SEARCHES, SEIZURES AND STATEMENTS
The Busy Lawyer's Handbook on the 4th, 5th & 6th Amendments

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I. SEARCHES AND SEIZURES

A. WHEN IS THE FOURTH AMENDMENT IMPLICATED?

1. When The Intrusion Is a Product of Government Action

Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574 (1921) Former employer illegally entered and searched defendant's business and turned papers over to government, no government action.

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971) When private citizen on his own turned over documents to police, no government action.

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct. 1402 (1989) When alcohol and drug testing carried out by a private employer mandated or strongly encouraged by government regulations, Fourth Amendment applies.

United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652 (1984) Government search which is not a significant expansion of the previously conducted private search does not implicate the Fourth Amendment.

Board of Education v. Earls, 536 U.S. 822, 122 S.Ct. 2559 (2002) Public school teachers are government actors.

TEST: "The test . . . is whether [the private citizen] in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state." *Coolidge*, 408 U.S. at 487, 91 S.Ct. at 2049.

2. When The Intrusion Breaches a Person's Security in His/Her Person, Houses, Papers and Effects

United States v. Jones, 565 U.S. __, 132 S.Ct. 945 (2012)
The government installed a GPS device on a target's vehicle without consent and monitored his movements on public streets for several months. The Court returned to the common-law trespassory test which was the standard prior to the reasonable expectation of privacy test set forth in *Katz* in finding that the placement of the GPS constituted a search under the Fourth Amendment. The Court held that "Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" 132 S.Ct. at 950 (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001). The Fourth Amendment was originally thought to embody a concern for the government's trespass upon the person, his/her houses, papers and effects. The Court made clear that this return to the trespass test does not usurp the *Katz* reasonable expectation of privacy test. The *Katz* test added to, but did not substitute for the common-law trespassory test. In *Jones*, the Court made no finding whether the search was reasonable, holding that the government forfeited this argument by not raising it below.

3. When The Intrusion Breaches an Expectation of Privacy That Society Accepts as Reasonable

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967) Government activity in electronically listening to and recording a telephone conversation from a public telephone booth, violated Katz' privacy upon which he justifiably relied and thus constituted a "search and seizure" within the Fourth Amendment. The fact that the electronic device employed to achieve the capture of the telephone conversation did not penetrate the wall of the booth, and hence the government did not trespass onto an area enumerated in the Fourth Amendment, had no constitutional significance. When there has been no trespass into those areas enumerated in the Fourth Amendment, the Court turns to the reasonable expectation of privacy test. "Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis." *Jones*, 132 S.Ct. at 953

No breach occurs when:

(a) Consensual encounter with police

United States v. Drayton, 536 U.S. 194, 122 S.Ct. 2105 (2002) The Fourth Amendment is not implicated during a consensual encounter between police and individuals. Even when law enforcement have no basis for suspecting a particular individual, police may pose questions to that person, ask for identification, and ask for consent to search, provided a reasonable person would feel free to decline the request or otherwise terminate the encounter.

(b) Object of the seizure is available to public or from another source

Maryland v. Macon, 472 U.S. 463, 105 S.Ct. 2778 (1985) Undercover entry and examination of pornographic material in adult bookstore during store hours not a search nor was purchase a seizure given consensual nature of transaction involved.

United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619 (1976) Subpoena of records containing financial information voluntarily surrendered to bank not search for Fourth Amendment purposes.

(c) Seizure is of physical characteristics readily exposed to public

United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764 (1973) The taking of voice exemplars does not implicate the Fourth Amendment.

United States v. Mara, 410 U.S. 19, 93 S.Ct. 774 (1973) The taking of handwriting exemplars does not implicate Fourth Amendment concerns.

Cupp v. Murphy, 412 U.S. 291, 295, 93 S.Ct. 2000, 2003 (1973) Fourth Amendment protection in the scrapings from fingernails because "the search . . . went beyond mere 'physical characteristics . . . constantly exposed to the public.'"

(d) Search is of open fields

Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735 (1984) Landowners do not possess a legitimate expectation of privacy in fields which are far removed from landowner's home and "curtilage" even if landowners has taken efforts to maintain some degree of

isolation. As addressed in *Jones,* "open fields" unlike the "curtilage of a home" are not one of the enumerated areas protected under the Fourth.

California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809 (1986) Aerial surveillance of property 1,000 feet over home did not violate a legitimate expectation of privacy.

Florida v. Riley, 488 U.S. 445, 109 S.Ct. 693 (1989) Observation in helicopter 400 feet over greenhouse did not violate privacy.

(e) The police used enhancement devices

United States v. Knotts, 460 U.S. 276, 103 S.Ct. 1081 (1983) Agents placed beeper in container which suspect placed in car. Tracking of suspect's car only with aid of beeper did not implicate Fourth Amendment because a person traveling in car on public roads has no reasonable expectation of privacy in his movements. The Court in *Jones* emphasized that the holding in *Knotts* addressed only the reasonable expectation of privacy test of *Katz* and not the trespassory test readdressed in *Jones*. The beeper had been placed in the container before it came into Knotts' possession, with the consent of the then-owner. Knotts did not challenge the installation.

United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296 (1984) The Court addressed the question whether the installation of a beeper in a container amounted to a search or seizure. The Court held that the beeper used to track whereabouts of container in public warehouse, not an intrusion on a reasonable expectation of privacy. The Court in *Jones* emphasized that like *Knotts*, the beeper was installed in the container when it belonged to a third party and did not come into the possession of Karo until later. Karo accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the container's location.

Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535 (1983) It is not a search to use a flashlight to look into a car.

United States v. Dunn, 480 U.S. 294, 107 S.Ct. 1134 (1987) It is not a search to use a flashlight to look into a barn located in an open field.

Dow Chemical Co. v. United States, 476 U.S. 227, 106 S.Ct. 1819 (1986) It is not a search to use a telescope to look into curtilage of business from lawful vantage point.

United States v. Place, 462 U.S. 696, 103 S.Ct. 2637 (1983) Dog sniff of luggage not a search, but 90 minute detention of luggage was unreasonable.

Florida v. Jardines, __ U.S. __, 133 S.Ct.1409 (2013) A dog sniff at the front door of a house where the police suspected drugs were being grown constitutes a search for purposes of the Fourth Amendment requiring probable cause.

Florida v. Harris, __ U.S. __, 133 S.Ct. 1050 (2013) When, subject to challenge by the defendant, the police provide evidence of a drug-sniffing dog's satisfactory performance in a certification or training program, the dog's alert can provide probable cause to search a vehicle.

Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834 (2005) The Fourth Amendment is not implicated when the police conduct a dog sniff during a traffic stop as long as the traffic stop is not prolonged beyond the time reasonably necessary to conduct the traffic stop.

But see: ***Kyllo v. United States***, 533 U.S. 27, 121 S.Ct. 2038 (2001) Thermal imaging techniques, when used to determine activity within a home constitutes a search under Fourth Amendment. One holds the interior of his home as private against outsiders, not private just to intimate details, but to all details. As emphasized in *Jones*, *Kyllo* stood for the "preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Jones*, 132 S.Ct. at 950, quoting *Kyllo*, at 34.

(f) The property was abandoned or placed in an area accessible to others

California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625 (1988) No expectation of privacy in garbage left in opaque bags on curbside.

But see: ***Bond v. United States***, 529 U.S. 334, 120 S.Ct. 1462 (2000) Even though passenger placed baggage in overhead compartment, he had a reasonable expectation of privacy in the opaque bag and even though the bag could have been handled by passengers and others, the police's manipulation of the bag in an exploratory manner exceeded the scope of what society deems as reasonable.

TEST: The Fourth Amendment protects people, their houses, papers and effects. The *Jones* common-law trespassory test deals with the physical invasion of those areas enumerated in the Fourth Amendment. The *Katz* reasonable expectation of privacy test expands the scope of protection to those areas that are not tied to property rights.

4. When the Intrusion Breaches the Legitimate Expectations of Privacy of the Individual in Question. The Old Question of "Standing"

Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421 (1978) Automobile passengers could not assert the protections of the Fourth Amendment in search of car they had no interest in or did not own.

Brendlin v. California, 549 U.S. 1263, 127 S.Ct. 2400 (2007) A passenger in a car stopped by police is seized for Fourth Amendment purposes and is entitled to challenge the constitutionality of the stop and subsequent search of his person **and car** as fruits of the unconstitutional seizure. Brendlin did not challenge the search of the car as a violation of his Fourth Amendment right against unreasonable searches as was done unsuccessfully in *Rakas*, but rather successfully challenged his seizure as unconstitutional and the search of his person and car as fruits of that unreasonable seizure.

Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684 (1990) Overnight guest may have legitimate expectation of privacy in another's home but one merely present with the consent of the householder may not.

Minnesota v. Carter, 525 U.S. 83, 119 S.Ct. 469 (1998) Individuals merely in home with the consent of the householder, conducting business -- packaging cocaine -- did not have a reasonable expectation of privacy in the home searched.

City of Ontario v. Quon, 560 U.S. __, 130 S.Ct. 2619 (2010) The Court assumed, without deciding, that a government employee has a reasonable expectation of privacy in text messages on government provided phone. Because of emerging technologies, the Court was unwilling to establish precedence that define the existence, and extent of privacy expectations enjoyed by employees when using employer-provided communication devices until it is clear what society accepts as proper behavior.

TEST: "In order to claim the protections of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e. one that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois*, 439 U.S. 128, 143-44, and n.12, 99 S.Ct. 421, 430 and n.12.

The Fourth Amendment applies when 1) the intrusion is the product of government action; 2) the intrusion breaches society's reasonable expectation of privacy; and 3) the intrusion breaches the legitimate expectations of privacy of the individual in question.

B. IF THE FOURTH AMENDMENT APPLIES, WAS A WARRANT REQUIRED?

1. Arrest Warrant

(a) Suspect's own home

Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980) Given the sanctity of the home, the police must have probable cause to believe the suspect is present in his home and an arrest warrant to enter and effect a non-exigent arrest in the subject's own home.

(b) Third party's home

Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642 (1981) Where the police seek to make a nonexigent arrest of an individual in a third person's home, the police must have probable cause to believe that the suspect is in the third person's home and a search warrant for the third person's home. The search warrant is to protect the third person's expectation of privacy.

(c) Public place

United States v. Watson, 423 U.S. 411, 96 S.Ct. 820 (1976) The police may make a warrantless arrest of an individual in a public place provided they have probable cause to believe the person committed a crime.

Devenpeck v. Alford, 543 U.S. 146, 125 S.Ct. 588 (2004) A warrantless arrest by the police is reasonable under the Fourth

Amendment if, given the facts known to the officer, there is probable cause to believe that a crime has been or is being committed, even if the offense establishing probable cause is not closely related to, and based on the same conduct, as the offense the arresting officer identifies at the time of arrest.

2. With or Without Warrant, Was The Seizure Reasonable?

Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694 (1985) Apprehension by use of deadly force is a "seizure" subject to the reasonableness requirement of the Fourth Amendment. Because one of the factors in Fourth Amendment balancing test is extent of the intrusion, reasonableness of a seizure depends on not only when a seizure is made, but also how it is carried out. Use of deadly force to prevent the escape of a felony suspect, whatever the circumstances, is constitutionally unreasonable where the suspect poses no immediate threat to the officers or general public.

Scott v. Harris, 550 U.S. 372, 127 S.Ct. 1769 (2007) In determining reasonableness of the manner in which a seizure is effected, court must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion. When officer stopped high speed chase by bumping his squad car into racing car which caused racing car to flip and render the driver a quadriplegic, the officer acted reasonably (without excessive force) under the Fourth Amendment because of the danger presented by the driver's behavior.

Maryland v. King, ___ U.S. ___, 133 S.Ct. 1958 (2013) When officers make an arrest supported by probable cause to hold for a serious offense and 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.

RULE: No warrant is required for an arrest unless it occurs in a home.

3. Search Warrant

Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967) A warrant is required before every search or seizure, "subject only to a few specifically established and well-delineated exceptions." (Exceptions discussed in section C).

4. Material Witness Warrant

Ashcroft v. Al-Kidd, 563 U.S. __, 131 S.Ct. 2074 (2011) The objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive.

5. Prerequisites for a Valid Search or Arrest Warrant

(a) Neutral and detached magistrate

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971) State attorney general in charge of investigating and prosecuting murder case not a neutral and detached magistrate and could not lawfully issue a search warrant for defendant's car.

Lo-Ji Sales v. New York, 442 U.S. 319, 99 S.Ct. 2319 (1979) Judge not neutral or detached when accompanied police as they executed warrant and assisted them in determining which items to seize.

Connally v. Georgia, 429 U.S. 245, 97 S.Ct. 546 (1977) Judge not neutral and detached if receives payment only if issues a warrant and no payment otherwise.

(b) Probable cause supported by oath or affirmation

(1) For Arrest

Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223 (1964) Probable cause to arrest exists when the facts and circumstances within law enforcement's knowledge of which they have reasonably trustworthy information are sufficient to warrant a prudent person in believing that the suspect had committed or was committing an offense.

(2) For Search

Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332 (1983) "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, give all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

(3) Challenges to probable cause within a warrant

United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984) If an officer acts on reasonable reliance upon a warrant lacking in probable cause, the fact that the magistrate mistakenly issued it will not render the search unlawful and its fruits inadmissible, as long as the police officer acted in good faith upon the warrant.

Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978) This challenge goes behind the affidavit and challenges the truthfulness of the facts contained therein. In order to obtain a *Franks* hearing, a defendant must make a substantial preliminary showing that the affidavit contains a false statement made by the affiant police officer either knowingly and intentionally, or with reckless disregard for the truth. The false statement must be necessary to the finding of probable cause.

(c) Particularly describing the place to be searched and items to be seized

Steele v. United States, 267 U.S. 498, 503, 45 S.Ct. 414, 416 (1925) The description must be sufficiently precise so that "the officer with a search warrant can with reasonable effort ascertain and identify the place intended."

Marron v. United States, 275 U.S. 192, 48 S.Ct. 74 (1927) The description must leave nothing to the discretion of the officers executing the warrant.

Zurcher v. Standford Daily, 436 U.S. 547, 98 S.Ct. 1970 (1978) The particularity requirement is afforded its most scrupulous enforcement when the items to be seized implicate the First Amendment.

Maryland v. Garrison, 480 U.S. 79, 107 S.Ct. 1013 (1987) When officers mistakenly describe a multi-dwelling building as a single dwelling home and search the wrong unit, if the mistake is objectively understandable and reasonable, the good faith of the officers will prevail over a less than particularized warrant.

Groh v. Ramirez, 540 U.S. 551, 124 S.Ct. 1284 (2004) Law enforcement officers violated the particularity requirement of the

Fourth Amendment when they executed a search warrant already approved by the magistrate judge, but that was devoid of any particularity on the warrant itself as to what the officers were entitled to seize even though the attached affidavit (which was not incorporated by reference) particularly described that to be searched and seized. An individual whose property is searched and seized needs to know that the police have the authority to conduct to search but also needs to know the limits on that authority. *Leon's* good faith exception did not apply to such a facially invalid warrant. The court did not decide whether the warrant would have been valid if it had incorporated by reference the supporting affidavit.

(d) Anticipatory Warrants

United States v. Grubbs, 547 U.S. 90, 126 S.Ct. 1494 (2006) In this case, the police conducted a search pursuant to an anticipatory warrant. Although anticipatory condition was satisfied, the triggering condition was not set forth in the warrant itself or in an affidavit in support of the warrant. The Fourth Amendment does not require that the triggering condition be set forth in the warrant. To be valid, an anticipatory warrant must establish that 1) it is now probable that 2) contraband, evidence or a fugitive will be on the described premises 3) when the warrant is executed. To comply with the Fourth Amendment, two prerequisites of probability must be satisfied – if the triggering condition occurs, there is a fair probability that the object will be present and there is probable cause to believe the triggering condition will occur.

(e) Knock and Announce

Richards v. Wisconsin, 520 U.S. 385, 117 S.Ct. 1416 (1997) In order to justify a "no-knock" warrant, the police must have reasonable suspicion that knocking and announcing would be dangerous, futile or would result in the destruction of evidence. There is not a blanket exception for drug cases.

But see: ***Hudson v. Michigan***, 547 U.S. 586, 126 S.Ct. 2159 (2006) A violation of the knock and announce rule does not require the suppression of evidence found in the search. The interest protected by this rule is the protection of human life and limb and property because

an unannounced entry may provoke violence in the form of self-defense from the surprised resident. The knock and announce rule has never meant to protect one's interest in preventing the government from seeing or taking evidence described in a warrant.

6. Special Cases of Parolees/Probationees/Supervisees

(a) Search of Person

Samson v. California, 547 U.S. 843, 126 S.Ct. 2193 (2006) Samson was walking down the street doing nothing wrong. Police officer approached and searched, finding meth in a cigarette box in his pocket. The Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee. Whether a search is reasonable "is determined by assessing, on the one hand, the degree to which it intrudes upon an individuals's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." (citing *United States v. Knight*, 534 U.S. 112, 118-119, 122 S.Ct. 587 (2001)) Given that balancing test, the Court held parolees have no expectation of privacy.

(b) Search of Residence

United States v. Knight, 534 U.S. 112, 122 S.Ct. 587 (2001) Warrantless search of probationer's apartment, supported by reasonable suspicion and authorized by a probation condition satisfied the Fourth Amendment under the totality of circumstances approach.

RULE: For a warrant to be valid, it must be signed by a neutral and detached magistrate, founded on probable cause supported by oath or affirmation, particularly describing the place to be searched and items to be seized.

C. DOES THE POLICE INTRUSION FALL WITHIN AN EXCEPTION TO THE SEARCH WARRANT REQUIREMENT?

1. Search Incident to Arrest

(a) Lawful arrest (based upon probable cause)

Draper v. United States, 358 U.S. 307, 79 S.Ct. 329 (1959) The most basic principle of search incident to arrest is the warrantless search is only justified if the arrest is lawful. When the arrest is

invalid, the search based on that exception violates the Fourth Amendment.

Maryland v. Pringle, 538 U.S. 921, 124 S.Ct. 795 (2003) In distinguishing ***Ybarra v. Illinois,*** 444 U.S. 85, 100 S.Ct. 338 (1979) and ***United States v. Del Ri***, 332 U.S. 581, 68 S.Ct. 222 (2003) the Court held that there was probable cause to arrest all the occupants of a car when drugs packaged for distribution and a roll of cash were found in the passenger compartment and no occupant acknowledged ownership of the drugs. The Court found it an entirely reasonable inference that all were involved in the common enterprise of drug dealing in the car, particularly where no informant specified a particular individual, and the police were not previously investigating a specific person.

Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484 (1998) If the police have probable cause to believe person committed offense (i.e. minor traffic offense) but only issue a citation, police cannot conduct search incident to arrest as an officer issuing a citation does not face the same risk as an officer about to execute an arrest.

But see: ***Virginia v. Moore***, 553 U.S. 164, 128 S.Ct. 1598 (2008) A police officer does not violate the Fourth Amendment by making an arrest if supported by probable cause even if the officer is only authorized under state law to issue a citation. In this case, because the state officer arrested the defendant, and therefore faced the risks that are an adequate basis for treating all custodial arrests alike for purposes of search justification.

Atwater v. City of Lago Vista, 532 U.S. 318, 121 S.Ct. 1536, reh'g denied 533 U.S. 924, 121 S.Ct. 2540 (2001) If officer has probable cause to believe that individual has committed even very minor criminal offense such as not wearing a seat belt (where statutory authority exists to make such an arrest) officer may, without violating the Fourth Amendment, arrest offender.

United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467 (1973) All lawful custodial arrests justify a full search of the person without a warrant.

Recent case: 06/25/14: ***Riley v. California***, 573 U.S. ___, 134 S.Ct. 2473 (2014) Court declined to extend *Robinson* to searches of data stored in cell phones. Interests in public safety and preservation of evidence do not justify dispensing with the warrant requirement.

Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488 (1973) A search incident to arrest includes a search of all containers upon the individual's person or in his clothing.

(b) Limited to "grabbing space"

Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969) Based on concerns for the safety of police, upon arrest in the home, the police are entitled to search the area within the immediate control of the arrestee. See the contrast with *New York v. Belton*, below, which expands the admissible search to the entire passenger compartment of the vehicle.

Maryland v. Buie, 494 U.S. 325, 110 S.Ct. 1093 (1990) Incident to a home arrest, the police may search areas adjacent to the arrest for confederates of the arrestee based on concerns that they may attack the police or destroy evidence. If the police have a reasonable suspicion that *other* areas of the premises harbor an individual who poses a danger, the police may conduct a **protective sweep** limited to a cursory visual inspection of areas in the home that may hide an individual.

Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969 (1970) Police may not conduct a search inside a home incident to an arrest occurring just outside the home even if concerns about the destruction of evidence.

Illinois v. McArthur, 531 U.S. 326, 121 S.Ct. 946 (2001) In a situation similar to *Vale*, police were entitled to seize the home and prevent entry into the home while obtaining a search warrant.

(c) Conducted contemporaneous with arrest

Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710 (2009) Police may search the passenger compartment of a car incident to a recent occupant's arrest only if it "is reasonable to believe" that the arrestee might access the car at the time of the search or that the car contains evidence of the offense of arrest. Gant was arrested for driving on a suspended license, was handcuffed and secured in squad car when officers searched his car and found cocaine. The search incident to arrest exception derives from interests of officer safety and preservation of evidence that are typically implicated in arrest situations. A search under these circumstances exceeds the rationale espoused in ***Belton***. Several consequences flow from this decision:

1. ***Belton's*** and ***Thornton's*** broad exception significantly streamlined. Per Justice Alito in his dissent, ***Belton*** and ***Thornton*** effectively overruled. "Although the Court refuses to acknowledge that it is overruling ***Belton*** and ***Thorton*** there can be no doubt that it does so." (J. Alito, dissent, 129 S.Ct. at 1726).

   a. ***New York v. Belton***, 453 U.S. 454, 101 S.Ct. 2860 (1981) Incident to an arrest in a vehicle, the police may search entire passenger area of the car and all packages in that area even if the car's occupants have been removed from the car, so long as the occupants have been lawfully arrested and the search is contemporaneous with the arrest.

   b. ***Thornton v. United States***, 541U.S. 615, 124 S.Ct. 2127 (2004) Incident to an arrest, police may search a vehicle's passenger compartment even when the officer does not make contact until the person has already left the vehicle, if the person was a "recent occupant." The concerns of officer safety and evidence destruction are identical whether the suspect is inside the vehicle or outside the vehicle, and there is a need for a clear rule that police officers can understand.

2. ***Thornton*** rationalized the broad search not only for concerns of officer safety, but out of concerns that an arrestee would try to destroy any evidence contained within the vehicle. In ***Gant***, the Court allows for the search of evidence incident to a lawful arrest when it is "reasonable to believe evidence ***relevant to the crime of arrest*** might be found in the vehicle." ***Gant***, 129 S.Ct. at 1719

RULE: Search incident to arrest is justified by a lawful arrest and is based on concerns for officer safety and the preservation of evidence. In order for the exception to apply:

1) there must be a lawful arrest based on probable cause;
2) the search must be contemporaneous with that arrest,
3) the police must "reasonably believe" that their safety is at issue or they "reasonably believe" the vehicle contains evidence of the offense of arrest; and
4) the search can only go so far as the "grabbing area" of the arrestee.

2. The Automobile Exception

(a) Mobile vehicle

California v. Carney, 471 U.S. 386, 105 S.Ct. 2066 (1985) The auto exception includes vehicles, cars, boats and planes. It does not include homes. The exception is based on the concerns that vehicles are easily moved out of the jurisdiction and that such vehicles have a lesser expectation of privacy associated with them. Thus, any analysis must start with whether the searched item is more akin to a vehicle or a home. This case involved a mobile home which the court concluded was more akin to a vehicle.

(b) Probable cause

Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769 (1996) This case did away with "pretextual" arguments. Regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances could have stopped the car for the suspected traffic violation. The traffic violation itself, no matter how minor, is sufficient probable cause to stop the vehicle. While police may have probable cause to stop the vehicle, under the automobile exception, they must have probable cause to believe contraband is within the car to search the car.

California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982 (1991) If the police have probable cause to believe contraband or evidence is within a vehicle, they are entitled to search the entire vehicle, packages, trunk and all as long as the area searched is consistent with the size and shape of the evidence sought.

Wyoming v. Houghton, 526 U.S. 295, 119 S.Ct. 1297 (1999) Police may conduct a warrantless search of containers (in this case a purse) possessed by passengers based upon probable cause to believe the driver is involved in crime.

RULE: The Automobile Exception is based on the inherent mobility of vehicles and the lower expectation of privacy in such highly regulated conveyances. In order for the auto exception to apply the area searched:

1) must be a vehicle capable of mobility and subject to regulation;
2) there must be probable cause to believe vehicle and/or container within vehicle contains evidence of a crime;
3) if those conditions exist, any area or container within the car that could hold

3. Exigent Circumstances

(a) Exigency

Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091 (1984) Hot pursuit requires that there be immediate and continuous pursuit of the subject from the scene of a serious crime. Hot pursuit of a suspect suspected of a minor crime (i.e. drunk driving) does not entitle the police to enter a home under this exception.

Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684 (1990) The situation must clearly be exigent. The gravity of the crime and the likelihood that the suspect is armed must be factors in assessing the urgency of the situation. In this case, the defendant was the get-away driver and the firearm had been discovered the day prior. No exigency that made getting a warrant impracticable.

Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978) Once the emergency ends, the police must obtain a warrant to conduct further searches.

Kentucky v. King, 563 U.S.__,131 S.Ct. 1849 (2011) The police may conduct a warrantless search based on an exigency that arose in response to an officer's lawful actions. This rule follows the principle that warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Justice Ginsburg, in her dissent warned, "The Court today arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases. In lieu of presenting evidence to a neutral magistrate,

the police officers may now knock, listen, then break the door down, never mind that they had ample time to obtain a warrant."

Missouri v. McNeely, __ U.S. __, 133 S.Ct. 1552 (2013)
In drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.

(b) Objectively Reasonable Basis

Illinois v. McArthur, 531 U.S. 326, 121 S.Ct. 946 (2001) The police would not allow the defendant to enter his home until a search warrant was obtained. The police had an objectively reasonable basis to believe that he would destroy the drugs in the house before the police could go in and seize them. Thus, the circumstances here involved a plausible claim of specially pressing or urgent law enforcement need.

Brigham City, Utah v. Stuart 547 U.S. 398, 126 S.Ct. 1943 (2006)
Regardless of their subjective motives, police officers are justified in making a warrantless entry into a home if they have an objectively reasonable basis to believe that an occupant is seriously injured or imminently threatened with injury.

RULE: The exigent circumstances exception is based on the impracticability of obtaining a warrant – where the exigencies of the situation compel the police to act immediately or risk imminent danger to themselves or the public, the destruction of evidence or the escape of a suspect. If applicable, this exception allows for a warrantless arrest in the home and search of a given area.

1) the circumstances must be sufficiently compelling and urgent, making the warrant process both impracticable and risky (i.e. suspect will escape, suspect will harm someone, evidence will be destroyed or lost)

2) police have probable cause to believe items relating to a crime would be found (in case of search); or suspect committed a crime (in case of arrest); and

3) the police did not create the exigency (but see *Kentucky v. King* above)

4. **Stop and Frisk**

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968) "A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause for an arrest." *Id.* at 22, 88 S.Ct. at 1880. A strong governmental interest in preventing crime, balanced against the minor intrusion associated with a stop (as opposed to an arrest) and a frisk (as opposed to a full search), justified such actions on a lesser showing of suspicion than probable cause. Thus, as long as the police have a reasonable articulable suspicion that criminal activity is afoot, trhe police may temporarily detain a person. If the police have a reasonable articulable suspicion to believe the subject is armed and dangerous, the police may conduct a frisk for weapons. The action must be justified at its inception and be reasonably related in scope to the circumstances which justified the interference in the first place.

(a) What constitutes a seizure?

Brendlin v. California, 549 U.S. 1263, 127 S.Ct. 2400 (2007) "A person "seized" by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement through means intentionally applied." Thus, for the duration of a car stop, law enforcement have effectively seized everyone in the vehicle.

Muehler v. Mena, 544 U.S. 93, 125 S.Ct. 1465 (2005) Mere police questioning does not constitute a seizure under the Fourth Amendment. Further, police are entitled to detain occupants of a residence during the execution of a search warrant without any other justification than the search itself and the police are entitled to use reasonable force during the detention. *See* also, ***Michigan v. Summers***, 452 U.S. 692 (1981) (a valid warrant to search for contraband implicitly carries with it the limited authority to detain the occupants at the premises during the seach.)

Bailey v. United States, ___ U.S. ___, 133 S.Ct. 1031 (2013) the rule in ***Michigan v. Summers*** that officers executing a search warrant are permitted "to detain the occupants of the premises while a proper search is conducted" is limited to the immediate vicinity of the premises to be searched and does not apply when a recent occupant of the premises was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question.

United States v. Drayton, 536 U.S. 194, 122 S.Ct. 2105 (2002) Plain clothed officers did not "seize" passengers on bus when officers boarded bus and began asking passengers questions despite that officers did not inform passengers that they could refuse to cooperate, where officers did not draw guns or make intimidating movements.

United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980) A consensual encounter between police and an individual is not a seizure for purposes of the Fourth Amendment. A person is "seized" when "a reasonable person would have believed that he was not free to leave. . ." Factors to consider are the threatening presence of several officers; a display of weapons; physical touching by the officers; and tone of voice or physical gestures indicating compliance with the officers was compelled.

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983)
A consensual encounter between police and an individual can rise to a seizure if the police do something to make it difficult for that person to leave, such as retaining an airline ticket and taking the defendant to a small room without telling him he was free to leave.

California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547 (1991) A mere show of authority by the police absent physical contact or submission to that authority is not a seizure. Here the suspect ran from the police, tossing crack as he ran. At the time of the chase, he had not been seized, thus that the police lacked reasonable articulable suspicion did not violate the Fourth Amendment.

Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 2382 (1991) Whether one feels he/she is not free to leave must be due to the actions of the police rather than the circumstances of the encounter between the police and suspect. In this case, encounter was on a bus and it was the natural result of being on a bus that made the suspect feel he was not free to leave when confronted by the officers, not the officers actions.

United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568 (1985) Although refusing to set a hard and fast rule, a twenty minute detention by DEA to conduct a limited investigation of the suspected activity considered a seizure rather than arrest as the police were diligent in their investigation.

TEST: A seizure has occurred when a reasonable person, viewing the particular conduct of the police and the surrounding circumstances, would have believed that his or her liberty was constrained and he/she was not free to leave.

(b) **What is reasonable articulable suspicion?**

Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883 (1968) Reasonable articulable suspicion was defined in *Terry* as "specific and articulable facts" that lead the officer to believe "criminal activity is afoot." Such suspicion may not be based upon an "inchoate or unparticularized suspicion or hunch, but must be grounded on facts which, in light of the officer's experience, support "specific reasonable inferences that justify the intrusion.

Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889 (1968) The act of talking to a group of drug addicts and placing one's hand into one's pocket does not create a reasonable articulable suspicion that the person was or is buying drugs.

Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673 (2000) Unprovoked flight from officers in a high crime area known for heavy drug trafficking is sufficient to establish a reasonable articulable suspicion that the person is involved in criminal activity.

Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375 (2000) An anonymous tip standing alone seldom demonstrates a sufficient basis of knowledge or veracity that one is involved in criminal activity and the information must be corroborated to establish a reasonable articulable suspicion.

United States v. Arvizu, 534 U.S.266, 122 S.Ct. 744 (2002) The police may rely on a combination of innocent conduct, under the totality of circumstances, to establish reasonable articulable suspicion.

Recent case 04/22/14: ***Navarette v. California***, ___ U.S. ___, 134 S.Ct. 1683 (2014) Navarette was stopped based on a 911 call from an unidentified individual claiming a particular car nearly ran her off the road. The Court upheld the traffic stop (even though police did not personally witness any traffic violation) finding that while an anonymous tip alone seldom demonstrates sufficient reliability for Fourth Amendment purposes, here there was a detailed and specific, traceable 911 call that occurred contemporaneous to the event.

Cert. granted 04/21/2014: ***Heien v. North Carolina***, ___ U.S. ___, 134 S.Ct. 1872 (2014) Can a police officer's mistake of law provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop? The officer stopped defendant's car because one of the brake lights was not working. The officer mistakenly believed that under North Carolina law a car must have two working brake lights, stopped the car, searched its interior and found drugs.

(c) What is the scope of *Terry* and its progeny?

Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391 (1979) Officer may stop and briefly detain a motorist in her car if the officer has reasonable articulable suspicion that she is violating the law or motor vehicle infraction.

Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977) A vehicle stop based on reasonable articulable suspicion also encompasses the authority to order the driver out of the car.

Maryland v. Wilson, 519 U.S. 408, 117 S.Ct. 882 (1997) A vehicle stop based on reasonable articulable suspicion also encompasses the authority to order the passenger out of the car based on concerns for officer safety.

Arizona v. Johnson, 555 U.S. 323, 129 S.Ct. 781 (2009) In the context of a vehicular stop for a minor infraction, an officer may conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, even if the officer has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense. This is an extension of *Mimms*, *Wilson* and *Brendlin*

a. ***Mimms*** - can order driver out of car in *Terry* stop. Driver is already lawfully stopped and thus ordering out of car is only an additional minimal intrusion.

b. ***Wilson*** - ***Mimms*** rule applies to passengers as well as drivers based on the same weighty interest in officer safety.

c. ***Brendlin*** - passenger seized as well as driver the moment a car is stopped.

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469 (1983) If officers have reason to believe a driver or passenger is armed and dangerous, the officer may frisk the individuals and conduct a limited search of the interior of the car immediately within the suspects control even if the suspect is already out of the car.

United States v. Place, 462 U.S. 696, 103 S.Ct. 2637 (1983) Reasonable suspicion that package contains narcotics sufficient to justify the temporary seizure of the package to subject it to a dog sniff.

Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993) In the course of a justified pat search for weapons, if an officers feels an object that is immediately recognizable as contraband, the officer is entitled to seize the object.

Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177, 124 S.Ct. 2451 (2004) Police may arrest *Terry* stop suspect for refusing to identify himself if the request was reasonably related to the circumstances justifying the *Terry* stop. The request for identity may have an immediate relation to the purpose, rationale, and practical demands of the *Terry* stop. Disclosure of name and identity presents no reasonable danger of incrimination (if a case arises where it does, the court can consider if 5th amendment privilege applies).

RULE: A consensual encounter with the police does not implicate the Fourth Amendment. If that encounter escalates into a seizure, the police must have a reasonable articulable suspicion that the person was, is, or is about to be involved in criminal activity, based upon specific and articulable facts. If the police reasonably believe that the person is armed and dangerous, the police may conduct a frisk of the outer clothing of the person.

5. Administrative, Regulatory and Inventory Searches

(a) Noncriminal purpose

Board of Education v. Earls, 536 U.S. 822, 122 S.Ct. 2559 (2002) Policy requiring all students involved in competitive extracurricular activities to submit to drug testing was a reasonable means of furthering school's important interest in preventing and deterring drug use among students, and thus did not violate the Fourth Amendment.

Veronia School District v. Acton, 515 U.S. 646, 115 S.Ct. 2386 (1995) Random student athlete drug testing, although requiring no individualized suspicion of wrongdoing, did not violate the Fourth Amendment as students have a reduced expectation of privacy in school and the testing was for the safety of the student athletes rather than for a criminal purpose.

Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738 (1987) The police conducted a routine inventory of a van after the driver was arrested for drunk driving but before the van was impounded. In conducting the inventory, the officer followed regular police procedure to protect against later concerns of theft. Inventory searches following regular police procedure conducted in good faith do not violate the Fourth Amendment.

City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447 (2000) A checkpoint is a seizure under the Fourth Amendment. If the program's primary purpose is indistinguishable from the general interest in crime control, the checkpoint violates the Fourth Amendment against unreasonable searches and seizures.

Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885 (2004) Police roadblock checkpoint to investigate a prior fatal hit and run, at which checkpoint law enforcement officers briefly stopped all oncoming motorists to hand out flyers about, and look for witnesses to, that prior offense, where the checkpoint was conducted exactly one week after, and at the same time of day as, the offense, and the checkpoint otherwise met the reasonableness standard articulated in ***Brown v. Texas***, 443 U.S. 47 (1979).

United States v. Flores-Montano, 541 U.S. 149, 124 S.Ct. 1582 (2004) Government has authority to conduct suspicionless inspections at the border (which may include disassembling a car's fuel tank) for the purpose of preventing entry of unwanted persons or effects.

(b) Special needs of the workplace

O'Connor v. Ortega, 480 U.S. 709, 107 S.Ct. 1492 (1987). Public employer searched government doctor's desk. The appropriate standard for a search conducted by a public employee depends on a balance between the employee's expectation of privacy against the government's need for supervision, control and the efficient operation of the workplace. Requiring probable cause would place an

intolerable burden on public employers as long as the search is for non-investigative, work-related purposes as well as work-related misconduct and is based on a standard of reasonableness.

National Treasury Employees Union v. Von Raab, 489 U.S. 659, 109 S.Ct. 1384 (1989) Mandatory drug testing for certain employees applying for sensitive positions. When the Fourth Amendment intrusion serves a special governmental, non-law enforcement need, it is unnecessary to balance an individual's expectation of privacy against government's interest to determine whether it is practical to require a warrant or some level of individualized suspicion.

City of Ontario v. Quon, 560 U.S. __, 130 S.Ct. 2619 (2010) Police officer challenged employer's search of his text messages from his work phone. While the Court assumed without deciding that Quon had an expectation of privacy, the Court found that because the police department was checking to see if they needed more hours rather than investigating some offense, the search of the text messages was reasonable.

(c) Limits on police discretion

Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738 (1987) The police must conduct an inventory search according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.

RULE: The administrative, regulatory and inventory searches are based on noncriminal societal concerns such as the safety of school children or employment related concerns (administrative), the safety of the general public (regulatory) and to prevent against later claims of theft (inventory).

6. Consent

(a) Voluntariness

Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973) A consent is not valid if coerced by explicit or implicit means. Whether consent to search is voluntarily given is determined under the totality of circumstances. One crucial consideration, although not a conclusive factor, is whether the person was informed that he/she could refuse to consent to the search.

United States v. Mendenhall, 446 US 544, 100 S.Ct. 1870 (1980) In this airport encounter between the DEA and passenger, the Court found voluntary consent when the defendant agreed to accompany the

police to the DEA offices. She was not "told" she had to accompany the officers but rather was "asked" if she would accompany them. When the police then "asked" to search her bag and person, the consent was voluntary under the totality of circumstances despite that she was a young black woman with no highschool education, confronted by several white police officers and felt threatened by them.

United States v. Drayton, 536 U.S. 194, 122 S.Ct. 2105 (2002) While knowledge of right to refuse consent is one factor to consider in determining the voluntariness of consent, officers' failure to explicitly inform passengers that they were free to refuse to cooperate did not make the consent involuntary.

(b) Scope of consent

Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801 (1991) Although an individual can limit the extent of the consent given, when an individual consents to the search of his car, it is reasonable for the officers to assume that the consent encompasses containers within the car as well.

(c) Third party authority (actual or apparent)

Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793 (1990) In order for a third party's consent to be valid, the third party must have common authority and mutual use of the property in question. The burden of establishing that common authority rests with the government. If the person did not have actual authority to consent, the search still will be deemed reasonable if the police acted in good faith and reasonably believed that the person had the apparent authority to consent.

Georgia v. Randolph, 547 U.S.103, 126 S.Ct. 1515 (2006) Where property is jointly occupied by two people, police may not conduct a warrantless search based upon consent of one party, when the other party, who is physically present, vehemently objects and refuses to permit entry.

Fernandez v. California, ___ U.S. ___, 134 S.Ct. 1126 (2014) Even though the defendant was present and objecting to the search prior to his arrest, if police have reasonable cause to take the defendant from

the area (arrest), the defendant's previously stated objection is no longer effective if they receive consent from an authorized individual.

RULE: An individual is entitled to waive his or her constitutional protections as long as he/she does so knowingly and voluntarily and not as a mere submission to a claim of legal authority (i.e. "If you don't consent, we'll just get a search warrant."

7. Plain view doctrine

(a) Lawful intrusion

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971) If the police are already lawfully in an areas, such as a house or a car, items which are immediately apparent evidence of a crime or contraband may be seized without any further justification.

(b) Item immediately apparent as contraband or evidence

Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243 (1969) Although film canisters were in plain view, the evidentiary nature of the films themselves, that they contained obscene material, was not readily apparent and thus could not be seized under the plain view doctrine.

Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535 (1983) The police need not be absolutely certain that the item seized contains evidence of a crime but rather the standard is that of probable cause. The officer must have probable cause to believe that the item the officer sees in plain view is or contains evidence of a crime.

Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149 (1987) If the police validly in a home develop probable cause to believe an item contains evidence of criminal activity, the police may not only seize the item without a warrant, the police can conduct a warrantless search of the item on the premises.

RULE: As long as the police are lawfully in the place of viewing, they are entitled to seize without a warrant any item that is immediately apparent on its face, contraband or evidence.

RULE: For a search to comply with the Fourth Amendment, police must obtain a warrant unless the situation falls within a well-delineated exception to the warrant requirement: 1) search incident to arrest; 2) the automobile exception; 3) exigent circumstances; 4) stop and frisk; 5) administrative, regulatory and inventory searches; 6) consent searches; and 7) the plain view doctrine.

D. WILL THE EVIDENCE BE EXCLUDED?

1. Exclusionary Rule

Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341(1914) Fourth Amendment bars use in federal court of illegally seized evidence. The purpose of the rule is to promote judicial integrity and to deter illegal police conduct. This is a judicial based rule that is not mandated by the Constitution.

Herring v. United States, 543 U.S. 335, 129 S.Ct. 695 (2009) The Fourth Amendment does not require evidence found during a search incident to arrest to be suppressed when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent. Here, the county failed to update its records that an arrest warrant had been recalled. The defendant was erroneously arrested and a gun and drugs were found during the course of the search incident to arrest. While a Fourth Amendment violation occurred, the evidence was not excluded because it was based on isolated negligence rather than systemic error or reckless disregard of constitutional requirements.

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961) The Supreme Court applied the exclusionary rule in state prosecutions.

2. Fruit of the Poisonous Tree

Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S.Ct. 407, 415 (1963) "In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, . . , this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. . . The exclusionary prohibition extends as well to the indirect as the direct product of such invasions. . . ." The "fruit" of an official illegality can come in the form of tangible as well as verbal evidence.

United States v. Patane, 542 U.S.630, 124 S.Ct. 2620 (2004) Physical evidence obtained in reliance on statements taken from suspect's unwarned but voluntary statements is admissible. The *Miranda* rule protects against

violations of the Self-Incrimination Clause, which is not implicated by the introduction of physical evidence resulting from voluntary statements.

Rule: "[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, 371 U.S. at 488, 83 S.Ct. at 417.

3. Purging the Taint

Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975) In order for the causal chain between the illegal arrest and the statements made subsequent thereto, to be broken, the statement must be purged of the initial Fourth Amendment violation. *Miranda* warnings in and of themselves do not necessarily purged the taint of a statement obtained after an illegal arrest.

New York v. Harris, 495 U.S. 14, 110 S.Ct. 1640 (1990) This case involved an arrest in the home which was supported by probable cause but was illegal because the police lacked an arrest warrant. The Fourth Amendment illegality was not the arrest, but rather the invasion into the home. The subsequent confession was not an exploitation of the illegal entry into the home. Thus, suppressing the confession would not bear a relation to the purposes underlying the rule against warrantless arrest in the home.

TEST: "The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factors to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant. *Brown*, 422 U.S. at 603-04, 95 S.Ct. at 2261. Exclusion of the evidence "because the officers have violated the law must bear some relation to the purposes which the law is to serve." *Harris*, 495 U.S. at 17, 110 S.Ct. at 1642-43.

4. Exceptions

(a) Inevitable Discovery

Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984) Evidence that would have been discovered despite police misconduct is admissible at trial.

(b) Independent Source

Murray v. United States, 487 U.S. 533, 108 S.Ct. 2529 (1988) Fourth Amendment does not require exclusion of evidence initially discovered through a Fourth Amendment violation but subsequently discovered through a lawful search independent of the illegality.

(c) Violation of the Warrant Knock and Announce Rule

Hudson v. Michigan, 547 U.S. 586, 126 S.Ct. 2159 (2006) A violation of the knock and announce rule does not require suppression of evidence found in the search because the rule was never meant to protect one's interest in preventing the government from seeing or taking evidence described in the warrant.

(d) Mistaken Arrest Based on Isolated Negligence

Herring v. United States, 543 U.S. 335, 129 S.Ct. 695 (2009) The Fourth Amendment does not require evidence found during a search incident to arrest to be suppressed when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent. Here, the county failed to update its records that an arrest warrant had been recalled. The defendant was erroneously arrested and a gun and drugs were found during the course of the search incident to arrest. While a Fourth Amendment violation occurred, the evidence was not excluded because it was based on isolated negligence rather than systemic error or reckless disregard of constitutional requirements.

(e) Good Faith Reliance on Binding Appellate Precedent

Davis v. United States, 564 U.S. __, 131 S.Ct. 2419 (2011) Searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule. Police had

conducted a search of a car under binding precedent that was later overturned by *Gant*. The Court noted there was no deterrent value in excluding evidence that was, at the time, obtained within the confines of the Fourth Amendment. The Court noted that in future cases it might allow the specific defendant who convinces the Supreme Court to overrule its precedent to benefit from its decision.

RULE: Evidence seized after a violation of the Fourth Amendment is inadmissible at trial unless it would have been inevitably discovered, obtained during the course of violating the knock and announce rule, or was obtained through an independent, legal source. Evidence obtained through exploitation of the primary illegality is also inadmissible at trial unless it was purged of the initial taint.

II. STATEMENTS

A. WAS THE CONFESSION OBTAINED IN VIOLATION OF THE *McNABB-MALLORY* RULE ON PROMPT PRESENTMENT

McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608 (1943); ***Mallory v. United States***, 354 U.S. 449, 77 S.Ct. 1356 (1957) - The ***McNabb-Mallory*** rule requires suppression of a confession obtained in violation of the requirement that an arrested defendant be promptly presented to a judge (as limited by 18 U.S.C. § 3501).

Corley v. United States, 556 U.S. 303, 129 S.Ct. 1558 (2009) In enacting 18 U.S.C. § 3501 Congress meant to limit ***McNabb-Mallory*** presentment exclusionary rule, not eliminate it. If a confession occurred before presentment to a magistrate judge and beyond six hours, the court must decide whether delaying that long was unreasonable or unnecessary under ***McNabb-Mallory***, and if it was, the confession must be suppressed regardless of its voluntariness.

B. WAS THE CONFESSION OBTAINED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?

1. Was the Defendant's Will Overborne under the Totality of Circumstances?

Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973) Voluntariness is determined under the totality of circumstances test.

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246 (1991) Whether a confession is involuntary is determined under the totality of circumstances test. A credible threat of violence from a police informant was sufficient to

overbore the will of the accused under the totality of circumstances test. However, an involuntary confession wrongfully admitted into evidence is subject to the harmless error doctrine.

Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978) Overreaching police conduct when defendant was subjected to four- hour interrogation while in great pain in the intensive care unit.

Greenwald v. Wisconsin, 390 U.S. 519, 88 S.Ct. 1152 (1968) Defendant's will overborne when he was interrogated for over 18 hours without food or sleep.

Beecher v. Alabama, 389 U.S. 35, 88 S.Ct. 189 (1967) Police held gun to defendant's head to obtain confession.

2. Was the Statement a Product of Police Coercion?

Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515 (1986) Coercive police activity is a necessary predicate to a finding that a confession is involuntary within the meaning of the due process clause.

3. Involuntary Statements Never Admissible

Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978) Involuntary statements are not admissible in the government's case-in-chief or for impeachment purposes, but are subject to the harmless error rule on appeal. ***Arizona v. Fulminante***, 499 U.S. 279, 111 S.Ct. 1246 (1991).

TEST: The police subjected the suspect to coercive conduct; and the conduct was sufficient to overcome the will of the accused given her particular vulnerabilities and the conditions of the interrogation, which resulted in an involuntary statement under the totality of circumstances test.

C. WAS THE STATEMENT OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT?

1. Self-Incrimination

McKune v. Lile, 536 U.S. 24, 122 S.Ct. 2017 (2002) Adverse consequences faced by prisoner who refused to make required admissions during sexual abuse treatment program did not amount to compelled self-incrimination as

it did not extend prisoners term of incarceration, only affected his privileges and place of confinement.

Salinas v. Texas, __ U.S. __, 133 S.Ct. 2174 (2013) When petitioner has not yet been placed in custody or received Miranda warnings, and voluntarily responded to some questions by police about a murder, the prosecution's use of his silence in response to another question as evidence of guilt at trial did not violate the Fifth Amendment because petitioner failed to expressly invoke his privilege not to incriminate himself in response to the officer's questions.

2. Miranda

Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326 (2000) *Miranda* is a constitutionally based rule and cannot be overruled by a legislative act.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) Because of the inherent coercive nature of in-custody interrogations, police must inform a suspect of his right to remain silent and his right to counsel prior to any questioning. In order for the *Miranda* warnings to be triggered, an individual must be in custody and the police must be the interrogators.

Florida v. Powell, 559 U.S. 50, 130 S.Ct. 1195 (2010) While law enforcement did not advise the arrestee that he could "use" a lawyer during questioning, it was sufficient that he was advised he had a right to talk to a lawyer before answering questions and that he could invoke at any time. The inquiry is simply whether the warning reasonably conveyed to a suspect his rights required by *Miranda*.

(a) Custody for *Miranda* purposes

California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520 (1983) The safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a "degree associated with formal arrest."

Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 3150 (1984) A routine traffic stop is more analogous to a *Terry* stop than to formal arrest. "The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. . . . If a motorist who has been detained pursuant to a traffic stop thereafter

is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*.'"

Orozco v. Texas, 394 U.S. 324, 89 S.Ct. 1095 (1969)(The Court found the defendant "in custody" for *Miranda* purposes when he was questioned in his bedroom by four police officers at 4:00 a.m. These circumstances produced a "potentiality for compulsion" equivalent to a police station interrogation.)

J.D.B. v. North Carolina, __ U.S. __, 131 S.Ct. 2394 (2011) The age of a child subjected to police questioning if known to the officer is a factor for the courts to consider in determining how the suspect perceived his or her situation and ability to leave. A child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception. They often lack the experience, perspective and judgment to recognize and avoid choices. They are more vulnerable to outside pressures. While the age is not a determinative or significant factor, it is a factor the courts cannot ignore.

Howes v. Fields, __ U.S. __, 132 S.Ct. 1181 (2012) A prisoner is not necessarily in custody for *Miranda* purposes even if the prisoner is isolated from general population and questioned about conduct occurring outside prison. A person already in custody does not necessarily feel the shock of an individual recently arrested. A person serving a sentence will not be lured into talking in hopes of immediate release. A prisoner probably knows that the police cannot extend his current prison term. When a prisoner is questioned, whether he is in custody for *Miranda* purposes is based on all features of the interrogation.

(b) Interrogation

Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682 (1980) The Court concluded that "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

(c) Suspect must know he is talking to police

Illinois v. Perkins, 496 U.S. 292, 297, 110 S.Ct. 2394, 2397 (1990) *Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary confession. This is because the purpose behind the rule itself is to help dispel the coercive nature of police dominated interrogation.

RULE: *Miranda* warnings are required when a suspect is in custody, the police question the person and the person is aware he/she is speaking with the police.

3. Adequate Waiver

***North Carolina v. Butler*,** 441 U.S. 369, 99 S.Ct. 1755 (1979). While silence is not enough, the police may infer waiver from "the actions and words of person interrogated." The primary protection is the warning itself. The *Miranda* requirements are met if 1) adequate *Miranda* warning; 2) suspect understands the warning; and 3) has an opportunity to invoke before giving any answers or admissions.

Berghuis v. Thompkins, 560 U.S. 370, 130 S.Ct. 2250 (2010) The defendant stayed silent for the first 2 hours and 45 minutes before uttering a response to officers' interrogation. The Court found this was insufficient to invoke his right to remain silent under *Miranda*. The police are not required to obtain an explicit waiver, nor obtain a waiver at all. As long as the facts and circumstances show that the arrestee received adequate warning, understood the warning, had an opportunity to invoke and did not explicitly invoke his right to remain silent, his actions are sufficient for an implicit waiver.

4. Right to Remain Silent

Michigan v. Mosely, 423 U.S. 96, 96 S.Ct. 321 (1975) When a suspect invokes his right to silence, the police must scrupulously honor that invocation and immediately cease questioning. Before resuming questioning, the police must wait a period of time, provide fresh *Miranda* warning and obtain a knowing and voluntary waiver of the right.

Berghuis v. Thompkins, 559 U.S. 98, 130 S.Ct. 2250 (2010) Like the right to counsel, an arrestee must unequivocally invoke his right to remain silent. Mere silence is not enough to invoke right to silence, and police are not

required to obtain waiver as long as warning provided, and arrestee understood the warning.

RULE: When a suspect ***unequivocally*** invokes his right to silence, the police must 1) scrupulously honor that invocation; and 2) immediately cease questioning. Should the police wish to resume questioning, the police must 3) wait a period of time; 4) provide fresh *Miranda* warnings; and 5) obtain a knowing and voluntary waiver of the *Miranda* rights.

5. Right to Counsel

Edwards v. Arizona, 451 U.S. 477 (1981) When a suspect unequivocally invokes his right to counsel, police may not question the defendant about any offense while still in custody unless the suspect reinitiates contact with the police.

Maryland v. Shatzer, 559 U.S. 98, 130 S.Ct. 1213 (2010) Once an arrestee invokes his right to counsel, if there is a break in the *Miranda* custody and the individual is returned to his regular course of life (even if in a prison setting serving a sentence on a different case) of at least 14 days, the police may reinitiate interrogation. While this is an arbitrary number, the *Miranda* warnings are a judicially created prophylactic rule and the Court has the authority to determine an appropriate length of time in which the coercive nature of the prior in-custody interrogation would have worn off. The Court reasoned this was amply time for the suspect to reacclimate to his normal life, to get in contact with friends and family, and shake off the coercive effects of the initial in-custody encounter.

Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350 (1994) Although it is a better course of action, police are under no obligation to clarify an ambiguous request for counsel. "Maybe I should talk to a lawyer" is deemed not a request for counsel.

McNeil v. Wisconsin, 501 U.S. 171, 111 S.Ct. 2204 (1991) A defendant's invocation of his Sixth Amendment right to counsel during a court appearance did not constitute an invocation of his right to counsel under *Miranda* given the different purposes and effects of the two rights. The Sixth Amendment right to counsel is intended to protect unaided laypersons at critical confrontations with the government after initiation of adversary proceedings. The Fifth Amendment right to counsel is to protect a suspect's desire to deal with police only through counsel.

Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093 (1988) Contrary to a Sixth Amendment request for counsel, if a suspect invokes his Fifth Amendment right to counsel, the *Edwards* rule applies even when the police question a suspect about an offense unrelated to the subject of the initial interrogation.

RULE: Once a suspect unequivocally invokes her right to counsel, the police may not question the suspect on any offense while the suspect remains in custody unless the suspect reinitiates contact with the police. The police may reinitiate contact with the suspect after a 14day break of the *Miranda* custody.

6. Exceptions to the *Miranda* Rule

New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626 (1984) If there exist overriding concerns of public safety, such as locating a recently abandoned gun, a police officer may be justified in failing to provide *Miranda* warnings in order to obtain the information.

Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971) A statement taken in violation of *Miranda* may not be used in the government's case in chief but may be used for impeachment purposes should a defendant choose to testify.

Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285 (1985) The failure to provide *Miranda* warnings when required will result in the suppression of the statement but all evidence derived therefrom and any subsequent *Mirandized* statements will be admissible.)((But see limitation set in *Seibert,* below.

Fellers v. United States, 540 U.S. 519, 124 S.Ct. 1019 (2004) Police officers questioned Fellers in his home armed with a federal warrant post-indictment. They did not provide his *Miranda* warnings. The Eighth Circuit found the home statement violated the Fifth Amendment but did not suppress the subsequent *Mirandized* jailhouse statement under ***Elstad***. The Supreme Court found a Sixth Amendment violation as the police deliberately elicited incriminating statement from the defendant. The Court remanded the case for the district court to determine whether the subsequent *Mirandized* jailhouse confession should be suppressed as fruits of the Sixth Amendment violation.

Missouri v. Seibert, 542 U.S.600, 124 S.Ct. 2601 (2004) (Miranda warnings given mid-interrogation, after defendant gave unwarned confession, were ineffective and thus confession repeated after warnings were given was

inadmissible at trial, abrogating ***United States v. Orso***, 266 F.3d 1030, and ***United States v. Esquilin***, 208 F.3d 315. Factors affecting "effectiveness" are the completeness and detail of the questions and answers in the first interrogation, the timing and setting of the first and second interrogations, the continuity of police personnel, and the continuous nature of the interrogations.

D. WAS THE STATEMENT OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT *MASSIAH* DOCTRINE?

1. When the Right Attaches

Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199 (1964) The Sixth Amendment right to counsel attaches once adversarial proceedings have begun. Once the right attaches, the government may not deliberately elicit an incriminating response from a defendant either openly by uniformed police officers or covertly by informants or undercover agents. This prohibition applies regardless of whether the individual is in custody or being subjected to interrogation. There need not be any compelling influences at work, inherent, informal or otherwise. However, the Sixth Amendment is offense specific which allows the police to question a represented defendant on unrelated charges.

Rothgery v. Gillespie County, TX, 554 U.S. 191, 128 S.Ct. 2578 (2008) A criminal defendant's initial appearance before a magistrate judge, where he learns of the charge against him and his liberty is subject to restrictions, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel. Attachment does not also require that a prosecutor be aware of that initial proceeding or involved in its conduct.

Patterson v. Illinois, 487 U.S. 285, 108 S.Ct. 2389 (1988) Even though Sixth Amendment right arises with indictment, police are not barred from initiating questioning prior to the appointment of counsel, if a defendant does not request counsel. Miranda warnings are sufficient to make the defendant aware of his Sixth Amendment right to counsel during post-indictment questioning.

Montejo v. Louisiana, 556 U.S. 778, 129 S.Ct. 2079 (2009) The Court overruled ***Michigan v. Jackson***, 475 U.S. 625, 106 S.Ct. 1404 (1986), which held that if police initiate interrogation after defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of defendant's right to counsel for that police-initiated interrogation is invalid. The rule in *Edwards* applies to the Sixth Amendment. Finding that the original rationale of ***Jackson*** was adequately served by the Court's Fifth Amendment limitations on police interrogation (found in ***Miranda v. Arizona***,

Edwards v. Arizona, and ***Minnick v. Missipppi***), the Court did not perceive a need for the additional level of prophylaxis provided by ***Jackson***.

2. Deliberate Elicitation

Fellers v. United States, 540 U.S. 519, 124 S.Ct. 1019 (2004) Police officers showed up at Fellers' home after he had been indicted for meth manufacturing. The police informed him that they had a warrant, that he had been indicted on drug manufacturing charges and that four people were involved. Mr. Fellers made statements in response. The court found that while the officers did not question him, they deliberately elicited an incriminating response from him and those responses had to be suppressed under the Sixth Amendment. The Court clarified the difference between police conduct under the Fifth Amendment requirement of "questioning or its functional equivalent" and the Sixth Amendment standard of "deliberately eliciting" an incriminating response. The Sixth Amendment provides a right to counsel even if there is no questioning and no Fifth Amendment applicability.

Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232 (1977) This case involves the famous Christian burial speech given by a police officer to a represented defendant who was deeply religious and mentally ill. In response to the speech, the defendant confessed to the murder and showed the police officer where the child's body was hidden. The Court held the officer deliberately elicited an incriminating statement from the defendant and suppressed the confession. However, the Court found that evidence regarding the child's body was admissible because it would have been discovered inevitably anyhow.

United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183 (1980) A jailhouse informant deliberately elicited incriminating statements from a represented defendant when he engaged his cell-mate in conversations and had developed a relationship of trust and confidence with him such that the defendant revealed incriminating information about the offense.

Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477 (1985) Incriminating statements made by defendant, after filing of formal charges against him, to co-defendant operating as undercover agent for state are inadmissible, notwithstanding the fact that police had legitimate reason for recording the conversation or were investigating other crimes.

Kuhlman v. Wilson, 477 U.S. 436, 106 S.Ct. 2616 (1986) If a jailhouse informant is merely a passive listening and makes no effort to stimulate

conversations about the crime charged, the informant has not deliberately elicited a response from the defendant.

Kansas v. Ventris, 556 U.S. 586, 129 S.Ct. 1841 (2009) A defendant's statement to an informant, concededly elicited in violation of the Sixth Amendment, is admissible to impeach his inconsistent testimony at trial.

RULE: Once adversarial proceedings have begun against a defendant, the government may not deliberately elicit an incriminating response from a defendant either openly by uniformed police officers or covertly by informants or undercover agents. This prohibition applies regardless of whether the individual is in custody or being subjected to interrogation. There need not be any compelling influences at work, inherent, informal or otherwise. However, the Sixth Amendment is offense specific which allows the police to question a represented defendant on unrelated charges. A testifying defendant may be impeached by the statement obtained in violation of the Sixth Amendment.

RULE: There are seven ways to challenge a statement 1) failure to present in a timely fashion; 2) as fruits of a Fourth Amendment violation; 3) as involuntary under the Due Process Clause of the Fifth Amendment; 4) based on a failure to provide *Miranda* warnings when required; 5) based on a failure to scrupulously honor one's right to silence if invoked; 6) based on a failure to halt questioning upon one's unequivocal request for counsel; and 7) when taken in violation of the *Massiah* doctrine under the Sixth Amendment.