standby counsel, but the judge may force it

13. Ineffective Assistance of Counsel

a. **<u>Two-Part Test:</u>** *Strickland*
   i. **(1.)** Deficient performance **AND**
      1. Objective Standard of Reasonableness: Whether counsel's representation fell below the objective standard of reasonableness → D must identify with precision the acts or omissions that he claims were constitutionally unreasonable
      2. Court: Evaluates from lawyer perspective at time of act or omission → Highly deferential to counsel
      3. Presumption: Effective representation (rebuttable)
   ii. **(2.)** Prejudice as a result of deficient performance
      1. **Standard:** "But for" the lawyer's deficient performance, the outcome would have been different (reasonable probability)

b. **Strategy Decision:** If strategy decision, virtually unchallengeable by D

c. Challengeable Deficient Conduct:
   i. Legally mistaken understanding of law of certain area of law
   ii. Failing to prepare for trial
   iii. Failure to uncover extensive evidence
   iv. Failure to submit timely motions → **<u>TIMELINESS</u>** in general
   v. Being completely unaware of relevant law
   vi. Drinking and Sleeping → Can still be hard to prove; Must be able to show that the reason for missing a particular important piece of info was the direct result of the drinking or sleeping

d. **Factually Guilty D Test:** In a situation where D plead guilty, but later discovered particularly important info that could have led lawyer to not advise D to plead guilty, D must satisfy **BOTH**
   i. **(1.)** That he would **<u>NOT</u>** have plead guilty, **AND**
   ii. **(2.)** There was a reasonable probability of ***acquittal*** at trial

e. **Order of Prongs:** May address prejudice question first if doing so would make disposition of the case easier (if D cannot prove prejudice, then proving deficiency doesn't matter)

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.

5th Amendment —> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself (Self Incrimination), nor be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation.

6th Amendment —> In all criminal prosecutions, the accused shall enjoy the right:

- to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

- to be confronted with the witnesses against him;
- to have compulsory process for obtaining witnesses in his favor, and
- **to have the Assistance of Counsel for his defense. (Right to Counsel)**