

**Motions:  
The Fourth Amendment**

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April 2015  
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**The Fourth Amendment**

- The right of the people to be secure in their persons, houses, papers, and effects, 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.*

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**Searches**

- What is a search?
  - Katz v. United States*, 389 U.S. 347 (1967) – two-part test: (1) subjective (actual) expectation of privacy (2) that society is prepared to recognize as reasonable
- Together, the subjective and objective parts of the test results in the “REASONABLE EXPECTATION OF PRIVACY” test
- Search, for purposes of 4<sup>th</sup> Amendment, is whether the State action infringed upon a person’s “reasonable expectation of privacy.”

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### Reasonable Expectation of Privacy

- How do we determine what/whether “reasonable expectation of privacy” exists in our case?
- MOST OF THE TIMES, it is clear.
  - person – REP
  - Property on Person – REP
  - But what if search of house where client is present – REP?
- How do we determine if REP exists?
- Consider a variety of factors

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### Reasonable Expectation of Privacy

- 4<sup>th</sup> Amendment protects People not Places, BUT REP has strong roots in property interests
- Notion of Privacy is intertwined with notions of Property
- USSC – 4<sup>th</sup> Amendment context -> greatest “protection” afforded, under the Fourth Amendment, is to Homes (private property)

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### Reasonable Expectation of Privacy

- Post-Katz → Searches were defined in terms of whether the defendant had a reasonable expectation of privacy and the objective reasonableness of that expectation.
- However, two recent USSC decisions (*Jones, Jardines*) “restore” traditional property rights and common law trespass decisions to Fourth Amendment analysis.

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### Florida v. Jardines (2013)

- “By reason of our decision in *Katz v. United States*, 389 U.S. 347 (1967), property rights “are not the sole measure of Fourth Amendment violations,” *Soldal v. Cook County*, 506 U.S. 56, 64 (1992)—but though *Katz* may add to the *baseline*, it does not subtract anything from the Amendment’s protections “when the Government *does engage in* [a] physical intrusion of a constitutionally protected area.”

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### United States v. Jones (2012)

- GPS case. Government claimed that Jones had no REP in placement of GPS device on vehicle.
- “But we need not address the Government’s contentions, because 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.” *Kyllo, supra*, at 34, 121 S.Ct. 2038. As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas (“persons, houses, papers, and effects”) it enumerates. *Katz* did not repudiate that understanding.”

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### PRACTICE TIP

- Need to adapt two-prong approach to determining if there was a search within the meaning of the Fourth Amendment.
- First, did the defendant possess a reasonable expectation of privacy?
- If not, did the defendant nevertheless possess an interest in the property or place that gave rise to traditional 4th Amendment understandings (meaning pre-*Katz*) of the scope of the protection.

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## REP - Homes and Curtilage

- REP exists in your home and curtilage
- REP limited to curtilage (Oliver v. United States, 466 U.S. 170 (1984))
- BUT REMEMBER FLORIDA v. JARDINES!!!
- Curtilage? United States v. Dunn, 480 U.S. 294 (1987) test:
  - Following factors bear upon the “centrally relevant consideration – whether the area in question is so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection.”
    - Proximity of the area claimed to be curtilage to the home;
    - Whether the area is included within enclosure surrounding the home;
    - Nature of the uses to which the area is put; and
    - Steps taken by resident to protect the area from observations by passers-by

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## Stepping Outside the Curtilage

- REP dissipates once leave the boundaries of curtilage
- Why?
  - Diminishing property interests ... but 4<sup>th</sup> Amendment protects people not places, so why does that matter?
  - Assumption of risk
- Where courts have refused to find REP can be analyzed under combination of diminished property interests/assumption of risk theory

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## REP... not.

- “Open Field Doctrine” – Oliver
- Aerial Searches – California v. Ciraolo, 476 U.S. 207 (1986) – Aerial surveillance permitting observation of private property, including curtilage, and even if the individual has taken some measures to restrict view, as long as the officer is in a public space, because the expectation of privacy is unreasonable and not one society is prepared to honor.

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REP... not.

- Thermal imaging of homes – Kyllo v. United States, 533 U.S. 27 (2001) – Recognizes home has special 4<sup>th</sup> Amendment protection – all details are intimate details → Thermal imaging of homes is a search and not permitted without PC and warrant, at least where the technology in question is not in public use.
  - As technology expands into public arena, you assume the risk...

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REP... not.

- Trash/Discarded Items – California v. Greenwood, 486 U.S. 35 (1988) opaque trash bags left at curb, police rummage through and obtain incriminating information. No REP, because not expectation of privacy in trash.

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REP... not.

- Observation and Monitoring of Public Behavior
- United States v. Knotts, 460 U.S. 276 (1983) – holding that it did not violate the Fourth Amendment for the police to surreptitiously plant an electronic tracking device in a container that was placed in Knott's car, and to use it to follow his movements through public thoroughfares
  - Rationale: The police could have observed all this from public places – it does not matter that they used a beeper
  - BUT SEE United States v. Karo, 468 U.S. 705 (1984) (holding that police use of an electronic tracking device to monitor movements or reveal activities inside a residence constitutes search within meaning of 4<sup>th</sup> Amendment.

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REP... not.

- Observation and Monitoring of Public Behavior
- No search when police listening to conversation between wired informant and defendant. United States v. White, 401 U.S. 745 (1971);
- Inspection of bank records are not searches. California Bankers Assn. v. Shultz, 416 U.S. 21 (1974);
- No REP in numbers you call or receive calls from, because phone companies are third parties to whom def. chooses to disclose information. Smith v. Maryland, 442 U.S. 735 (1979).

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REP... not.

- Canine searches of closed luggage in airport. United States v. Place, 462 U.S. 696 (1983)
- Canine searches of automobiles (otherwise lawfully stopped) Illinois v. Caballes, 543 U.S. 405 (2005)
- USSC – not searches, because the “well-trained” narcotics dogs do not expose non-contraband items that would otherwise remain hidden from public view, but only detect contraband, and we have no right to privacy in illegal activity.

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REP... not.

- Even in residences, courts have been hesitant to find that temporary visitors to the home/residence have REP
- Minnesota v. Olsen, 495 U.S. 91 (1990) (holding that overnight guests have same protection as residents of home)
- But... drug bust, 5 people in home, who has REP? Homeowner? Renter? Overnight guest? “Friend” who comes over for a few hours?
  - What are the consequences for designation as “visiting friend” versus “overnight guest”?

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## Seizures

- What is a seizure?
- A seizure of a "thing" occurs whenever the government engages in "some meaningful interference with an individual's possessory interest in the property." United States v. Mendenhall, 446 U.S. 544 (1980).
- A person is seized only when, by means of physical force or a show of authority, his or her freedom of movement is restrained. A seizure of a person occurs when, in view of all the circumstances, a reasonable person would not believe he or she is free to leave. Mendenhall.

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## Seizures

- California v. Hodari D., 499 U.S. 621 (1991) – A person is seized when the suspect is physically restrained or submits to a show of authority.
- Hodari D. – Abandonment cases/Dropsy cases – courts have held that if person "drops" during police chase, no 4<sup>th</sup> Amendment violation because person never seized – person never physically restrained and flight, by definition, is not submission to show of authority.
- Other cases...
  - In a situation where factors compel a person to stay put (such as on a bus), test is whether a reasonable person would feel free to decline officer's requests or terminate the encounter. Florida v. Bostick, 501 U.S. 429 (1991)
  - Reasonable person test presupposes an innocent person. United States v. Dravton, 536 U.S. 194 (2002)
  - Passengers are seized when they are riding in a car stopped by police officers. Brendlin v. California, 551 U.S. 249 (2007)

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## Seizures

- Different levels of seizures, and what the level of seizure "is" has drastic constitutional implications
- 3 levels: (1) consensual encounter; (2) stops; and (3) arrests.
- Consensual encounters – Police are always free to engage a person ("Hello citizen, what's your name?") as long as the person is free to decline ("Fuck you copper!"). This "interaction" does not amount to a seizure and therefore does not implicate the Fourth Amendment.

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## Seizures: Arrests versus Stops

- The line between an Arrest and a Stop can be quite blurry.
  - But the distinction is critical – because the authority permitting the police to stop someone is very different than the authority permitting the police to arrest someone (“probable cause” versus “reasonable articulable suspicion”).
  - Moreover, the consequences following an arrest versus a stop are very different – search incident to arrest versus Terry frisk.
- How do we distinguish between arrest and stop?

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## Seizures: Arrests versus Stops

- There is no magic event that transforms a stop into an arrest. In other words, placing handcuffs on a person does not, per se, make a stop turn into an arrest.
- Two general factors we look at to argue arrest versus stop:
  - Duration
  - Atmosphere/Location

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## Seizures: Arrests versus Stops

- DURATION – The longer the person is seized, the greater the likelihood that the seizure will constitute an arrest.
  - Duration matters, but no rigid rules.
  - United States v. Sharpe, 470 U.S. 675 (1985) (suspects seized for 30-40 minutes; stop, not arrest).
- LOCATION – The more closely the seizure comes to taking place in a “police-dominated atmosphere, the stronger the argument that it has evolved into an arrest.
  - Arrest occurred when police take suspect to station for questioning. Dunaway v. New York, 442 U.S. 200 (1979)
  - Arrest occurred when police took suspect to station for fingerprinting. Hayes v. Florida, 470 U.S. 811 (1985)

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## Seizures: Arrests versus Stops

- Role as litigators is to attempt to frame the seizure as an arrest, if that is tactically beneficial
- How?
  - Time
  - Number of officers surrounding Defendant
  - Guns drawn
  - Handcuffs
  - Defendant placed in patrol car; Defendant driven to station; Defendant driven to scene
  - Other people free to go but your client detained
  - Indicia of arrest: Miranda warnings, told what going to be charged with, "paddy wagon" arrives...

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## Probable Cause and Warrants

- The GENERAL Rules
- RULE 1: Generally, a judge may issue a search or arrest warrant only with probable cause.
- RULE 2: In a circumstance where a warrant is not required, a police officer generally can search or arrest only with probable cause.
- There are many exceptions to both the requirement of a warrant and the requirement of probable cause (Terry stops and Terry frisks being just one example), but the necessity of a warrant and the existence of probable cause remain the fundamental requirements before police may engage in search or seizure.

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## Probable Cause

- Definition: The question is whether "the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed." Carroll v. United States.
- Definition: Whether, at the time of arrest, facts and circumstances within officer's knowledge, and of which they have trustworthy information, were sufficient to warrant a prudent man in believing the target had committed or was committing a crime. Beck v. Ohio.
- Probable cause is more than bare suspicion, but less than evidence which would justify conviction. Brinegar v. United States. It is less than preponderance of the evidence
  - Probable Cause → Preponderance of the Evidence
  - Clear and Convincing Evidence → Guilt Beyond a Reasonable Doubt

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## Probable Cause

- Probable Cause is an OBJECTIVE standard
  - Whren – issue is whether a reasonable officer would have found PC.
  - Whren – the decision to stop an automobile is reasonable where police have PC to believe a traffic violation occurred – even if pretextual. Subjective intentions play no role.
  - Devenpeck v. Alford – The subjective reason for making the arrest need not be the criminal offense to which the known facts provide PC; i.e., doesn't matter if arrested for wrong crime; if a reasonable officer could have arrested you for another crime, the arrest is lawful.

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## Probable Cause – “Facts and Circumstances”

- Police obtain information – facts and circumstances – from (1) personal observation, (2) from other police officers, and (3) from civilians.
- From other police officers – “Collective Knowledge Doctrine” Whiteley v. Warden, 401 U.S. 560 (1971).
  - An officer may use information he learns from other officers in making PC determination, as long as he has that information at the time he/she is making the PC determination
  - An officer may act on the ORDERS of another officer to effectuate a search or seizure, even if the acting officer does not possess enough information to personally determine that PC exists, as long as the officer giving the COMMAND has sufficient information to determine PC.
  - BUT NO “COLLECTIVE KNOWLEDGE” where acting officer does not have sufficient information for PC, and another officer does, but does not convey that information/command to acting officer.

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## Probable Cause – “Facts and Circumstances”

- From civilians (informants)
- PC – Aquilar-Spinelli – police officer could only rely on information from informants if information met two-prong test: (1) veracity/reliability/credibility of informant and (2) basis of knowledge. Had to satisfy both prongs.
- Illinois v. Gates - “Totality of the Circumstances” test

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### Illinois v. Gates

- Gates – Did not fully abandon the two-prong approach of Aquilar-Spinelli, but under the “totality of the circumstances” approach, “credibility” and “basis of knowledge” are not separate inquiries, but components of the larger question: totality of the circumstances.
- A deficiency in one can be compensated by strengths in the other – lack of evidence of credibility can be set off by basis of knowledge, and vice versa.

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### Illinois v. Gates

- In assessing the credibility of information provided by civilians, courts look to factors such as whether the tip predicts future behavior (cuts in favor of PC because civilian has “basis of knowledge”) versus merely describing present behavior, or whether the behavior is consistent with an innocent explanation (cuts against PC).
- An officer’s failure to corroborate information, particularly where corroboration is easily-done, cuts against a finding of PC.  
– LITIGATE lack of corroboration!!

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### Warrants

- Just as there is a presumption that all searches and seizures must be accompanied by probable cause, there is a similar presumption that all searches and seizures must only be conducted pursuant to the issuance of a WARRANT.
- But, as we will see, there are many exceptions to the warrant requirement, as there are exceptions to the PC requirement

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## Warrants

- Analyze Warrants under three rubrics
- First, Application
  - What supports application
  - What information must be included
- Second, Issuance
  - Who issues?
  - Form of warrant
- Third, Execution
  - Who can be searched?
  - Day versus Night?
  - Whoops, wrong house...

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## Warrants - Application

- All warrants must be accompanied by affidavit establishing probable cause and describe with particularity the places to be searched and the items to be seized (an arrest warrant must describe with particularity the person to be seized). Most common challenge to warrants → it was not supported by PC
- Must specify time period for execution → warrants can become stale.

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## Warrants - Issuance

- Warrant must be ISSUED by neutral and detached judicial officer
  - AG not okay Coolidge v. New Hampshire
  - Clerk of the Court – okay – Shadwick v. City of Tampa
  - Judge issuing warrant can't become leader of search party – Lo-Ji Sales v. New York – no longer “detached” judicial officer.

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## Warrants - Issuance

- Form of the Warrant
  - No general warrants – must be specific. Andresen v. Maryland, 427 U.S. 463 (1976)
  - Warrant itself must be particular – NOT ENOUGH for the affidavit to be particular. Groh v. Ramirez, 540 U.S. 551 (2004)
    - In this posture (Issuance), this is a common area of constitutional attack on the warrant
  - Warrant can cross-reference other documents (for purposes of particularity), but the referenced documentation must be attached to the warrant. Groh.
  - Residual Clauses – added to the list of items that can be seized → often phrased as “all other evidence.” Only permissible if residual clause can be read in context to be limited to the specific crime detailed in the warrant. Andresen. Otherwise, the warrant is open to challenge as overbroad.

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## Warrants - Issuance

- Anticipatory Warrants – in which affidavit states that the search will occur only if certain event take place are permissible (United States v. Grubbs) ONLY IF:
  - It is true that if the triggering condition occurs there is a “fair probability” that contraband or evidence of crime will be found in particular place, AND
  - There is PC to believe the triggering condition will occur.

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## Warrants - Execution

- Execution is about how the search/arrest goes down.
- Person who happens to be present in premises subject to search cannot themselves be searched by virtue of their mere presence. Ybarra v. Illinois.
- However, police can detain people who are at a home when it is searched. Michigan v. Summers.
- Treatment – Just fine for police to handcuff and detain a woman who was present during the search of a home – police held woman in garage and asked her about immigration status → USSC – that’s all fine – reasonable force in detention is okay; reasonableness is balancing test (governmental interests v. individual intrusion). Muehler v. Mena.

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## Warrants - Execution

- Key to analyzing the execution of the warrant is "reasonableness."
- Was it reasonable to execute the warrant at 2:00 am?
- Was it reasonable to destroy property or use force on persons during the execution of the warrant?
- Was the failure to knock-and-announce prior to execution of warrant reasonable?
  - "Knock-and-Announce" principle forms a part of the reasonableness inquiry – means of entry is a factor in the balancing test. Not a rigid rule, may be countervailing law enforcement interests. Wilson v. Arkansas.
- Was it reasonable for the police to search the wrong apartment?
  - If a mistake is made in executing the warrant, the search is permissible so long as the police action is objectively understandable and reasonable. Marvland v. Garrison, 480 U.S. 79 (1987).

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## Warrants - Execution

- The BIG POINT:
- IF YOU ARE FILING A MOTION CHALLENGING THE EXECUTION OF A WARRANT, YOU MUST ALLEGE THAT THE GOVERNMENT ACTION (WHETHER MISTAKE, FAILURE TO KNOCK-AND-ANNOUNCE, TIME OF EXECUTION OF WARRANT) WAS AN UNREASONABLE ERROR.

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## EXCEPTIONS TO WARRANT REQUIREMENT

- Exceptions are created when the USSC balanced the privacy interests involved against the extent to which adhering to the warrant requirement would unduly hamper effective law enforcement.

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### Search Incident to Arrest

- Still have to have PC for arrest
- Permissible to search person (for weapons and evidence). Chimel v. California, 395 U.S. 752 (1969).
- May search area into which arrestee might reach. Chimel.
- Police may also search any containers within the "reachable area" of the arrestee. United States v. Chadwick, 433 U.S. 1 (1977).
- Can't search more than arrestee and immediate area – i.e., can't search the entire house as search incident to arrest. Chimel.
- Search incident to arrest OK no matter what crime (even driving on a revoked license). United States v. Robinson, 414 U.S. 218 (1973).
- BUT, there must actually be an arrest. If officer chooses to issue citation, rather than arrest, then cannot perform search incident to arrest. Knowles v. Iowa, 525 U.S. 113 (1998)

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### Search Incident to Arrest -- Automobiles

- If police arrest driver of car, may search the vehicle as part of a search incident to the arrest. New York v. Belton, 453 U.S. 454 (1981). The scope of this search includes the entire passenger compartment, including containers, but not the trunk. USSC – bright-line rule – officer safety trumps.
- In 2004, seemingly extended Belton. Police can search the passenger compartment of a vehicle if the arrestee was a recent occupant of the vehicle. Thornton v. United States, 541 U.S. 615 (2004).

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### Search Incident to Arrest -- Automobiles

- Practical Reality – Belton and Thornton – police arrest occupant of car, search him, handcuff him, throw him in the back of the police cruiser, lock the door, and then toss the car. Courts said, "Hey, that's okay, bright-line rule..."
- BUT.... Arizona v. Gant, 129 S. Ct. 1710 (2009) – can only search vehicle incident to arrest only if (1) the arrestee has access to the passenger compartment at the time of the search or (2) there is reason to believe there is evidence of the crime for which defendant arrested for inside the car
- WHOLE NEW WORLD OF LITIGATION
  - What is "reason to believe"?
  - Where police searching for evidence of crime Defendant was arrested for, or was it a general search?

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### Plain View, Plain Touch, Plain Smell

- Arizona v. Hicks, 480 U.S. 321 (1987) – Police lawfully in residence, cop sees stereo equipment (thinking, “What the hell is this dude doing with stereo equipment like this and all I got is my Sony Walkman), and moves the stereo equipment to see serial number to determine if stolen. Valid Warrantless Search under “Plain View” Doctrine?
- Three factors for valid plain view exception
  - Officer must be in place lawfully (with prior justification, not violating 4th Amendment)
  - Must be in plain view, and incriminating character must be “immediately apparent”
  - Officer must have lawful right of access to the object itself
- Valid in Hicks? Why or why not?

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### Plain View, Plain Touch, Plain Smell

- Plain View has been expanded into “Plain Senses.” But the same requirements as under Plain View apply to Plain Touch and Plain Smell – most notably, the incriminating nature of the item must be **immediately apparent**.
- Plain Touch/Feel: Minnesota v. Dickerson, 508 U.S. 366 (1993). Officer conducting lawful frisk of defendant (i.e., officer lawfully in place, not violating 4th Amendment) when feels lump in suspect’s pants pockets. He “manipulates” the lump with his fingers and determines it was drugs. USSC – Plain Touch/Feel exists as exception to warrant requirement, but because officer had to “manipulate” the lump, the incriminating nature of the item was not immediately apparent – bad search.
- Motion Practice: What do you want to allege? What do you want to know/develop from the evidentiary hearing?

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### The Automobile Exception

- Cars and other movable vehicles can be searched without warrant if the officer has probable cause for the search.
  - Carroll v. United States, 267 U.S. 132 (1925)
  - Justification: cars are already “pervasively regulated” by government; mobility of cars (no time to get the warrant); reduced expectation of privacy in cars compared to homes.
- If there is PC to search the car, can search all containers in the car.
  - California v. Acevedo, 500 U.S. 565 (1991) (paper bag)
  - Arkansas v. Sanders, 442 U.S. 753 (1979) (suitcase)
  - Note – Containers outside the car can only be searched without a warrant if exigent circumstances exist. Chadwick.

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## The Automobile Exception

- Vehicle exception applies even to mobile homes.
  - California v. Carney, 471 U.S. 386 (1985)
  - Remember the "inviolable" and "protected" nature of the home under the 4th Amendment?
  - Mobility trumps the "protected" nature of home.
- Applies even if the automobile has been taken to the police station and secured. Chambers v. Maroney, 399 U.S. 42 (1970).
- If officers proceeding under "automobile exception" → can't search people in car w/o independent PC; but can search containers in car that belong to suspicionless passenger. Wyoming v. Houghton, 526 U.S. 295 (1999).

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## Exigent Circumstances

- Warden v. Hayden – police acted reasonably when they entered home in hot pursuit of a suspected felon and then searched the house for the man and weapons.
- But police cannot enter a home without a warrant to make a "routine" arrest.
- Something has to be happening that requires immediate action → (1) emergency situation, (2) justifying warrantless activity (i.e., whether there are real, immediate and serious consequences if action is postponed) and (3) PC
- Two general or common justifications:
  - Fleeing felon
  - Immediate destruction of evidence (i.e., flushing drugs down the toilet).

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## Exigent Circumstances

- But Officer Cannot Create the Exigent Circumstances, and then Rely Upon those Circumstances to Proceed Without a Warrant
- Example: Controlled Drug Buys. Undercover makes 3-4 buys; cops then break in, saying "If we didn't break in, they were going to flush the stash."
  - Is that an "exigent circumstance"?
- All a question of reasonableness – why taking the time to get a warrant would frustrate the ability of the state to secure the evidence in question.
- Must consider the gravity of the underlying offense – Welsh → no exigent circumstances when police entered home without warrant to make an arrest for nonjailable traffic offense.

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## CONSENT

- Police can always engage in warrantless search or seizure where they receive CONSENT.
- BUT, consent must be voluntary
  - Schneckloth v. Bustamonte – determine voluntariness by examining totality of circumstances; gov't does not have to demonstrate knowledge of right to refuse consent
  - Consent may not be coerced, by explicit or implicit means, by implied threat or covert force – no matter subtle the coercion.
- Drayton – police enter bus, ask consent to search luggage in overhead compartment – USSC – consent valid → no application of force, no intimidating movement, no brandishing of weapons, no blocking of exits, no threats, no commands, not even an authoritative tone of voice...

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## CONSENT

- Who can give consent?
- Person giving consent (to search, for example) must have **actual or apparent authority** to consent.
  - Police knock on door, 4 year old answers, police say, "Hey little boy, can we come in and search for meth?" → Valid Consent?
  - Apparent authority exists where reasonable officer, under the circumstances, believes the 3rd party has authority to consent. Illinois v. Rodriguez
- Where there is common authority by more than one person, officer can act on consent of one of the authorized persons as long as there is not another person there who objects. Georgia v. Randolph, 547 U.S. 103 (2006)
  - An occupant of a residence can give consent if the other is not present. United States v. Matlock, 415 U.S. 164 (1974)

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## Consent

- The scope of the search is limited to the scope of consent given.
- When scope of consent at issue, what becomes the focus of litigation is what a reasonable person would have understood the scope of the consent to be.
- Once give consent, can be withdrawn.

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### “Special Needs”

- Whole “categories” of searches and seizures excluded from the warrant requirement on the theory that the purpose of the search is regulatory in nature, and not primarily directed towards law-enforcement purposes.
- Under this rubric came the “Administrative Searches” cases and the “Drug Testing” Cases – each category predicated on a non-law enforcement need

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### “Special Needs”

- Burger – warrantless search of junkyard was reasonable as junkyard is closely regulated business.
- Skinner – Upheld drug testing of railroad workers involved in accidents – purpose not law enforcement but discovering source of malfunction
- New Jersey v. T.L.O. – warrantless search of student’s property – concern is not law-enforcement but school safety
- South Dakota v. Opperman and Lafayette – police inventory – purpose is to safeguard property of defendant
- United States v. Martinez-Fuerte – government has authority to conduct warrantless border searches because purpose is to protect country from harmful entrants – specifically, in Martinez-Fuerte, government permitted to have fixed checkpoints at borders to ensure that all cars entering are lawfully permitted (immigration, not law enforcement...)
- Sitz – sobriety checkpoint upheld; interest in highway safety, not prosecuting drunk drivers.

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### “Special Needs”

- But almost every “law enforcement” project can be justified on secondary, non-law enforcement grounds...
- Is there no end???
- City of Indianapolis v. Edmond – struck down roadblocks where primary purpose of roadblock was drug interdiction
- Ferguson v. City of Charleston – struck down drug testing of pregnant women admitted to hospital because primary purpose was to threaten women with prosecution.
- Case-by-case analysis – what is “primary purpose”?

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### Terry Stops

- Goodbye warrants... so long PC.
- Continuum of contacts between civilians and police
- Consensual encounters ←----→ Arrests
- USSC – there are encounters in between, where something more than nothing is required, but less than probable cause
- That intermediate encounter -- STOP

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### Terry Stops

- What is a stop?
- Less than an arrest...
- But no specific definition – except for references to it as a brief investigatory detention.
  - Brief is relative term – we saw earlier, 30-40 stops viewed as “brief.”
- Practice Point – State always looking to diminish the nature of the civilian-police encounter; we are looking to escalate the encounter.
- Why?

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### Terry Stops

- Burden on State to justify stop is less than burden on State to justify arrest.
- Terry stop – not PC, but RAS
- RAS – “reasonable, articulable suspicion”
- Officer must be able to point to specific and articulable facts which, taken together with rational inferences, reasonably warrant the intrusion.
- Must not be inchoate and unparticularized suspicion or hunch.

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### Terry Stops

- Test for RAS is totality of the circumstances – must have particularized and objective basis for suspecting legal wrongdoing. Officers may draw on experience and specialized training to make inferences from and deductions about cumulative information available to them. Again, a mere hunch is insufficient. United States v. Arvizu, 534 U.S. 266 (2002).
- Officer can take into consideration pieces of information cumulatively – need not weigh each piece of information about suspect individually to determine if RAS exists. Arvizu.

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### Terry Stops

- What constitutes RAS?
- Two people walking away from another in high crime area is not RAS – Brown v. Texas.
- But fleeing from police in high crime area can be RAS – Illinois v. Wardlow
- Anonymous tip that person at bus station has gun – not RAS – Florida v. J.L.
- But tip that man has gun from known informant – might be enough for RAS – Adams v. Williams.
- Moreover, anonymous tip, but predicts future behavior (recall: basis of knowledge prong of Illinois v. Gates) might be RAS – Alabama v. White
- Use of a profile (such a drug courier) may be sufficient for RAS. United States v. Sokolow

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### Terry Stops

- Terry stops – the overriding concern is investigation and safety
- Everything flows around those premises
- Arrest – PC – Search Incident to Arrest – Person and Area
- Stop – RAS – Terry Frisk – Long Search – Buie sweep

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### Terry Frisk

- Terry stop can give rise to a justification for a limited search – called a frisk.
- Right to frisk is not automatic
- Standard: Officer must have RAS that defendant is armed and presently dangerous
- Justification: Officer safety
- Scope: Limited to a pat down of the outer clothing to check for weapons
  - sole justification of search is protection of the police officer and others nearby, so search must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments that could be used to assault the officer.

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### Terry extended

- Terry principle extended to “frisks” of cars when the officer has RAS to believe that the stopped occupant is armed and presently dangerous. Michigan v. Long
  - Officers may look in areas immediately accessible to the occupant that may contain a weapon.
- Terry sweep – When police arrest a person, they may conduct sweep of premises if they have RAS that a person might be there who poses a threat to them. Maryland v. Buie, 494 U.S. 325 (1990). Sweep may extend to only cursory inspection of places where person may be found. Remember Chimel – can’t search house simply because arrest person in house → Buie → you can conduct limited search if RAS that person in house who poses danger

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### Terry Thoughts

- Terry, much like every other doctrine in the 4th Amendment context, is based on reasonableness.
- The litigation strategy, necessarily, becomes an issue of unreasonableness
- Terry is confined. Fruitful areas of litigation often involve scope → exceeding the “scope” of the frisk, exceeding the scope of the “Long frisk” of the car.
- Litigation not only about RAS, but about everything that follows.

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## Exclusionary Rule

- RULE: Material obtained in violation of the Constitution cannot be introduced at trial against the defendant. Mapp v. Ohio
- But only those whose 4th Amendment rights were violated may seek the remedy of exclusion.
- The proponent of a motion to suppress has the burden of establishing that his own 4th Amendment rights were violated by the challenged search or seizure. Rakas v. Illinois
- This concept is called STANDING

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## Exclusionary Rule

- If you are going to allege a violation of the Fourth Amendment, you must consider whether the state can challenge your client's standing to assert the claim. Under federal constitutional law the only persons who have standing to challenge the reasonableness of a search or seizure are the people who have a reasonable expectation of privacy in the place searched or a possessory interest in the thing seized.
- Remember: the focus of standing is whether your client's 4th Amendment rights were violated, and that, in turn, depends on whether your client's reasonable expectation of privacy.
- Because... what is a search? It is a gov't intrusion in REP – If your client has no REP, then no search, then no 4th Amendment violation, and then no standing to seek the remedy of exclusion

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## Exclusionary Rule - Standing

- Minnesota v. Carter – an overnight guest has REP in a dwelling, but not a "casual," merely present guest. People who enter a home to conduct business have no legitimate expectations of privacy.
- Rakas – Defendant, who was passenger in car, challenged the search of car – USSC – passengers in car, driven by another, who have no ownership or exclusive right to use car, had no REP
  - BUT – A traffic stop is a seizure of both driver and passenger. Brendlin.
  - SO... How do you articulate the 4th Amendment violation??

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### Exclusionary Rule - Standing

- Where there is a question of standing the lawyer should look for any indicia of reasonable expectation of privacy such as mail matter or clothing in the room searched or exclusive permission to drive a car owned by another. Some states provide broader authority for a person to assert standing so you need to review the law in your jurisdiction.

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### Exclusionary Rule

- Once a person with standing successfully raises a 4th Amendment challenge, the next question is what the appropriate remedy will be.
- Under the exclusionary rule, any evidence that is the fruit of (or discovered as a result of) the illegality should be suppressed, or not permitted to be used against the person whose rights were violated.

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### Exclusionary Rule - Exceptions

- INEVITABLE DISCOVERY: Nix v. Williams → If the court finds that the State inevitably would have discovered the evidence through lawful means, the exclusionary rule will not apply.
- Burden on prosecution to establish inevitable discovery by preponderance of the evidence.

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### Exclusionary Rule - Exceptions

- INDEPENDENT SOURCE: Exclusionary rule does not apply when the police secure the evidence in question independent of the police illegality.
- Murray v. United States – Police have PC to believe drugs are in warehouse. Without a warrant, the police enter the warehouse to confirm their suspicions. The police then apply for a warrant without using the information they obtained illegally. USSC → Despite the 4th Amendment violation, the warrant was issued independent of information obtained illegally.

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### Exclusionary Rule - Exceptions

- ATTENUATION OF THE TAIN: The exclusionary rule applies if there is a substantial casual connection between the illegal police behavior and the evidence. All evidence that is the product of the illegal police activity – fruit of the poisonous tree – must be excluded. But, if link between illegal police act and evidence is attenuated, then evidence is admissible. Wong Sun.

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### Exclusionary Rule - Exceptions

- ATTENUATION OF THE TAIN: Central question: Is evidence sufficiently distinguishable to be purged of primary taint? Brown v. Illinois, 442 U.S. 590 (1975)
- In case of illegal arrest, followed by confession, Miranda warnings alone are not automatically sufficient to protect 4th Amendment rights → may have 4th Amendment violation even if there is no 5th Amendment violation. Miranda warnings alone cannot attenuate the taint. In order for the casual chain to be broken, statement must be voluntary and “sufficiently an act of free will to purge the primary taint. Brown.
- Case-by-case determination
- Factors:
  - Temporal proximity – the amount of time that passed between the illegality and the discovery/obtaining of evidence
  - Intervening Events – events that occur between the illegality and the discovery/obtaining of evidence
  - Burden on prosecution

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### Exclusionary Rule - Exceptions

- GOOD-FAITH EXCEPTION: Exclusionary rule does not apply if police reasonably relied on an invalid warrant to conduct search or seizure. United States v. Leon.
  - Where warrant defective, but police acted in reasonable good-faith reliance on warrant, evidence will not be suppressed as long as the warrant was properly executed and search confined to areas and objects defined with particularity.

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### Exclusionary Rule - Exceptions

- GOOD-FAITH EXCEPTION:
- Objective reasonable good faith means:
  - The warrant allows for no subjectivity on the part of the executing warrant
  - A reasonably well-trained officer would have believed the warrant to be valid
    - Standard of reasonableness is an objective one, and requires officers to have a reasonable knowledge of what the law prohibits. Leon.
  - There is institutional good faith

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### Exclusionary Rule - Exceptions

- GOOD-FAITH EXCEPTION
- The good-faith exception does not apply when:
  - The affiant supplied false information or acted in reckless disregard for the truth (no institutional good faith)
  - The magistrate abandoned his role as a neutral and detached judicial officer
  - The affidavit was so lacking in indicia of probable cause as to render the magistrate's belief in its existence unreasonable
  - The warrant is facially deficient in describing with particularity the places to be searched or the things to be seized.
- Good-faith exception does not apply to negligent acts by police → Herring v. United States, 129 S. Ct. 695 (2009) (employee of Sheriff's department negligently failed to remove invalid warrant from computer – and deputy acted in reliance on warrant → 4th Amend. violation but no suppression b/c exclusionary rule applies only to deter acts of reckless or grossly negligent behavior by police, not mere negligence.

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## Exclusionary Rule - Exceptions

- THE IMPEACHMENT EXCEPTION
- The exclusionary rule also does not apply when the defendant testifies on direct examination (at trial) in a manner that is inconsistent with the suppressed evidence. United States v. Havens, 446 U.S. 620 (1980).
- It only applies to testifying defendants. James v. Illinois, 493 U.S. 307 (1990).

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## New Federalism

- State constitutions are sources of greater protections than those provided by the federal constitution.
- It is a well-recognized principle that a state court is free to interpret its state constitution in any way that does not violate principles of federal law, and thereby grant individuals more rights than those provided by the U.S. Constitution. Nowak, Rotunda, & Young, Constitutional Law, § 1.6(c), p. 21 (3rd ed.). Thus, a state court may interpret a state constitutional provision as affording more protection to citizens than have the federal courts in interpreting a parallel provision of the federal constitution. See Creamer v. State, 229 Ga. 511(3), 192 S.E.2d 350 (1972).

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## New Federalism

- Georgia and the Right to Privacy
- Powell v. State, 510 S.E.2d 18 (1998)
- From the Georgia Supreme Court: "The right of privacy has a long and distinguished history in Georgia. In 1905, this Court expressly recognized that Georgia citizens have a "liberty of privacy" guaranteed by the Georgia constitutional provision which declares that no person shall be deprived of liberty except by due process of law. The [1905 decision] constituted the first time any court of last resort in this country recognized the right of privacy, making this Court a pioneer in the realm of the right to privacy."

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## New Federalism

- Open Fields Doctrine – Mississippi
- Voluntariness – Louisiana
- Trash – New Jersey
- Electronic Tracking Devices to monitor what may otherwise be viewed through visual surveillance – Oregon
- Good-Faith Exception – Connecticut, Michigan, NY, NJ, North Carolina, Oregon, PA, & Vermont

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## CONFESSIONS: THE FIFTH AMENDMENT & MOTIONS PRACTICE

William R. Montross, Jr.  
Southern Center for Human Rights, Atlanta, GA  
April 2015  
wmontross@schr.org

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## Why is knowing this important?

- Clients – no matter how much they distrust the police – will invariably make a statement when they are arrested.
- The prosecution may not obtain a conviction based solely on a confession. Opper v. United States, 348 U.S. 84 (1954). However, finders of fact give great weight to a client's confession and it can damn an otherwise good case.

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### The Fifth 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...; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.

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### Grounds for Suppression of Confession

- 4th Amendment (As Fruit of an Illegal Seizure)
- 5th Amendment (Self Incrimination)
- 5th Amendment (Due Process Clause)
- 6th Amendment Right to Counsel

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### Miranda – Fifth Amendment

- Custody
- Interrogation
- Warnings
- Waiver

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## Voluntariness – Due Process

- Police Coercion
- Overcame suspect's will

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## 6th Amendment

- Attaches
- Critical Stage
- Offense Specific
- Waiver – *Montejo v. Louisiana*

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## Grounds for Statement Suppression

#1 – A public servant obtained the statement as a result of the client's **custodial interrogation** without adequately advising him of his **Miranda warnings** and the client knowingly and **voluntarily waiving** those rights.

- Basis:
  - Fifth and Fourteenth Amendments of the US Constitution
  - *Miranda v. Arizona*, 384 U.S. 436 (1966)

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## Grounds for Statement Suppression

# 2 – The statement was **involuntary** in the traditional sense, in that it was the product of police threat, coercion or other conduct and not the product of “free and rational choice under the totality of the circumstances”

- Basis:
  - Due Process Clause of the 5<sup>th</sup> Amendment
  - Brown v. Mississippi, 297 U.S. 278 (1936)

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## Grounds for Statement Suppression

# 3 – Law enforcement obtained the statement after the client’s **right to counsel** attached under the US Constitution because the client requested counsel, counsel entered the matter or a criminal action was commenced against him and the client did not waive his right.

- Basis:
  - Sixth and Fourteenth Amendments of the US Constitution

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## Grounds for Statement Suppression

# 4 – The client’s statement was the product of an **illegal seizure** of his person or physical evidence or illegal questioning.

- Basis:
  - Fourth and Fourteenth Amendments of U.S. Constitution
  - Wong Sun v. United States, 371 U.S. 471 (1963)
  - Brown v. Illinois, 422 U.S. 590 (1975)
  - Dunaway v. New York, 442 U.S. 200 (1979)

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### Practice Tip

- **Commit these to memory.**
  - Will assist you in the courtroom if you have to spontaneously argue a statement issue.
  - Should structure your initial client interview with these grounds in mind. You want to get as many details as possible from your client as to the circumstances of the confession while they are fresh in his mind.

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### What constitutes a statement?

- The law governing suppression of statements applies to any declaration by the client that tends to implicate him, including the accusation of another person, a false exculpatory statement, or a refusal to confess.
  - Rhode Island v. Innis, 446 US 291 (1980)

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### What constitutes a statement?

- The law applies to non-verbal, but incriminatory conduct. However the conduct must be “testimonial” that is, communicative.
  - Pennsylvania v. Muniz, 496 US 582 (1990)

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### Must be voluntary...

Under the Fifth Amendment of the US Constitution, involuntary statements violate the privilege against self-incrimination.

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### To Be Admissible A Statement Must be Voluntarily Given

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### Must be voluntary...

- Prosecution has the burden of proving that a confession is voluntary.  
– Jackson v. Denno, 378 U.S. 368 (1965)
- Must prove voluntariness even if the police follow the mandates of Miranda.

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### Must be voluntary...

- Even if the statement is found to be admissible, the question of whether it was voluntarily given may be raised as a question for the jury.
  - Crane v. Kentucky, 476 U.S. 683 (1986)
- Voluntariness is determined by the “Totality of the Circumstances”. Brown v. Mississippi, 297 U.S. 278 (1936)

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### Voluntariness: Factors Considered

- Some kind of **police coercion** is necessary for a finding of involuntariness.
  - Colorado v. Connelly, 479 U.S. 157 (1986)

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### Voluntariness: Factors Considered

- **Length of the Interrogation**
  - Whether the client was deprived of basic functions such as food, sleep, water, restroom.
  - Involuntary when suspect denied sleep during 36 hours of interrogation. Ashcroft
  - Involuntary when suspect denied food for 24 hours. Payne

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### Voluntariness: Factors Considered

- Use of physical force and threats of physical force.
  - Confession involuntary if the suspect is coerced due to a threat of physical violence. Arizona v. Fulmante, 499 U.S. 279 (1991)

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### Voluntariness: Factors Considered

- Promises and Threats
  - Promises of leniency or threats of additional prosecution may constitute psychological coercion.
    - United States v. Harris, 301 F. Supp 996 (E.D. Wis. 1969)

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### Voluntariness: Factors Considered

- Deception
  - Confession involuntary where suspect told that she would receive 10 years in prison and have her children taken away. Suspect said she would tell the police anything they wanted and then confessed. Lynnum

BUT...

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### Voluntariness: Factors Considered

- Supreme Court has been generally tolerant of police techniques that seem to be pretty close to deceptive
  - Confession voluntary even though police told suspect that his accomplice had already confessed and implicated him. Leyra v. Dennis
  - Confession voluntary even though officer acted as friend and expressed sympathy for suspect's plight. Frazier v. Cupp

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### Voluntariness: Factors Considered

- Age, Level of Education and Mental Condition of the suspect
  - Confessions of juveniles require special attention. In Re Gault. 387 U.S. 1 (1967)
  - Level of Education a factor. Spano
  - Illiterate and of low intelligence – involuntary. Culombe

BUT....

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### Voluntariness: Factors Considered

- A confession is involuntary, regardless of mental condition, only if it is the product and police coercion or overreaching. Colorado v. Connelly, 479 U.S. 157 (1986)
- Mental condition is important in the voluntariness calculation, especially since now more subtle forms of psychological coercion. But absent police conduct causally related to the confession, no deprivation of due process.

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### Practice Tip

- When speaking to your client about his confession use these factors to guide your questioning.
- When preparing for your suppression hearing, use these factors to develop your cross-examination and structure your suppression argument.

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To Be Admissible, Any Statement Which is the Product of Custodial Interrogation Must Be Properly Preceded by a Miranda Waiver.

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### Custodial Interrogation & Miranda

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

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### Custodial Interrogation & Miranda

- The Miranda requirements *only* apply if a person is in custody “or otherwise deprived of his freedom of action in any significant way.”
  - Miranda v. Arizona, 384 U.S. 436 (1966)

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### Custodial Interrogation

- What is 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.

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### Custody

- “In custody” is an objective inquiry
  - Not focused on the state of mind of the officer OR the suspect.
  - Determined based on how a reasonable person in the suspect’s situation would perceive his circumstances. Yarborough v. Alvarado, 124 S.Ct. 2140 (2004)
  - Totality of the Circumstances Test

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### Custody Factors

#### Site of the Interrogation

- Questioning at a neutral location, such as a crime scene, a public place, or the suspect’s workplace, home, or vehicle is often deemed non-custodial because it is inherently less coercive than police dominated settings. Berkemer v. McCarty, 468 U.S. 420
  - However, a person can be “in custody” if they are placed under arrest inside their home. Orozco
  - Roadside questioning of a motorist during a traffic stop is not custody. Berkemer v. McCarty, 468 U.S. 420

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### Custody Factors

#### Level of Intrusion

The “only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.”  
Berkemer v. McCarty, 468 U.S. 420 (1984).

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### Practice Tip

- When gathering the factual information from your client and preparing for the hearing remember the cross-examination device of drawing out all of the facts to really highlight the element of custody.
  - Example: There were 4 officers? They were all in uniform? They were all in uniform? They all had their badges in view? They all had nightsticks? 2 had their guns drawn?

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## Interrogation

What is interrogation?

- Interrogation is either express questioning or its functional equivalent.
  - Functional equivalent means any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.
  - Focus is primarily upon the perceptions of the suspect rather than the intent of the police.

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## Interrogation

- Not interrogation
  - Cops said it would be a shame if a disabled kid got killed with a hidden gun. Rhode Island v. Innis, 446 U.S. 291 (1980)
  - Not interrogation when police allowed suspect to speak to his wife in front of another officer. Arizona v. Mauro, 481 U.S. 520 (1987)
  - Miranda warnings not required when suspect is unaware that he is speaking to a law enforcement officer. Illinois v. Perkins, 496 U.S. 292 (1990)

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## Procedural Safeguard

### The Miranda Warnings

- Prior to questioning suspects must be advised of their rights:
  - Right to remain silent
  - Anything you say can be used against you
  - Right to an attorney
  - If you cannot afford an attorney one will be appointed to you

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### Miranda Waiver

- A statement is admissible only if police gave a suspect his Miranda warnings and the suspect properly waived his Miranda rights.

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### Miranda Waiver

- What constitutes a proper waiver of Miranda rights?
  - A waiver is effective only if it is knowing, intelligent, voluntary, and intentional relinquishment of a known right or privilege. Miranda, 384 U.S. at 475.

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### Determining Proper Waiver

- “A finding of waiver depends on the Totality of Circumstances and may be inferred from the circumstances.”
  - North Carolina v. Butler, 441 U.S. 369 (1979)

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### Factors for Determining Proper Waiver

- Factors considered:
  - Client’s prior experience with the legal system
  - Circumstances of the questioning
  - Any allegation of coercion or trickery
  - Any delay between the arrest and the statement

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### Factors for Determining Proper Waiver

- Issuance of proper Miranda warnings:
  - Inquiry is whether the warnings reasonably conveyed to a suspect his rights as required by Miranda. Duckworth v. Eagen, 492 U.S. 195 (1989)
  - Rigid recitation of Miranda Warnings is not required of the police. Prysock

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### Factors for Determining Proper Waiver

- Waiver of Miranda rights cannot be based on a presumption.
  - Waiver can not be presumed from mere silence.
  - Waiver can not be presumed because a confession was eventually obtained.

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### Factors for Determining Proper Waiver

- If police do not inform suspect of the nature of the crime it does not invalidate a waiver. Spring
- If police withhold from a suspect that his attorney wants to consult with him it does not invalidate the waiver. Moran

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### Assertion of Miranda Rights

- Right to Counsel
  - When counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the suspect has consulted his attorney. Minnick v. United States, 607 A.2d 519 (D.C. 1992).
  - HOWEVER, the defendant can reinitiate police interrogation – governed by the Edwards line of cases.

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### Assertion of Miranda Rights

- Right to Counsel continued...
  - Suspect must unambiguously request counsel. Must articulate his desire to have counsel present with sufficient clarity that a reasonable officer in the circumstances would understand the statement to be a request for an attorney.
    - Minnick v. United States, 607 A.2d 519 (D.C. 1992).

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### Assertion of Miranda Rights

- Right to Remain Silent
  - If suspect indicates in any manner that he does not wish to be interrogated, the police may not interrogate him??
  - The Defendant must assert his right to remain silent.
  - AND REMAINING SILENT IS NOT AN ASSERTION OF THE RIGHT TO REMAIN SILENT.
    - *Berghuis v. Thompkins*, 560 U.S. 370 (2010)

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### Assertion of Miranda Rights

- If any of the previously mentioned situations occurs after interrogation begins, questioning must cease.

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### Waiver After the Assertion of Rights

- Right to Remain Silent
  - If suspect asserts right to remain silent, then later waives and talks, admissibility of the statements depends on whether his “right to cut off questioning” was “scrupulously honored.”
    - *Michigan v. Mosley*, 423 U.S. 96 (1975)

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### Waiver After the Assertion of Rights

- Right to Counsel continued...
  - Police may not interrogate a suspect after he has asserted his right to counsel until counsel has been made available to him UNLESS the suspect himself initiates further communication, exchanges or conversations with the police.
    - Edwards v. Arizona, 451 U.S. 477 (1981).

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### Exceptions to Miranda

- Public Safety Exception
  - Exception available in situation posing a threat to public safety, where officers ask questions reasonably prompted by a concern for the public safety.
    - Quarles v. United States, 308 A.2d 773 (DC 1973)
  - Availability of exception does not depend upon the officers' motivation.
    - Quarles v. United States, 308 A.2d 773 (DC 1973)

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### Exceptions to Miranda

- Pedigree Information
  - Police can ask a person questions when taking him into custody that are needed in the booking process, such as name, address, date of birth, height, weight.
- Impeachment
  - Statements gained from a suspect are admissible for impeachment if suspect testifies at trial.
    - Harris v. New York, 401 U.S. 222 (1971)

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Miranda Violations

- Physical evidence obtained as a result of an unwarned statement is admissible as long as the statement was voluntary.
  - Patane
- Prosecutor can call a witness at trial, though the identity was found through the illegal interrogation.
  - Tucker

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Miranda Violations

- Statement obtained without giving Miranda warnings cannot be used at trial.
- Unwarned statement then a warned statement
  - Warned statement is admissible if there was no deliberate coercion or improper tactics. The warned statement is untainted. Elsad
  - Warned statement excluded where there is a police protocol in which police interrogate until confession then Mirandize and repeat confession. Seibert

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**IDENTIFICATIONS:  
THE SIXTH AMENDMENT & MOTIONS  
PRACTICE**

William R. Montross, Jr.  
Southern Center for Human Rights, Atlanta, GA  
April 2015  
wmontross@schr.org

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### Why is this important?

- Misidentifications are one of the leading causes of wrongful convictions.
  - The law regarding identifications, as it stands now, is oftentimes not supported by scientific studies on identifications.
  - Studies have shown, eyewitness identifications are fraught with errors of perception and memory. Elizabeth Loftus and James Doyle, Eyewitness Testimony: Civil and Criminal (2d. Ed 1992)

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### Why is this important?

- Juries place great weight on identifications.
  - "I would never forget that face"
- It is an exciting area of the law where you can make great change.
  - i.e. Sequential, Double - blind line-ups.

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### Identification Procedures

- Police arranged Identification procedures
  - Photo arrays
  - Line-ups
  - Show-ups
- Non-police arranged identification procedures
  - Second Sightings
- In-court identification

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### Why file a Motion to Suppress Identification?

The suppression motion challenges the constitutional propriety of a pre-trial identification and urges that any subsequent identification evidence, including an in-court identification, be excluded as tainted.

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### 3 Grounds for Suppression

- ❑ 1. Due Process Challenge
- ❑ 2. Right to Counsel or 6<sup>th</sup> Amendment Challenge
- ❑ 3. Evidentiary or 4<sup>th</sup> Amendment Challenge

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### Due Process Challenge

- ❑ Undue suggestivity surrounding an out of court identification procedure leads to an impermissibly **unreliable** identification.
  - Manson v. Braithwaite, 432 U.S. 98 (1977)

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### Due Process Challenge

- Focuses *solely* on government arranged identification procedures.
  - Photo arrays
  - Single photo identification
  - Line ups

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### Due Process Challenge

- An in-court identification is inadmissible if the out-of-court identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable identification.
  - Simmons v. United States, 390 U.S. 377 (1968)

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### Due Process Challenge

Reliability is the lynchpin

“It is the reliability of identification evidence that primarily determines its admissibility” – Watkins v. Sowder, 449 US 341 (1981)

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### Due Process Challenge

HOWEVER...

- ▣ IF the prosecution can establish by clear and convincing evidence that the in-court identification was based on observations of the suspect other than the lineup then the in-court identification can be admissible, despite and illegal identification procedure. Wade
- ▣ This is known as an Independent Source Hearing. See Stovall v. Denno, 388 U.S. 293 (1967)

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### Due Process Challenge

- ▣ The Independent Source Hearing
  - Factors the Court considers:
    - Opportunity to observe suspect during crime.
    - Existence of any discrepancy between any pre-lineup description and client's actual description.
    - Any identification prior to lineup of another person.
    - Identification by picture of client prior to the lineup
    - Failure to identify client on a prior occasion
    - Lapse of time between the alleged act and the lineup identification
    - Whatever is known of the conduct of the lineup

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### Breaking Down the Due Process Challenge

- ▣ Must be a government arranged ID procedure
- ▣ First prong of the analysis is an examination of whether ID procedure was unduly suggestive
  - Wade Hearing
    - No finding of unduly suggestive ID procedure:
      -  both out of court and in court ID are admissible.
    - Finding of unduly suggestive ID procedure
      -  Out of court ID suppressed , but must consider reliability in regards to in court ID

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### Breaking Down the Due Process Challenge

- Second prong of the analysis is an examination of whether the ID procedure was reliable, despite the suggestivity.
  - Independent Source Hearing
  - Finding of reliability:
    - ➔ In court ID is admissible.
  - No finding of reliability
    - ➔ In court ID is inadmissible

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### Second Ground for Suppression

- The pre-trial identification was obtained in violation of the accused's Right to Counsel and should be suppressed as an improperly made prior identification.
  - 6<sup>th</sup> Amendment Challenge

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### The Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

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### Right to Counsel

- The Sixth Amendment Right to Counsel attaches when judicial proceedings **have been initiated** against the accused.
  - Therefore if government agents “deliberately elicit” incriminating evidence after adversarial proceedings have begin AND in the absence of counsel, the evidence is inadmissible.

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### Right to Counsel

- What does this mean in terms of identification procedures?
  - *No right to counsel* at photographic identifications. Ash
  - *Right to counsel* at corporeal line ups
    - BUT only if the lineup occurs after the formal commencement of a criminal action.
    - Arraignment or indictment. Kirby

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### Right to Counsel 5<sup>th</sup> Amendment vs. 6<sup>th</sup> Amendment

- The 6<sup>th</sup> Amendment Right is “Offense Specific” and the 5<sup>th</sup> Amendment is not.
  - Assertion of 5<sup>th</sup> Amendment Right to Counsel means government agents must stop **all** questioning and must refrain from putting the accused in **any** line-up.
  - 6<sup>th</sup> Amendment Right to Counsel means government agents cannot speak to the accused or place him in a lineup pertaining **only** to the matter on which he is represented.

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### Right to Counsel 5<sup>th</sup> Amendment vs. 6<sup>th</sup> Amendment

Think of it this way....

- ☐ If someone *requests* a lawyer while being interrogated or before being placed in a line-up; he is invoking his 5<sup>th</sup> Amendment Right to Counsel.
  - The police *cannot* question him further about ANYTHING. End of story
  
- ☐ If criminal proceedings are initiated against someone and a lawyer is appointed to the case - that is the 6<sup>th</sup> Amendment Right to Counsel.
  - The police *can* question your client about ANYTHING - except for the case for which counsel was appointed.

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### Waiver of Right to Counsel

The waiver of the Right to Counsel is like every other waiver you have learned about since becoming a public defender...

*Must be knowing, voluntary and intelligent.*

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### Waiver of Right to Counsel

- ☐ The prosecution has the burden of proving that there was a waiver of the 6<sup>th</sup> Amendment Right to Counsel by the accused.
  - It was a strict standard - there was a presumption against waiver. Brewer
  
- ☐ BUT → Montejo v. Louisiana, 129 S. Ct. 2079 (2009) - overrules Michigan v. Jackson. In Jackson, the Court held that if the police initiate interrogation after a client's assertion, at arraignment or similar proceeding, of his Right to Counsel, any waiver of the client's Right to Counsel for that police-initiated interrogation is invalid.

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### Waiver of the Right to Counsel

- ❑ Montejo v. Louisiana changed all that. Police can now, under the Sixth Amendment, approach client and ask client if he wants to talk to them – there is no presumption that if the client does want to talk to police, that such a “waiver” was invalid or involuntary.
- ❑ Can still be 5th Amendment violation – Edwards – but Edwards is narrower → client asserts right to counsel, then police can’t reinitiate conversation (client can).

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### Waiver of Right to Counsel

- ❑ Waiver of the Fifth Amendment Right to Counsel (Miranda Waiver) is a sufficient waiver of the Sixth Amendment Right to Counsel.
  - Patterson

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### Third Ground for Suppression

- ❑ Suppression of identification evidence obtained as a result of other unlawfully acquired evidence.
  - Fourth Amendment Challenge

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## Evidentiary Challenge

- A pre-trial identification may be the tainted fruit of an unlawful detention of the accused.
  - See *Wong Sun v. United States*, 371 U.S. 471 (1963)
  
- When the police exploit the illegal custody of the suspect to obtain a witness's pre-trial identification of him/her, that identification is subject to suppression on the basis of the unlawful seizure of the suspect.

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